



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

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

MATTER OF W-T-

DATE: SEPT. 19, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a product development and services company, seeks to employ the Beneficiary as a “software developer” under the H-1B nonimmigrant classification for specialty occupations. *See* section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 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 evidence of record did not establish that (1) the proffered position qualifies as a specialty occupation position, or (2) the Petitioner will have an employer-employee relationship with the Beneficiary.

On appeal, the Petitioner submits additional evidence and asserts that the Director erred in denying the petition.

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

I. 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 the proffered position is a software developer position. On the labor condition application (LCA)¹ submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Software Developers, Applications” corresponding to the Standard Occupational Classification (SOC) code 15-1132.²

¹ The Petitioner is required to submit a certified LCA to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

² The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). The “Prevailing Wage Determination Policy Guidance” issued by the Department of Labor provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and

The Petitioner stated that the Beneficiary will work in-house at the Petitioner's offices as a software developer on its [REDACTED] product. In response to the Director's request for evidence, the Petitioner described the proffered position as follows:

As our employee in the position of Software Developer (Internal Designation: Lead Technology), [the Beneficiary] will be responsible for the following duties/tasks:

- Plans, designs, develops, and tests software systems or applications for software enhancements and new products. Design highly scalable classifiers and tools leveraging machine learning, data regression, and rules based models. Suggest, collect and synthesize requirements and create effective product/solution roadmap. (20%)
- Writes new software or makes modifications to existing software applications and modules in accordance with written specifications. Responsible for [the Petitioner's] [REDACTED] SharePoint Add-in Design, development, and configuration to meet client requirements from analysis, design, implementation, and quality assurance (including testing), to delivery and maintenance of the software product for a specific phase of the lifecycle. (20%)
- Develops software using disciplined software development processes, adhering to industry standards and software best practice guidelines. Responsible for the client side of our product. His primary focus will be to implement a complete user interface using angular JS and Typescript in the form of a mobile and desktop web app, with a focus on performance. His main duties will include creating modules and components and coupling them together in a functional app. The artistic design will be delivered to him, together with a few HTML templates, but we will ask for his help in regard to animations, CSS, and final HTML output. Writing tested, idiomatic, and documented JavaScript, HTML and CSS. Work closely with business users to design/develop the best technical design and approach. (20%)
- Carries out unit testing, ensuring application meets needs of client and business. Customer & Business Analytics – Focused on converting customer specific learnings into actionable insights that will drive feature improvements to the Azure Compute Service for the customer. [REDACTED] integration with Project Online, Visio based Visual Designer for learning paths and Content storage on OneDrive for Business. (10%)

progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

- Requires excellent understanding of business application and software code base. Able to review specified business requirements and propose solution options and take responsibility for design and delivery within own area of expertise. Implement innovative machine learning capabilities within [the Petitioner's] [REDACTED] product that will be a core of our product offerings. Enhancing existing Architecture and use machine learning: target content for adapting standard machine learning methods to best exploit modern parallel environments (e.g. distributed clusters – Azure). (10%)
- Acts as point of contact for technical issues for a specific work streams within a project. Works with technical staff to analyze and understand problems with complex software and resolve them. Provides work breakdown and estimates for complex software development tasks. (5%)
- Resolves customer complaints with software and responds to suggestions for improvements and enhancements. Able to demonstrate software to stakeholders. (5%)
- Takes part in reviews of work of self or peers e.g. code reviews on ongoing basis. (5%)
- Develops and integrates applications as per written specifications. (5%)
- Translates technical requirements and design documentation into application code and modules. (5%)
- Takes part in reviews of work of self or peers e.g. code reviews on ongoing basis.

According to the Petitioner, the incumbent for the proffered position “must possess at least a Bachelor’s Degree in Computer Science, Mathematics, Engineering, Information Technology, Management Information Systems or a closely related field.”

C. Analysis

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record does not (1) establish that the Petitioner had secured definite, non-speculative work for the Beneficiary to perform prior to filing the petition; (2) describe the

position's duties with sufficient detail; and (3) establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.³

The Petitioner did not demonstrate that it had secured definite, non-speculative work for the Beneficiary before it filed the petition. The Petitioner indicated that the Beneficiary will be employed in-house from October 1, 2016, to September 21, 2019, to work on the development of its [REDACTED] project. In support of this assertion, the Petitioner submitted a document that provides an overview of the product, as well as a Master Services Agreement (MSA) between the Petitioner and its client, Company W. However, the MSA, which outlines the terms under which the Petitioner will provide development and implementation services to Company W, was executed by the parties after the instant petition was filed. In addition, while a Statement of Work (SOW) appended to the MSA identifies the Beneficiary as the resource who will perform the services outlined in the MSA, the duration of the work identified in the SOW is only for a one-year period, from January 1, 2017, to December 31, 2017.

On appeal, we note the Petitioner's assertion that it has submitted additional evidence to address the Director's concerns regarding the MSA with Company W. Upon review, however, the minimal documentation appended to the appeal brief, which includes a letter from the Petitioner and the Petitioner's "Timeline Infographic," does little to establish that definite, non-speculative specialty occupation work existed for the Beneficiary at the time of filing.

The Petitioner also submitted a Master Vendor Services Agreement (MVSA) between the Petitioner and Company A. We note preliminarily that this document was not executed until eight months after the filing of the instant petition. Nevertheless, we note the Petitioner's submission of this document as a "representative sample" of the types of agreements in which it engages to demonstrate the availability of work for the Beneficiary. However, this document raises further questions regarding the nature of the Beneficiary's employment.

The MVSA states:

[Company A] shall attempt to locate a customer (hereinafter "Client") who requires temporary staffing for a specific project and to identify the training, skills, abilities, and experience required to perform such project. When [Company A] identifies such project, [Company A] shall outline services that it may request Contractor to provide under one or more Statements of Work. Contractor shall fully disclose the nature and extent of training, skills, abilities and experience in the specialized areas possessed by the Consultants it proposes to provide services under a requested Statement of Work.

³ 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.

According to this agreement, the Petitioner will rely on Company A to secure various assignments for its consultants, and the nature, duration, and requirements of such assignments will be determined by SOWs prepared by the ultimate customer or end-client. Therefore, it is evident that the Petitioner will be engaged in outsourcing of its personnel to various clients or customers located by Company A, who it appears will act as a mid-vendor to secure relevant assignments for the Petitioner's personnel. No such SOWs, pursuant to this MVSA, were submitted into the record.⁴ Absent relevant SOWs that identify with specificity a project to which the Beneficiary will be assigned as a resource, and which outline the requirements and duration of said project, we are unable to determine that specialty occupation work exists for the Beneficiary.

Upon review, we find that the Petitioner has not provided documentary evidence to establish the existence of specialty occupation work available to the Beneficiary as a software developer for the requested H-1B validity period. The Petitioner also did not submit documentary evidence regarding any additional work for the Beneficiary. Thus, the Petitioner has not established that the petition was filed for non-speculative work for the Beneficiary that existed *as of the time of the petition's filing*, for the period requested.⁵ U.S. Citizenship and Immigration Services 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. Comm'r 1978).

⁴ We note the Petitioner's submission of a Development Agreement (DA) between the Petitioner and Company C, executed in August of 2016. This document also post-dates the filing of the petition, and therefore cannot be deemed evidence of specialty occupation work available for the Beneficiary at the time of filing. Nevertheless, even if it were considered, we note that the DA and accompanying exhibits do not identify the Beneficiary or other personnel by name, and indicate that the project's duration is short-term, from August 2016 to December 2016.

⁵ The agency made clear long ago that speculative employment is not permitted in the H-1B program. 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.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). 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).

Moreover, insufficient documentation exists to establish the Beneficiary's specific job duties and responsibilities. Although the Petitioner provides a list of job duties the Beneficiary will purportedly perform in relation to the internal [REDACTED] project, documentation in the record indicates that this is a project of temporary duration. Specifically, the nature of the Petitioner's business will involve the outsourcing of the Beneficiary and other personnel to various client projects ultimately secured by Company A. Although the Petitioner provides its own annotated list of duties for the proffered position, it does not adequately convey the substantive work that the Beneficiary will perform for the entire requested period of employment.

As recognized by the court in *Defensor*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. See *Defensor*, 201 F.3d at 387-388. 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.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Here, while the Petitioner claims the Beneficiary will work on an internal, in-house project, the record also indicates that the Beneficiary's assignments will fluctuate between clients yet unidentified on projects for which the specific details and requirements have not been disclosed. There is insufficient documentation which describes the nature and timeline of the Beneficiary's employment for these various clients. Under these circumstances, sufficiently detailed evidence of the work the end-client(s) will assign to the Beneficiary and evidence of the educational requirement it imposes for the performance of that work are indispensable. The record is missing this critical evidence. This lack of evidence precludes us from determining the substantive nature of the duties the Beneficiary would perform.

As the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, we are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, the record does not demonstrate that the proffered position qualifies as a specialty occupation, and that specialty occupation work existed and was available for the Beneficiary at the time of filing.

II. EMPLOYER-EMPLOYEE RELATIONSHIP

Furthermore, the Petitioner has not established that it meets the regulatory definition of a United States employer. 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the Petitioner has not established that it will have “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.” *Id.*

A. Legal Framework

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

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

The term “United States employer” is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) *Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and*
- (3) Has an Internal Revenue Service Tax identification number.

(Emphasis added); see Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an individual coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time

“employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii). Further, the regulations indicate that “United States employers” must file a Form I-129, Petition for a Nonimmigrant Worker, 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 terms “employee” or “employer-employee relationship” are defined 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.⁶ Specifically, the regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to engage a person to work within the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee” or “employer-employee relationship” combined with the agency’s otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition” or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-19.⁷

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).⁸ 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

⁶ 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).

⁷ 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))).

⁸ 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).

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 388 (determining that hospitals, as the recipients of beneficiaries’ services, are the “true employers” of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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

Furthermore, when examining the factors relevant to determining control, 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, 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).

We note the Petitioner's assertion that the Beneficiary will work onsite at its offices. However, the record of proceedings lacks relevant documentation establishing the existence of projects that would engage the Beneficiary to perform the duties that the Petitioner ascribes to the proffered position for the duration of the requested validity period. Although the Petitioner submitted copies of various master agreements and sample statements of work for projects that post-date the filing of the petition, there is no evidence in the record establishing the nature of the Beneficiary's proposed employment effective at the time of filing and continuing for the requested period.

Additionally, as noted above, the record contains evidence suggesting that the Beneficiary's ultimate assignments, and supervisors, may vary. The MVSA with Company A indicates that it will strive to secure various assignments for the Petitioner and its consultants, the requirements of which will be outlined in SOWs prepared and approved by the ultimate end clients. Moreover, we note that the MVSA specifically states, in Paragraph 2, that "[a]ny evaluation of Consultant's performance shall be made by Client." Based on this statement, viewed in light of the uncertainty surrounding the Beneficiary's assignments for the requested period of employment, we are unable to conclude that the Petitioner will maintain the requisite employer-employee relationship with the Beneficiary.

There is insufficient documentary evidence in the record corroborating what the Beneficiary would do, where the Beneficiary would work, and the availability of work for the Beneficiary for the requested period of employment. Consequently, we cannot reasonably conclude that the Petitioner would engage the Beneficiary to perform work in the United States, as the existence of such work for the Beneficiary has not been established.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. While we have considered the Petitioner's attestations that it alone would control the Beneficiary and his work, because the evidence of record does not establish either an actual project that would require the Beneficiary's services, or the actual scope of such services that would be required, or the contractual terms set by whatever client would generate such a project, we cannot conclude that it is more likely than not that the Petitioner - and not a client or intermediate party between the Petitioner and the client - would have the requisite employer-employee relationship. Without full disclosure of all of the relevant factors relating to the end-client, including evidence corroborating the Beneficiary's actual work assignment, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

The evidence, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner

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exercises significant or even complete control over the Beneficiary's work, without evidence supporting that claim, does not establish eligibility in this matter.

Based on the tests outlined 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).

III. CONCLUSION

Here, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation, and that it will have the requisite employer-employee relationship with the Beneficiary.

ORDER: The appeal is dismissed.

Cite as *Matter of W-T-*, ID# 486625 (AAO Sept. 19, 2017)