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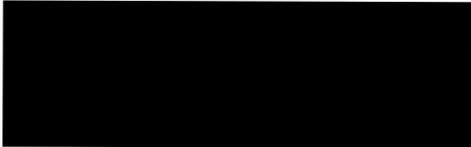
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: EAC 08 152 52000 Office: VERMONT SERVICE CENTER Date: AUG 20 2009

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center recommended denial of the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the director's decision and deny the petition.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of "fashion marketing analyst" as an H-1B nonimmigrant in a specialty occupation pursuant to 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 petitioner is a corporation that was duly incorporated under the laws of the State of New York on January 15, 2008. At the time of the incorporation, the beneficiary was a nonimmigrant student who was authorized employment for post-graduation practical training. *See* 8 C.F.R. § 214.2(f)(10)(ii). The beneficiary's immigration counsel prepared and filed the incorporation documents approximately ten weeks before the filing of this visa petition. The beneficiary describes the business as a fashion goods distributor, exporter, and market research provider. The beneficiary indicates that the corporation currently employs one person, the beneficiary herself.

The director denied the petition based on the petitioner's failure to establish that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Applying a test provided by the Supreme Court of the United States, the director concluded that the record does not establish that the petitioner will have an "employer-employee relationship" with respect to the beneficiary. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003). As the beneficiary will be the petitioner's sole stockholder, sole employee, and president, the director concluded that she will not be an "employee" as required by 8 C.F.R. § 214.2(h)(4)(ii)(2). To the contrary, the director indicated that the beneficiary will be a proprietor and that "[s]he will control the organization, she cannot be fired; she will report to no one; she will set rules governing her own work; and she will share in all profits and losses." Accordingly, the director concluded that the petitioner will not be a "United States employer" with respect to the beneficiary. The director certified his decision to the AAO for review.

On certification, counsel did not submit a brief. However, in response to the director's Request for Evidence, counsel submitted a letter dated September 3, 2008 in which he asserts that the petitioner will be a "United States employer" with respect to the beneficiary even though the beneficiary owns and controls the petitioner as its 100% shareholder. 8 C.F.R. § 214.2(h)(4)(ii). Counsel explains as follows:

[The petitioner] is clearly a US Employer. As a corporate entity, which is a separate entity and person from the beneficiary, the corporation qualifies as a US employer. It has the right, as a lawful US entity to engage a person in the US, and has an IRS tax identification number. We believe that the criteria being question [sic] is whether the corporation has an employer-employee relationship, as indicated by the fact that it may hire, fire, supervise, or otherwise control the work of any such employee. The beneficiary is most certainly an owner of the corporation. This however, does not disqualify the corporation from being a separate entity. The corporation, as a separate entity, can hire, fire, supervise or control the work of its employees, who also happens to be an owner.

[The petitioner] is a newly established corporation that was duly incorporated under the laws of the State of New York on January 15, 2008. [The petitioner] engages in the distribution and exporting of fashion goods and provides market research of the U.S. fashion industry for Japanese retailers and distributors and the U.S. brands. [The petitioner] submitted an offer of employment to [the beneficiary] to work in her individual capacity as a Fashion Marketing Analyst in a specialty occupation as an H-1B nonimmigrant.

Counsel submits as additional evidence various organizational documents indicating that the beneficiary owns and controls the petitioner as its sole stockholder and president. Counsel also submits a copy of an organizational chart showing the beneficiary supervising herself as both the principal owner and fashion marketing analyst.

In support of his arguments, counsel relies on *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) and an unpublished 1999 AAO decision. Counsel argues that these decisions establish that a corporation, as an entity having a legal existence separate from its owner, may hire the sole owner and operator of that corporation and create an employer-employee relationship for purposes of the H-1B visa classification.

The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the AAO must determine whether the petitioner has established that it will have "an employee-employer 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)(2).

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . ., who meets the requirements of the occupation specified in section 1184(i)(2) . . ., and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(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.)

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner as its sole owner, sole operator, and president. The petition will be denied.

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," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien 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." Sections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§ 1182(n)(1)(A)(i) and 1182(n)(2)(C)(vii). Further, the regulations indicate that "United States employers" must file Form I-129 in order to classify aliens as H-1B temporary "employees." 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(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 legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) defined the terms "employee," "employed," "employment," 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."¹ Therefore, for purposes of the H-1B visa classification, these terms are undefined.

¹ Under 8 C.F.R. §§ 214.2(h)(2)(i)(F), it is possible for an "agent" who will not be the actual "employer" of a beneficiary to file an H petition on behalf of the actual employer and the alien. While an employment agency may petition for the H-1B visa, the ultimate end-user of the alien's services is the "true employer" for H-1B visa purposes, since the end-user will "hire, pay, fire, supervise, or otherwise control the work" of the beneficiary "at the root level." *Defensor v. Meissner*, 201 F.3d 384, 387-8 (5th Cir. 2000). Accordingly, despite the intermediary position of the employment agency, the ultimate employer must still satisfy the requirements of the statute and regulations: "To interpret the regulations any other way would lead to an absurd result." *Id.* at 388.

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 Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community 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.

Darden, 503 U.S. at 323-324; see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). 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 America*, 390 U.S. 254, 258 (1968)).²

² 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), *aff'd*, 27 F.3d 800 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). 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 Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in 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

As correctly noted by counsel, the legacy INS has in the past considered the employment of principal stockholders by petitioning business entities in the context of employment-based nonimmigrant classifications, specifically the L-1A intracompany transferee classification. However, these precedent decisions predate the Supreme Court's *Darden* decision by over a decade and can be distinguished from the present matter. The decisions in *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) (hereinafter *Aphrodite*) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm. 1979) (hereinafter *Allan Gee*) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with the corporation's ability to file a nonimmigrant visa petition in the present matter. Instead, as will be discussed, the cited decisions fail to address an H-1B petitioner's burden to establish that an alien beneficiary is a bona fide "employee" of a "United States employer" or that the two parties otherwise have an "employer-employee relationship."

In the 1980 *Aphrodite* decision, the INS Commissioner addressed whether a petitioner may seek to classify a beneficiary as an intracompany transferee even though the beneficiary was a part owner of the foreign entity and, apparently, not an "employee" of either the foreign entity or the petitioner. The district director and regional commissioner determined that the beneficiary could not be classified as an intracompany transferee, because "he is 'an entrepreneur, a speculative investor, and not an employee of an international company.'" 17 I&N Dec. at 530. Relying on *Matter of M--*, 8 I&N Dec. 24 (BIA 1958), the Commissioner disagreed, declined to require intracompany transferees be "employees," and specifically noted that the word "employee" is not used in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L) (1980). 17 I&N Dec. at 531. The

employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the "conventional master-servant relationship as understood by common-law agency doctrine," and the *Darden* construction test, apply to the terms "employee," "employer-employee relationship," "employed," and "employment" 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). That being 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 aliens).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

Commissioner further reasoned that adopting the word "employee" would exclude "some of the very people that the statute intends to benefit: executives" and noted that the *Webster's New Collegiate Dictionary* did not define "employee" to include "executives."

However, counsel's reliance on the *Aphrodite* decision is misplaced. First, the *Aphrodite* decision concerns L-1A intracompany transferees and an interpretation of section 101(a)(15)(L) of the Act. The holding and reasoning therein is not applicable to the H-1B visa classification. The Commissioner's reasoning in the *Aphrodite* decision solely addressed whether an "executive," who is not an "employee" of the petitioner, was eligible for the benefit sought. The Commissioner concluded in that context that requiring the "executive" to be an employee without any authority would be contrary to the Act. However, in the H-1B context, there is no statutory or regulatory requirement that beneficiaries be "executives." Instead, the H-1B classification pertains to "employees" performing temporary services in a specialty occupation. See section 101(a)(15)(H) of the Act; section 214(n) of the Act; 8 C.F.R. § 214.2(h). Accordingly, the decision is inapposite.

Second, while the *Aphrodite* decision remains instructive as to whether a petitioner may seek L-1 classification for a beneficiary having a substantial ownership interest in the organization, the determination that an intracompany transferee employed in an executive capacity need not be an "employee" has been superseded by statute and, thus, the decision is of questionable precedential value even by analogy. The *Aphrodite* decision predates both the 1990 codification of the definitions of "managerial capacity" and "executive capacity" in 8 U.S.C. § 1101(a)(44), as enacted by Pub. L. No. 101-649, § 123 (1990), and the Supreme Court's decision in *Darden*. As the definitions of both "managerial capacity" and "executive capacity" now clearly use the word "employee" in describing intracompany transferee managers and executives, the commissioner's decision in *Aphrodite* declining to impose an employment requirement upon intracompany transferees, while perhaps correct at the time, ceased being a valid approach to determining an alien's eligibility for L-1 classification in 1990.³ Furthermore, given that Congress did not define the term "employee" in codifying the definitions of "managerial capacity" and "executive capacity," the Supreme Court instructs that one should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. As such, the AAO notes that the Commissioner's reliance on the dictionary definition of the term "employee" is neither binding nor persuasive when compared to the common law treatment of this complex subject.

Third, the *Aphrodite* decision predates the reformation of the H-1B visa classification by the Immigration Act of 1990, Pub. L. No. 101-649 (1990), which "dramatically altered" the H-1B nonimmigrant classification and required petitioners to include approved labor condition applications issued by the Department of Labor with their petitions. 56 Fed. Reg. 61111 (Dec. 2, 1991). It was this alteration to the program which prompted the legacy INS to promulgate regulations which, *inter alia*, defined "United States employer" and mandated that

³ The INS adopted regulations substantially similar to the definitions of "managerial capacity" and "executive capacity" ultimately codified in 1990 at 8 U.S.C. § 1101(a)(44). See 8 C.F.R. §§ 214.2(l)(1)(ii)(B)-(C); 52 F.R. 5738-01 (Feb. 26, 1987). These regulations, which also require that L-1 managers and executives be employees, were generally upheld as consistent with the Act even prior to the 1990 codification of these definitions. See *National Hand Tool Corp. v. Pasquarell*, 889 F.2d 1472 (5th Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

H-1B employers have "employer-employee relationships" with their temporary H-1B "employees." *Id.* at 61112; *see also* 57 Fed. Reg. 12179, 12182 (Apr. 9, 1992). The Department of Labor also promulgated regulations which similarly require employers to have an employment relationship with H-1B beneficiaries.⁴ *See* 20 C.F.R. § 655.715.

Accordingly, even if the *Aphrodite* decision was applicable to the H-1B classification at the time it was issued, which it was not, this approach similarly ceased to be valid when the H-1B classification was reformed ten years later and the legacy INS promulgated regulations requiring "United States employers" to have "employer-employee relationships" with H-1B "employees." Again, as the terms "employee" and "employer-employee relationship" were not defined in promulgating the definitions of "United States employer," the Supreme Court instructs that one should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323.

Finally, in the 1979 *Allan Gee* decision, the acting regional commissioner of INS determined that the petitioning corporation could seek L-1 classification for the beneficiary even though the beneficiary was the sole stockholder of the petitioner. 17 I&N Dec. at 298. Relying on the basic legal tenet that corporations are separate and distinct from their stockholders, INS properly concluded that the Act does not prohibit a petitioning corporation from employing, and petitioning for, a beneficiary who happens to own all of a petitioner's stock. 17 I&N Dec. at 297-298. This is true for petitioners in both the H-1B and L-1 visa classifications. Importantly, however, the decision does not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of the petitioners. It is unclear why the acting regional commissioner did not take this crucial next step in the analysis. While it is correct that a petitioner may employ and seek L-1 classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that such beneficiaries are bona fide employees. The same is true for H-1B beneficiaries. The *Allan Gee* decision simply fails to address the critical issue in the instant matter.

Regardless, as with the *Aphrodite* decision, the *Allan Gee* decision was decided approximately 13 years before the Supreme Court's decision in *Darden*. As explained above, the *Darden* decision indicates that where the term "employee" is undefined, courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323. Again, the terms "employee," "employed," "employment," and "employer-employee relationship" are not defined for purposes of the nonimmigrant visa classifications. Therefore, while a petitioner, which is solely or primarily owned by a beneficiary, *may* file a visa petition for that beneficiary, the question of whether such a beneficiary will truly be an "employee" as required by law is a separate and independent matter which must be scrutinized on a case-by-case basis utilizing the analysis set forth by the Supreme Court in *Darden*, 503 U.S. at 323-324, and *Clackamas*, 538 U.S. at 449-450.

⁴ It is noted that, in defining the terms "[e]mployed," "employed by the employer," and "employment relationship," the Department of Labor also stated in its regulations that "the common law" should be used in determining this employment relationship, citing to *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968), the same decision cited by the Court in reaching its decision in *Darden*. *Darden*, 503 U.S. at 324.

In other words, while an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." See *Clackamas*, 538 U.S. at 440.

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; see also 8 C.F.R. § 214.2(h)(4)(ii)(2) (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)).

Factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; 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 448-449; cf. *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); see also *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 actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

It is important to note 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 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 448-449; *New Compliance Manual* at § 2-III(A)(1).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or a major shareholder, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii)(2). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.

- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Clackamas, 538 U.S. at 449-450; *see also* EEOC *New Compliance Manual* at § 2-III(A)(1)(d).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; *cf. Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, 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, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director 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).

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." As explained above, the petitioner purports to be a corporation which is solely owned, controlled, and operated by the beneficiary. The beneficiary owns 100% of the petitioner's issued stock and is the president of the corporation. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all profits and losses. Finally, because the petitioner was incorporated a mere ten weeks prior to filing this petition, the AAO notes that there is no record of employment actions or any employment history for this corporation that would establish that it ultimately controls the work of the beneficiary. Therefore, 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).

Accordingly, the petitioner and the beneficiary are not eligible for the benefit sought, and the petition is

denied.⁵

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.

⁵ It is noted that counsel cites to an unpublished AAO opinion in support of his contention that the beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. However, counsel's reliance on this decision is misplaced. First, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, this decision has no precedential value, and the AAO is under no obligation to adopt its reasoning.

Second, it is noted that the unpublished AAO decision correctly determined that corporations are separate and distinct from their stockholders and that corporations may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 *Allan Gee* decision discussed above, the unpublished AAO decision does not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." Again, it is unclear why the AAO did not take this crucial next step in the analysis in this unpublished decision. Regardless, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. The prior, unpublished AAO decision simply fails to address the issue being addressed in the instant matter, and counsel's reliance on it is misplaced for this additional reason.