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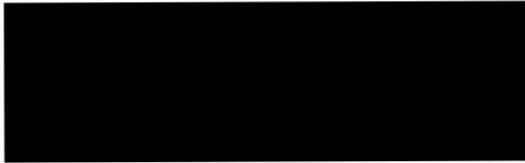
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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*D2*

FILE: EAC 07 167 52441 Office: VERMONT SERVICE CENTER

Date: JUN 04 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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner seeks to employ the beneficiary in a position to which the petitioner assigns the title Director of Boating and Tourism. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker 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 director based his denial of the petition on his determination that the petitioner had not established the proffered position as a specialty occupation. On appeal, counsel asserts that the director erred in denying the petition by mischaracterizing evidence in the record and misapplying the pertinent law to the evidence submitted in response to the service center's request for additional evidence (RFE).

Upon independent review of the totality of the evidence of record, the AAO concludes that the director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the RFE; (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and all of the allied documents submitted on appeal.

In determining whether a proffered position qualifies as an H-1B specialty occupation, the AAO applies the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [2] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the

criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner's response to the RFE includes the following description of the duties and responsibilities proposed for the beneficiary:

- Promote [the petitioner] and Tarpon Point Marina's objectives in sales, service, and business expansion through management of staff, marketing efforts, sales and advertising.
- Build relationships with local tourism population and develop, plan, and carry out charter boat operation marketing, advertising and promotional activities and campaigns.
- Direct and coordinate crew members or workers. Make staffing [decisions] including making employment and termination decisions. [The beneficiary] will also be responsible for scheduling employees as required by anticipated business activity while ensuring that all positions are staffed and labor cost objectives are met.
- Operate boats and ensure that all equipment is clean and in working condition through implementation of [the petitioner's] preventative maintenance program.
- Inspect fleet of boats for efficient and safe operation.
- Implement company personnel, charter boat operation and administrative policies and administer corrective action for violations of policies, rules and procedures.
- Fully understand and comply with all federal, state, county, and municipal regulations that pertain to health, safety, and labor requirements of the charter boat operation.
- Understanding of local waters, review of weather and sea conditions, monitoring passengers and boats in distress on the water.

This list describes the position and its duties in generalized terms that do not relate any concrete information about either the specific work that the beneficiary would do for the petitioner, or the content and educational level of specialized knowledge that the beneficiary would apply in that work. Likewise, the issues that would engage the beneficiary are presented in generic terms that do not relate the level of theoretical and practical knowledge that would actually be applied in addressing them. In this regard, the AAO observes that the record lacks not only substantive information about particular tasks that would be involved in performing the listed duties and responsibilities, but also cogent explanations of how any aspects of the beneficiary's on-the-job

performance would involve both the theoretical and practical application of a body of highly specialized knowledge either attained by or usually associated with at least a bachelor's degree in a specific specialty. The record's information about the proffered position and the duties comprising it is limited to generalized and generic descriptions, such as "promot[ing] . . . objectives in sales, service, and business expansion through management of staff, marketing efforts, sales and advertising"; "develop[ing], plan[ning], and carry[ing] out charter boat operation marketing, advertising and promotional activities and campaigns"; and "direct[ing] and coordinate[ing] crew members or workers."

Besides the duty descriptions just discussed and counsel's cover letter, the petitioner's response to the RFE also includes the following documents regarding the proffered position: (1) an affidavit from ██████████ who describes himself as "the managing partner of [the petitioner] and Tarpon Point Marina"; (2) three job vacancy announcements that employers other than the petitioner posted on the Internet; and (3) one affidavit each from ██████████ and ██████████, whom counsel describes as persons who formerly held the position now offered to the beneficiary.

According to ██████████'s affidavit, the petitioner and Tarpon Point Marina "entered in a joint venture to bring a charter and tourism business to the marina," and he is the "managing partner of [the petitioner] and Tarpon Point Marina." ██████████ states that the petitioner "operates the charter business and we have offered [the beneficiary] the position of Director of Boating and Tourism." ██████████ describes the responsibilities of the proffered position as follows:

[The petitioner] operates a fleet of boats for boat rental, fishing charters, boating lessons, and boat charters. To direct a department that is such an integral part of a marina's operation requires specialized knowledge of boating, the tourism industry in Southwest Florida and business operations. The position requires that the person in this position be able to direct and coordinate crew members or workers, operate boats, maintain and repair boats, [and] inspect the boats for efficient and safe operation. It also requires maintaining records, understanding of weather and sea conditions, monitoring passengers and troubleshooting boats in distress on the water. There is responsibility for implementing department policy for the charter boat operation, mak[ing] employment decisions, [and] promot[ing] tourism by building relationships with [the] heavy German population in the Cape Coral area. Must have the ability to understand and comply with federal, state, county, and municipal regulations that govern our industry.

Additionally, this position requires knowledge and practical experience managing the day to day operation of a business. The marina treats this operation as an independent business. It is the responsibility of the Director of Boating and Tourism to manage the staffing needs, scheduling, generating of reports, marketing, and budget management.

The affidavits of [REDACTED] and [REDACTED] convey substantially the same information and also substantially comport with [REDACTED] information about the proffered position.

The pertinent part of [REDACTED] affidavit states:

To direct a department that is such an integral part of a marina's operation requires specialized knowledge of boating, the tourism industry in Southwest Florida and business operations. The average person with a business degree cannot enter this occupation without also having very specialized knowledge about boating and the waters around Southwest Florida. The position requires that the person in this position be able to direct and coordinate crew members or workers, operate boats, maintain and repair boats, [and] inspect the boats for efficient and safe operation. It also requires maintaining records of weather and sea conditions, monitoring passengers and troubleshooting boats in distress on the water. There is responsibility for a whole fleet of boats.

Additionally, this business requires knowledge and practical experience managing the day to day operations of a business. The charter boat operation requires a person who can develop the department for the marina. It is the responsibility of the Director of Boating and Tourism to manage the staffing needs, scheduling, generation of reports, accounting, and marketing.

The pertinent part of [REDACTED] affidavit reads:

To direct a department that is such an integral part of a marina's operation requires specialized knowledge of boating, the tourism industry in Southwest Florida and business operations. A combined knowledge of business and tourism is required for this occupation. In addition, specialized knowledge about boating, the waters around Southwest Florida and the tourism climate in Southwest Florida is essential. The position requires that the person in this position be able to direct and coordinate employees, operate boats, maintain and repair boats, [and] inspect the boats for efficient and safe operation. It also requires maintaining records of weather and sea conditions, monitoring passengers and troubleshooting boats in distress on the water. The person in this position has responsibility for a fleet of boats and is ultimately responsible for the success or failure of the charter boat department of the marina.

Additionally, this business requires knowledge and practical experience managing the day to day operation of a business. The marina treats this operation as an independent business. It is the responsibility of the Director of Boating and Tourism to manage the staffing needs, scheduling, generation of reports, accounting and marketing. They [sic] are responsible for establishing departmental policies.

The AAO finds that these three affidavits suffer from the same deficiencies as noted in the list of proposed duties and responsibilities submitted in the petitioner's RFE response. They lack substantive information and discussion sufficient to establish whatever level of theoretical and practical applications of highly specialized knowledge in a specific specialty would be involved in the execution of the proposed duties in the context of the petitioner's particular business operations.

Each of the three affiants also opines about the credentials that a person needs for the proffered position. ██████████ asserts:

[T]his position requires a bachelor's degree in either a business related field, tourism administration or related field. It also requires a specialized knowledge of Boating and Southwest Florida tourism . . . .

As a person who "performed the same duties and responsibilities" as comprise the proffered position, ██████████ asserts that the position requires "an employee with a bachelor's degree or equivalency in experience" who "also must have experience [related to the position.]" ██████████ also as a person who "performed the same duties and responsibilities" as comprise the proffered position, opines that "the position requires a bachelor's degree or the equivalency" and a person with "years of hands on experience."

The AAO notes, that, in contrast to ██████████ opinion that the proffered position requires "a bachelor's degree in either a business related field, tourism administration or related field," neither ██████████ nor ██████████ specify a requirement for a major or academic concentration in any particular specialty. Further, while each of these two former position-holders asserts that he holds a bachelor's or higher degree, neither indicates the degrees' majors or academic concentrations. Therefore, neither ██████████, nor ██████████ corroborates the assertions of the petitioner and ██████████ that the proffered position requires a bachelor's degree in a specific specialty.

The AAO finds that the affidavits from ██████████ and ██████████ are not probative evidence that the proffered position requires at least a bachelor's degree in a specific specialty. The affiants do not provide an analysis of the factual basis for their opinions about the educational credentials required for the proffered position, and the generalized duty descriptions that they provide do not demonstrate the need to apply a particular educational level of theoretical and practical knowledge in a specific specialty. Further, ██████████ affidavit is materially inconsistent with the affidavits of the two former position-holders in that they neither indicate that their degrees are in a specific specialty related to the proffered position nor specify any educational requirement other than a bachelor's degree, without mention of any major or academic concentration.

The AAO also finds that the letter submitted on appeal from the president of Captiva Cruises (CC) is not probative of the proffered position being a specialty occupation. It is noteworthy that, while the author states that the two CC employees in positions akin to the one proffered in the present petition hold bachelor's degrees (from Boston College and Eastern Illinois University), he does not identify

the majors or academic concentrations in which the degrees were awarded, and he does not specify that the CC positions require that the degree be in a specific specialty. The AAO also finds that, as with the affidavits of [REDACTED] and [REDACTED], the CC's failure to mention a specific major or academic concentration as an aspect of the degree required for the position is materially inconsistent with [REDACTED]'s assertion that the proffered position requires "a bachelor's degree in either a business related field, tourism administration or related field."

Further, the AAO credits the affidavits of [REDACTED] and [REDACTED] and the letter from CC's president as evidence that the proffered position is not a specialty occupation, in that all of them specify only a need for a bachelor's degree, rather than a bachelor's degree in a specific specialty.

Against this evidentiary background, the AAO will now discuss the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to this record of proceeding.

As reflected in the above discussion of evidence submitted to support the proffered position as a specialty occupation, the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position if the degree requirement that the petitioner asserts for it is common among positions in the petitioner's industry that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has neither alluded to the *Handbook* nor established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. There are no submissions from professional associations. With regard to the submissions from individuals or firms in the petitioner's industry, the AAO here incorporates its earlier discussions of the negative evidentiary impact of the letter from CC's president and the affidavits from [REDACTED] and [REDACTED]. As reflected in those discussions, these documents not only do not establish an industry-wide requirement for a bachelor's degree in a specific specialty, but they also serve as evidence that the proffered position neither requires nor is associated with a degree in a specific specialty.

The AAO acknowledges the Internet job placement announcements submitted by the petitioner. However, they are not probative. These few announcements are not supported by any documentation establishing how representative they are of the industry's recruiting and hiring policies. Further, only one of them states a definite requirement for a degree in a specific specialty closely related to the advertised position.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." As evident in this decision's earlier comments about the lack of substantive evidence about the duties comprising the proffered position, the record fails to show that the position has the complexity or uniqueness required by this criterion.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO here again incorporates its comments about the evidentiary impact of the affidavits from [REDACTED] and [REDACTED], which are submitted as testimony of persons who have held positions akin to the one proffered in the present petition. As indicated in those earlier comments, neither of these affiants testify that they held, or that the proffered position requires, a degree in a specific specialty closely related to the proffered position. Accordingly, if their affidavits are presented as evidence that the petitioner normally requires a bachelor's degree or its equivalent in a specific specialty, they fail that purpose. However, the AAO also notes that, as there is no evidence that either [REDACTED] and [REDACTED] were employees of the present petitioner, their affidavits are not relevant in establishing the hiring practices of the present petitioner.<sup>1</sup>

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussions of the limited information about the proffered duties, they have not been described with sufficient specificity to demonstrate their level of specialization and complexity. Consequently, the evidence of record is insufficient to establish the requisite association with a baccalaureate or higher degree in a specific specialty.

As the evidence of record establishes that the director's decision to deny the petition for failure to establish a specialty occupation position is correct, the AAO will dismiss the appeal and deny the petition.

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<sup>1</sup> The AAO notes that counsel's RFE-reply letter introduces [REDACTED] and [REDACTED] as former employees "for the marina," which is not the entity that the Form I-129 and the related Labor Condition Application (LCA) attest as being the petitioning employer. Consequently, the entity to which the affidavits of [REDACTED] and [REDACTED] relate is not the entity that the Form I-129 and the LCA attest to be the petitioning employer. If the employer is the marina or some other entity other than that cited as the employer on the Form I-129 and the LCA, the petitioner would need to file a new Form I-129 and LCA, with the appropriate fees, that correctly identify the true employer.

Beyond the decision of the director, the AAO finds that the evidence of record fails to establish that the petitioner and the beneficiary in this proceeding have the required employer-employee relationship to establish that the petitioner is an intending United States employer under section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). Specifically, the record indicates that petitioner has not established the requirement specified at 8 C.F.R. § 214.2(h)(4)(ii)(2) that the petitioner 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."

A decisive document on this issue is counsel's letter to the service center's CRU supervisor, in which counsel relies on *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980) and an unpublished 1999 AAO decision as establishing 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 letter states in pertinent part:

Please be advised that the beneficiary is the owner of [the petitioner]. There is no bar from self-petitioning. AAO decisions support the right of a corporation to petition for its owner for an H-1B if the owner is H-1B qualified. *Matter of X, SRC9810150785[,] AAO August 9, 1999*. A sole owner and sole employee of the petitioning company is not precluded from receiving an H-1B, *Matter of Aphrodite Investments Ltd.*

Equally decisive is the offer of employment letter from the beneficiary to herself, dated March 29, 2007. It indicates no intervening person between the petitioning entity and the beneficiary other than herself. r

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 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).

"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.

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 and operator.

Although "United States employer" is defined in the regulations, it is noted that "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, including within the definition of "United States employer" at 8 C.F.R. § 214.2(h)(4)(ii). 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"). Accordingly, neither the legacy Immigration and Naturalization Service (INS) nor U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the law describes H-1B beneficiaries as being "employees" who must have an "employer-employee relationship" with a "United States employer."<sup>2</sup> Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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<sup>2</sup> It is noted that, in certain limited circumstances, a petitioner might not necessarily be the "employer" of an H-1B beneficiary. 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 the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. However, the regulations clearly require H-1B beneficiaries of "agent" petitions to still be employed by "employers," who are required by regulation to have "employer-employee relationships" with respect to these H-1B "employees." *See id.*; 8 C.F.R. §§ 214.2(h)(1) and 214.2(h)(4)(ii) (defining the term "United States employer"). As

The Supreme Court of the United States 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)). That definition is as follows:

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 *Restatement (Second) of Agency* § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (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)).<sup>3</sup>

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such, the requirement that a beneficiary have a United States employer applies equally to single petitioning employers as well as multiple non-petitioning employers represented by "agents" under 8 C.F.R. § 214.2(h)(2)(i)(F). The only difference is that the ultimate, non-petitioning employers of the H-1B employees in these scenarios do not directly file petitions.

<sup>3</sup> 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 (2<sup>nd</sup> 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

Counsel's reliance on the unpublished 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.

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)

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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, thus indicating that the regulations do not indicate an intent 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/\$1,000 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.

(hereinafter *Allan Gee*), both primarily addressed the ability of corporate entities to file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The soundness of this particular conclusion is not being questioned and is not at issue in the present matter. However, these decisions fail to directly address how, or whether, H-1B petitioners must establish that beneficiaries are bona fide "employees" of "United States employers" having 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). 17 I&N Dec. at 531. The 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."

As discussed below, there are several reasons why 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 is focused solely on whether an "executive," who is not an "employee" of the petitioner, was eligible for the benefit sought. The Commission 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 services in a specialty occupation. Both the Act and the regulations repeatedly refer to the employment of H-1B temporary employees. 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), Pub. L. No. 101-649, § 123, 104 Stat. 4978, § 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.<sup>4</sup> 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. Finally, 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, 104 Stat. 4978 (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 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. 20 C.F.R. § 655.715.<sup>5</sup> Once again, 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.*, 467 U.S. at 844-45. 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

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<sup>4</sup> 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 (5<sup>th</sup> Cir. 1989). Therefore, an employment requirement was arguably imposed upon managers and executives seeking L-1 classification as early as 1987.

<sup>5</sup> 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.

conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. at 322-323.

Moreover, 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 correctly 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 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 commission 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 issue being addressed 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. As indicated above, the Act and regulations fail to define the terms "employee," "employed," "employment," and "employer-employee relationship" for purposes of the H-1B visa classification. Therefore, while a petitioner, which is solely or primarily owned by a beneficiary, may file a petition for that beneficiary as an L-1A intracompany transferee or H-1B temporary employee, the question of whether such a beneficiary will truly be an "employee" as required by law is a separate and independent matter which will 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.

In other words, while an H-1B petitioner may file a 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. 440. In fact, courts employing this analysis in considering whether an owner of an "employer" is also an "employee" in an "employer-employee relationship" have concluded, in certain contexts, that the owner is not an "employee." See, e.g., *Ziegler v. Anesthesia Associates of Lancaster, Ltd.*, 74 Fed. Appx. 197, 2003 WL 22048003 (3<sup>rd</sup> Cir. 2003) (unpublished); *Solon v. Kaplan*, 398 F.3d 629 (7<sup>th</sup> Cir. 2005). Using similar analysis, USCIS could reasonably conclude that beneficiaries who own and control a petitioning corporation or partnership, as in the cases of *Allan Gee Inc.* and *Aphrodite Investments Limited*, might not, given the facts of individual cases, be "employees" of those petitioners.

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 will focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is 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 (5<sup>th</sup> 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 a worker is also a partner, officer, member of a board of directors, or a major shareholder, the worker 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); *see also Clackamas*, 538 U.S. at 449-450; *New Compliance Manual* at § 2-III(A)(1)(d). 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 (citing *New Compliance Manual*).

Again, it is important to note that this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Id.* 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. 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).

As discussed above, the petitioner and the beneficiary are not eligible for the benefit sought, and the petition will be denied for this additional reason.

Also beyond the decision of the director, the AAO finds that the petitioner has failed to establish that the beneficiary possesses education, training, and/or experience sufficient to qualify her for service in any specialty occupation in accordance with section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), and its implementing regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). Specifically, to prove that the petitioner possesses the work-experience equivalent of a U.S. bachelor's degree, the petitioner relies upon a work-experience evaluation not provided by "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," as required by the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). For this reason also, the petition will be denied and the appeal dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition decisions, the burden for 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.

**ORDER:** The appeal is dismissed. The petition is denied.