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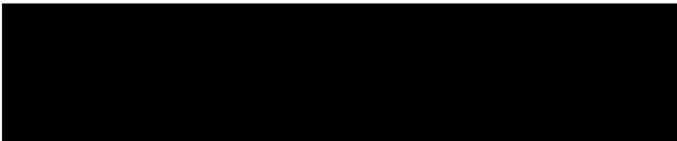
Date: **FEB 01 2010**

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).

  
Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is an information technology services and consulting company. It seeks to employ the beneficiary as a quality assurance engineer and to classify him 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 denied the petition on the ground that the record failed to establish that the petitioner does not qualify as either an employer or agent and therefore is not qualified to file H-1B petitions.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the documentation submitted with the petition, the petitioner described itself as an information technology services and consulting company. The petitioner indicated that it wished to employ the beneficiary as a quality assurance engineer from October 1, 2008 through October 1, 2011, at an hourly wage of \$27.27.

The primary issue in this matter is whether the petitioner has established its eligibility to file the instant petition as either the direct United States employer of the beneficiary or as an agent of the beneficiary's ultimate United States employer. See 8 C.F.R. §§ 214.2(h)(2)(i)(F) and 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

Under the test of *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*"), 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." *Darden*, 503 U.S. at 322-323 (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)).<sup>1</sup>

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*

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<sup>1</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 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 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).

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).

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.<sup>2</sup> 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).

The scope of the position was described as follows in the support letter the petitioner submitted with the H-1B extension petition on behalf of the beneficiary:

Will be responsible for interacting with developers to analyze the user requirements, functional specifications to understand product and its features. Perform object oriented analysis, design and development of software for client server platforms using computer skills. Analyzing users' data, general modes of operation, existing operation procedures, and problems and devising methods and approaches to meet the users' need based upon knowledge of supply chain management, products, operation research, data processing techniques, management information, and statistical, audit, and control systems. The position involves extensive use of modern computer languages such as C/C++, Visual [B]asic, Matlab, and high-end databases. The incumbent creates new solutions and algorithms to manage and implement those solutions.

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<sup>2</sup> It is noted that in analyzing *Matter of Smith* within the context of *Darden* and *Clackamas*, while social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. Without full disclosure of all of the relevant factors, the director would be unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The Labor Condition Application (LCA) was filed for a quality assurance engineer to work in Fremont, CA, and lists a prevailing wage of \$27.27 per hour. The LCA also lists an additional work location, Sunnyvale, CA, at a prevailing wage of \$23.38 per hour. The LCA submitted by the petitioner is valid from September 18, 2008 to September 18, 2011.

With respect to the proposed worksite where the beneficiary will be assigned, the support letter does not provide this information, but the Form I-129 and LCA indicate that the beneficiary will work either at the petitioner's offices in Fremont, CA or at another location in Sunnyvale, CA (the petitioner does not explain why it has listed a location in Sunnyvale, CA on the LCA).

The petitioner also submitted a copy of a work order on the petitioner's letterhead, dated March 20, 2008, which lists the beneficiary by name. The work order states that the beneficiary will work as a quality assurance engineer pursuant to the services agreement between the petitioner and another company called [REDACTED] starting October 10, 2008, for 18 months (which would be through April 10, 2009), with the possibility of an extension. This work order is signed by the petitioner only and is not signed by [REDACTED]. The work order does not state at what address the beneficiary would be assigned.

In her RFE issued on May 8, 2008, the director indicated that the evidence was insufficient to establish that a specialty occupation exists for the beneficiary and that there was a bona fide job offer at the time of filing. The petitioner was advised to submit an itinerary of definite employment, listing the organization(s) and location(s) where the beneficiary would provide services, as well as the dates of service, for the period of requested H-1B status. The petitioner was also advised to submit copies of its contractual agreements with the beneficiary and with companies for which the beneficiary would be providing consulting services. The RFE specifically noted that "providing evidence of work to be performed for other consultants or employment agencies who provide consulting or employment services to other companies may not be sufficient. The evidence should show specialty occupation work with the actual client-company where the work will ultimately be performed."

In response to the RFE, the petitioner submitted an undated itinerary of employment for the beneficiary providing conflicting information. On the one hand, the itinerary states that the beneficiary will work at a client site for 18 months, although only the name of the client, [REDACTED] and not the address of the client, is provided. On the other hand, the itinerary states that the beneficiary will work in-house through October 1, 2011 (again, the specific address is not provided). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner also submitted a copy of a master contractor agreement, dated October 4, 2007, between itself and Trianz. The contract includes the following provisions:

Trianz provides consultants or consulting services to its clients as an independent contractor or a temporary employee;

\* \* \*

Client or Third Party User (hereafter referred to as TPU) is a company that has requested [REDACTED] to present candidates to provide consulting services.

\* \* \*

[REDACTED] may at any time terminate the contract without prior notice or cause . . . .

Because [REDACTED] is a consulting services company, these provisions indicate that it is likely that any of the petitioner's employees assigned to [REDACTED] under this contract will perform services at third party locations.

Moreover, the record of proceeding lacks evidence that this contract's validity has not already ended. The contract states that it is valid either one year from the effective date or from the date the contractor's service was last used, whichever is later. Attached to the contract are copies of purchase orders, dated October 4, 2007, between the petitioner and [REDACTED] that provides for the services of two contractors (but not the beneficiary) between March 3, 2008, and April 30, 2008. The petitioner also submitted copies of invoices for work performed by the contractors on behalf of [REDACTED], the latest of which is dated June 16, 2008. Therefore, at best, the latest validity date of the contract would have been June 16, 2009, as this is one year from the latest date the petitioner's service was last provided to [REDACTED] according to the documentation submitted. The copies of the contract and supporting documentation submitted therefore do not cover the entire period requested in the H-1B petition either now or, more importantly, at the time the petition was filed. *See* 8 C.F.R. § 103.2(b)(1) (stating that eligibility must be established at the time of filing). Moreover, the beneficiary's name is not listed on any of the documentation issued by [REDACTED].

On appeal, counsel for the petitioner argues the following in explaining why it should not have to provide an itinerary:

H-1B cases must be reviewed with an eye toward business realities. The focus should be on establishing that the employer really has a job for the individual, and that it is not speculative. If the employer's business is well established, and it is clear that there is a need for the individual's services, the exact itinerary for three years should not be a prerequisite for approval.

Counsel then cites to a Michael L. Aytes internal memorandum to support its assertion that the itinerary requirement can be met by providing a general statement of the proposed or possible employment. *See* INS Central Office Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995) (hereinafter Aytes memo).

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<sup>3</sup> Since the contract with [REDACTED] does not appear to be valid and since it is not clear whether, even if the contract were valid, the beneficiary would be assigned to work at [REDACTED] main offices, the AAO does not need to determine whether the LCA covers any location related to work to be performed on behalf of Trianz or other clients.

With respect to the Aytes memo, unpublished and internal opinions can not be cited as legal authority and they are not precedent or binding on USCIS. *See* 8 C.F.R. § 103.3(c) (types of decisions that are precedent decisions binding on all USCIS officers). Courts have consistently supported this position. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (holding that legacy Immigration and Naturalization Serviced (INS) memoranda merely articulate internal guidelines for the agency's personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely"); *see also Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975) (finding that policy memoranda to legacy INS district directors regarding voluntary extended departure determinations to be "general statements of policy"); *Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004) (describing a legacy INS Operating Policies and Procedures Memorandum (OPPM) as an "internal agency memorandum," "doubtful" of conferring substantive legal benefits upon aliens or binding the INS); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (describing an INS Operations Instruction (OI) as an "internal directive not having the force and effect of law"). Further, the Aytes memo qualifies its guidance as being subject to the exercise of the adjudicating officer's discretion. This is evident in the memo's statements that the itinerary requirement has been met "[a]s long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment," and that "[s]ervice officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

In addition, the Aytes memo was written to provide guidance to USCIS in situations where the documentation submitted by the petitioner indicates that the petitioner is the actual employer and not a contractor or agent. Regardless, the Aytes memo must not be interpreted as countermanding or contradicting the regulations authorizing USCIS to request additional documentation. Under 8 C.F.R. § 103.2(b)(8)(ii), "if all required initial evidence is not submitted with the application or petition *or does not demonstrate eligibility*, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified time as determined by USCIS." (Emphasis added). Title 8 C.F.R. § 214.2(h)(9)(i) also states, "The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."

Therefore, under the regulations, USCIS has broad discretionary authority to require additional documentation, especially in a case, like this, where the petitioner has not demonstrated eligibility at the time of filing the petition or where it is needed for a material line of inquiry. Contrary to counsel's assertions, the fact that the petitioner's business is established is not sufficient in and of itself to demonstrate a bona fide offer of employment. In a situation where the beneficiary will be contracted out to a third party worksite, the petitioner must provide detailed evidence with respect to the contractual relationship between the petitioner, its clients, and any other third party end users, in order to establish which entity will actually control the work to be performed by the beneficiary. Such documentation was not provided.

As the director notes in her denial, issued June 26, 2008, by not submitting any other contracts, itineraries of definite employment, or other supporting documentation evidencing that the beneficiary would be employed in the proffered position for the period of time and at the location requested in the petition, the petitioner has not established who has actual control over the beneficiary's work or duties, or the condition and scope of the beneficiary's services. In other words, the director could not establish whether the petitioner has made a bona fide offer of employment to the beneficiary based on the evidence. As discussed above, there are no

valid contracts or documentation stating where the beneficiary will work, the specific projects to be performed by the beneficiary, or for which company the beneficiary will ultimately perform these services. Without this evidence, it cannot be found that the petitioner or one of its clients, which it might claim to represent as an agent, will qualify as having the requisite employer-employee relationship with respect to the petitioner such that it meets the definition of United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Therefore, the director's decision is affirmed.

Beyond the decision of the director, the AAO determines that the evidence provided by the petitioner is not sufficient to establish that the proffered position is a specialty occupation. To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the beneficiary will likely perform for the entity or entities ultimately determining the work's content.

On appeal, the petitioner claims that the beneficiary will be working at [REDACTED] but provides no current contract or other documentation that names the beneficiary (other than a work order that is not signed by [REDACTED] or specifies the duties to be performed by the beneficiary at [REDACTED] or the location(s) where the duties will ultimately be performed. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this respect, the AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000), where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. Such evidence must be sufficiently detailed and explained as to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. The record of proceedings lacks such substantive evidence from any end-user entities that may generate work for the beneficiary and whose business needs would ultimately determine what the beneficiary would actually do on a day-to-day basis. In short, the petitioner has failed to establish the existence of H-1B caliber work for the beneficiary.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally

requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

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

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