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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

Date: MAY 03 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner is a software business development firm with five employees and a gross annual income of $1.44 million that seeks to employ the beneficiary in a specialty occupation from November 15, 2009 to November 14, 2012. The petitioner, therefore, 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 AAO bases its review on the record, which includes: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial; (5) Form I-290B with counsel's brief and supporting documentation; and (6) counsel's oral argument presented before the AAO on April 7, 2011. The AAO reviewed the record in its entirety before issuing this decision.

In a support letter submitted with the petition, the petitioner stated that the beneficiary has been a member of the petitioner's Board of Directors since 2003. The beneficiary's resume indicated that he is a founder of the petitioning company.

On November 27, 2009, the director issued an RFE, which stated that the beneficiary appears to be a partner/owner of the company and, therefore, the petitioner needed to submit a copy of the Articles of Incorporation along with any other evidence that establishes that the beneficiary will be an employee.

In response to the RFE, the petitioner submitted a copy of its Articles of Incorporation along with a copy of its 2009 Annual Report. The Annual Report indicates that the beneficiary is one of the petitioner's three Officers and Directors. Additionally, the petitioner submitted a letter dated January 6, 2010 from its Chairman of the Board. This letter states that once the beneficiary is employed with the petitioner in the U.S., he will "be under the direction of the Board as an employee, which will have the complete power to fire him, change his duties, set his pay, and otherwise control his work." The petitioner also submitted copies of its workers' Forms W-2.

The director denied the petition on January 14, 2010, finding that the petitioner failed to demonstrate that it meets the definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). The director based his decision on a finding that the beneficiary is a proprietor of the petitioner's business and therefore will not be an employee of the petitioner.[1]

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[1] Although the director found that the beneficiary will in fact be a proprietor of the business, as opposed to an employee, this finding should not be misconstrued as a finding that the business is a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1520 (9th Ed. 2009). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984).

Counsel timely filed an appeal on February 17, 2010. On appeal, counsel for the petitioner argues that the beneficiary is a minority shareholder of the petitioning corporation, owning 45% of the petitioner's shares, and will therefore be the petitioner's employee. Counsel submitted evidence that as of February 24, 2009, a date before the present petition was filed, the beneficiary owned 5,000 shares of the petitioning corporation, while the petitioner's other two shareholders together held 6,250 shares. Further, counsel argues that the beneficiary has only one vote of three on the Board of Directors, which is evident from the copy of the petitioner's Corporate Bylaws submitted by counsel on appeal.

On appeal, counsel also submitted a letter dated February 11, 2010 from a Board member of the petitioner. This letter states as follows:

> **Each of the three Board members has one vote and no one "controls" the Board. We decide all management oversight issues by consensus or vote. The Board as a whole decided to hire [the beneficiary]. The Board established the job description and the salary. The Board will supervise his work . . . by regular reporting at monthly Board meetings and directions given by the Board. [The beneficiary] is a minority shareholder (45%) and has only one vote of three on the Board. He will be paid, supported and given benefits as a W-2 employee. The Board is fully empowered to terminate him by a 2-1 vote and can remove him from the Board by a majority vote of the shareholders. . . .**
>
> [The third Board member] and I, together, own 55% of the share[s] and can control the membership of the Board at any time. [The third Board member] has been an employee in the past and will continue in that role when [the beneficiary is employed in the proffered position]. The Board reassigned him to work under [the beneficiary's] supervision. In the past it has overruled him on the accounting methodology used by the company and removed him from the position of Sales Manager, all while he had the same Board and shareholder status as [the beneficiary] will have when he is [employed in the proffered position]. **I was put on the Board to assure that it had the independence to control the Corporation apart from the individual roles of the shareholder employees. And it has always done so while I have been on the Board.**

Counsel for the petitioner requested, and the AAO granted, oral argument, which was heard by the AAO on Thursday, April 7, 2011. Counsel asserted: "[The beneficiary] can be fired. A two to one vote of the Board can dismiss him over his own objection. He can be removed from the Board by the vote of his two colleagues on the Board. . . ." Further, regarding the Board's ability to hire or dismiss the beneficiary, counsel emphasized that "[t]hese are all activities not taken in the personal interest of [the beneficiary]. They are taken in the interests of the corporation and its profitability."

II. THE LAW

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); *see also* 56 Fed. Reg. 61111, 61121 (Dec. 2, 1991).

III. ANALYSIS

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 employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii)(2).

Upon review, the AAO finds that the director's conclusion is not in accord with the facts or law. The petitioner persuasively establishes 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 persuasive in establishing that the beneficiary will be an "employee" of the petitioner despite his non-majority ownership interest in the organization.

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."[2] Therefore, for purposes of the H-1B visa classification, these terms are undefined.

A. The Supreme Court Decisions: *Darden* and *Clackamas*

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 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); *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)).

B. No Congressional Intent to Expand Common Law Agency Definitions

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[2] 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, 387-388 (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.

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).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. *See generally* 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). Instead, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition. 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, 844-845 (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 express Congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee," "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).[3]

Finally, 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 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

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[3] That said, there are instances in the Act where Congress may have intended a broader application of the term "employer" than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to "unaffiliated employers" supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

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.

C. The INS Precedents Distinguished

In the past, the legacy INS 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 Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) (hereinafter *Aphrodite*) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 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 do not 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 L-1 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 that 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 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."

Any reliance on the *Aphrodite* decision in determining eligibility for the benefit sought in this matter would be misplaced, however. 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. In the H-1B context, however, 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 212(n)(2)(C)(vii) 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) (effective Oct. 1, 1991), 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.[4] 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.

Third, the *Aphrodite* decision predates the reformation of the H-1 visa classification by the Immigration Act of 1990, Pub. L. No. 101-649 (1990), which "dramatically altered" the H-1 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.[5] *See* 20 C.F.R. § 655.715.

Accordingly, even if the *Aphrodite* decision was applicable to the H-1 classification at the time it was issued, which it was not, this approach similarly ceased to be valid when the H-1 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

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[4] 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) (1988); 52 Fed. Reg. 5738, 5752 (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.

[5] 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. The Department relied on *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.

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 immigrant 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 of both immigrant and nonimmigrant 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. While it is correct that a petitioner may employ and seek immigrant 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.

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.

D. The Common-Law Standard of "Control"

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)).

The factors indicating that a worker is or will be an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 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; *see 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 at 388 (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the 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).[6]

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.

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[6] An employer-employee relationship hinges on the overarching right to control the manner and means by which the product is accomplished. When examining the factors relevant to this inquiry, USCIS must assess and weigh the actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

- 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'r 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).

E. The Common Law Test Applied

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has 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 evidence demonstrates that the beneficiary is not a majority shareholder of the petitioning corporation. The beneficiary is a member of the petitioner's Board of Directors, but, as one of three members, can be outvoted by the other two members of the Board over his own objection, including on a decision to remove the beneficiary from the Board. Further, the petitioner presented evidence that another Board member who is employed by the petitioner has been demoted in the past. The petitioner has also demonstrated that (1) the beneficiary will report to the board, (2) he can be hired and fired by the Board, (3) the beneficiary's duties and pay can be determined and otherwise modified by the Board, and (4) the beneficiary's salary will be paid by the petitioner and he will be issued a Form W-2 as an employee. Therefore, despite (1) the petitioner's limited supervision over the beneficiary, (2) the beneficiary's significant influence over the organization, and (3) the beneficiary's sharing of profits, losses, and liabilities of the organization, the petitioner has sufficiently established that, based on all of the incidents of the relationship, the beneficiary's work will be "controlled" by the petitioner such that it will have an employer-employee relationship with the beneficiary.

IV. CONCLUSION

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the basis for the director's decision will be withdrawn.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the petition is approved.