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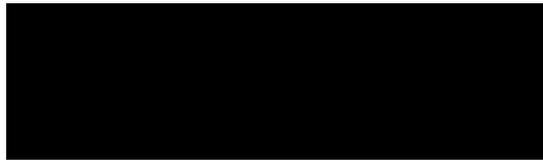
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: **NOV 15 2011** Office: VERMONT SERVICE CENTER FILE:

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:**

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, 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 remain denied.

The petitioner states on the Form I-129, Petition for Nonimmigrant Worker, that it was established in 2009, provides childcare services, does not employ any personnel, and was a start-up company when the petition was filed. It seeks to employ the beneficiary as an administrator/accountant and to classify her 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 determining that the beneficiary would not be a bona fide employee of the petitioner as she is an owner and director of the petitioner. The petitioner filed a motion to reopen and reconsider the matter which the director granted. Upon review, the director affirmed his initial decision. Counsel for the petitioner timely filed an appeal.

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; (5) the petitioner's motion and supporting documentation; (6) the director's decision on motion; and (7) Form I-290B, Notice of Appeal or Motion, with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

### **I. Factual and Procedural Background**

The petitioner is a corporation incorporated in the State of Texas in May 2009. The beneficiary and one other individual are listed as the directors of the company in the Articles of Incorporation and the total number of authorized shares is listed as 2000. The record includes two stock certificates, one issued to the beneficiary in the amount of 500 shares and the second issued to the second director of the corporation also in the amount of 500 shares. The record also includes evidence that the petitioner obtained a Federal Tax Identification number from the Internal Revenue Service and includes plans for building a daycare center. The record does not include the corporation's by-laws or minutes of meetings or other documentation relating to the daily operation of the petitioner.

On appeal, counsel for the petitioner asserts that the petitioner is a separate legal entity from its shareholders and is capable of establishing an employer-employee relationship with its owners. Counsel contends that a corporation may file an H-1B petition for its sole owner as the beneficiary. Counsel submits a number of cases in support of his assertions.

### **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).

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.”<sup>1</sup> 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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<sup>1</sup> 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).<sup>2</sup>

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

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<sup>2</sup> 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).

\$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, “directly or indirectly, voluntarily or involuntarily,” by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite “control” over the beneficiary has not been established by the petitioner.

### 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.<sup>3</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.

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.<sup>4</sup> See 20 C.F.R. § 655.715.

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<sup>3</sup> 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 (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>4</sup> 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.

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 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).<sup>5</sup>

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.

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<sup>5</sup> When examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer’s right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. 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 and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

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

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas* at 450 (citing *Darden*, 503 U.S. at 324). Moreover, in applying the above test, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; cf. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'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 not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." The evidence of record demonstrates that the beneficiary is an equal shareholder of the petitioning corporation with one other shareholder. The beneficiary is one of two members of the petitioner's Board of Directors, and as such, may not be outvoted by the other member of the Board over her own objection, including on a decision to remove her from the Board. The petitioner has not demonstrated that (1) the beneficiary will report to the board, (2) she can be hired and fired by the Board, (3) the beneficiary's duties and pay can be determined and otherwise modified by the Board, (4) the beneficiary's salary will be paid by the petitioner and she will be issued a Form W-2 as an employee; and (5) that the petitioner, as a separate entity, supervises the beneficiary. In this matter, with the beneficiary's significant influence over the organization and the beneficiary's sharing of profits, losses, and liabilities of the organization, the petitioner has not 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

In view of the above, it appears that the beneficiary will not be an “employee” having an “employer-employee relationship” with the petitioner. It has not been established that the beneficiary will be “controlled” by the petitioner or even that the termination of the beneficiary’s employment is the ultimate decision of the petitioner. 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).

The AAO therefore affirms the director’s finding that the beneficiary is not a bona fide employee of the petitioner as a separate entity, as the petitioner failed to establish that it will control the beneficiary’s work such that it will have an employer-employee relationship with the beneficiary.

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 remains denied.