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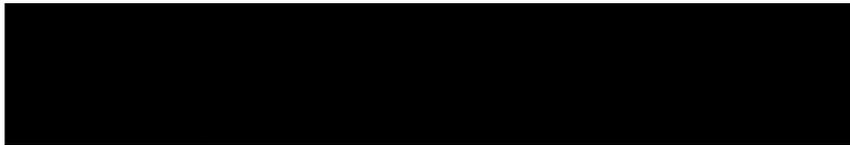
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

**PUBLIC COPY**

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Date: **JAN 2012** Office: CALIFORNIA 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, California 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 1998, provides professional healthcare services, employs 3,300 personnel, and had a gross annual income of \$7,800,000 when the petition was filed. It seeks to employ the beneficiary as a physical therapist 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 on the grounds that: (1) the petitioner failed to establish that it qualifies as a U.S. employer or agent; (2) the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation; and (3) the petitioner failed to submit an appropriate and valid Labor Condition Application (LCA).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's initial request for evidence (RFE) and the petitioner's response; (3) the March 30, 2009 notice of decision; (4) the Service motion to reopen the matter and issuance of a second RFE and the petitioner's response to the RFE; (5) the September 21, 2009 denial decision; and (6) the Form I-290B, Notice of Appeal or Motion, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

In the February 9, 2009 letter submitted in support of the petition, the petitioner indicated that it wished to employ the beneficiary as a physical therapist at a facility located in Streator, Illinois for three years, at an annual salary of \$79,040.

The petitioner indicated that the beneficiary would plan and administer medically prescribed physical therapy treatment for patients suffering from injuries, or muscle, nerve, joint and bone diseases, to restore function, relieve pain, and prevent disability. The petitioner stated that the beneficiary "will review physician referrals and prescriptions, and patients' condition[s] and medical records in order to determine what physical therapy treatment is required." In addition, the petitioner noted that the beneficiary will test and measure patients' strength, motor development, sensory perception, functional capacity, and respiratory and circulatory efficiency, record her findings, and implement the treatment program designed. The petitioner provided a copy of the beneficiary's Illinois license to perform physical therapy.

In an August 17, 2009 RFE, the petitioner was advised that as it appeared to be engaged in the business of consulting, staffing, or job placement, the petitioner must provide evidence of the specialty occupation work for the beneficiary with the actual end client where the work would ultimately be performed. The RFE also requested copies of signed contracts between the petitioner and the beneficiary, a complete itinerary of services and the names and addresses of the actual employer(s), and copies of signed contractual agreements, statements of work, or other agreements between the petitioner and the authorized officials of the ultimate end-client companies where the work would actually be performed, among other items.

In a September 4, 2009 response, counsel for the petitioner noted that an agreement between the petitioner and [REDACTED] had been in existence since 2004 and that the petitioner's agreement with the beneficiary was for an indefinite duration. The petitioner submitted an employment agreement between the petitioner and the beneficiary dated February 3, 2009 and signed February 12, 2009. The employment agreement indicated the petitioner was hiring the beneficiary in the capacity of a physical therapist with her primary facility being [REDACTED]. The petitioner also provided in the employment agreement that "[o]ccasional travel to other facilities may be necessary during periods of low patient volume or other Company needs." The petitioner also submitted an agreement between the petitioner and [REDACTED] a skilled nursing facility located in Streator, Illinois (facility). The agreement requires the facility to provide work and storage areas and therapy related equipment and supplies and to designate an administrator as a liaison with the petitioner. The agreement commenced February 1, 2005 for a period of one year with automatic extensions unless either party terminated the agreement with a sixty-day notice. An exhibit "A" attached to the agreement indicates that the petitioner will provide direct therapy services, therapy related documentation, evaluations, patient care conferences, and other therapy related services based on patient need, will implement and monitor therapy compliance with documentation and billing requirements, will provide appropriate supervision of therapists, assistants, and aides, and will participate in care conferences and caregiver education, among other things. The petitioner also attached exhibit E to the original therapy services agreement increasing [REDACTED] payment to the petitioner effective June 1, 2007 with scheduled increases effective January 1, 2008 and January 1, 2009.

The director denied the petition on September 21, 2009.

On appeal, counsel for the petitioner asserts the petitioner is a qualifying employer, the beneficiary's work is under the direct control of the petitioner, and the work to be performed is specialty occupation work. Counsel references the petitioner's obligations outlined on the Exhibit "A" attached to the petitioner's contract with [REDACTED] as evidence that it controls the beneficiary's work, as well as the clause in its agreement where the petitioner assumes liability for malpractice performed by its employees. Counsel avers that there is no question the proffered position is a specialty occupation. Counsel also asserts that LCA rules allow short-term placement of employees without triggering the need for a new LCA and as there has been no need to move the beneficiary's work location, the director's determination that the submitted LCA is invalid is speculative and premature. Counsel also observes that the director failed to request that the petitioner demonstrate that it was an employer or agent in the RFE.

Preliminarily, the AAO observes that the August 17, 2009 RFE specifically requested that the petitioner "clarify the petitioner's employer-employee relationship with the beneficiary" and requested information to assist in establishing the relationship. Thus, the petitioner had notice and opportunity to respond to the director's concerns regarding the petitioner's employer-employee relationship with the beneficiary.

The first issue in the present matter is whether the petitioner has established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). Specifically, as the petitioner has satisfied the first and third prongs of the

definition of United States employer, the remaining question is 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).

Under the test of *Nationwide Mutual Ins. Co. v. Darden* (*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. 318 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 (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)).<sup>1</sup>

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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, 844-845 (1984).

Therefore, in considering whether or not one is an “employee” in an “employer-employee relationship” with a “United States employer” for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of “control.” *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a “United States employer” as one who “has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise *control* the work of any such employee ...” (emphasis added)).

Factors indicating that a worker is or will be an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* *Restatement (Second) of Agency* § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 448-449; *cf. New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

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-

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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).

III(A)(1).<sup>2</sup>

Applying the *Darden* test 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.” Although the petitioner has established that it will pay the beneficiary, the beneficiary will not be located at the petitioner’s work place but instead will work at another location. The end-client will also be the source of the instrumentalities and tools of the beneficiary’s work. Although the exhibit “A” to the agreement between the petitioner and [REDACTED] states that the petitioner will provide direct therapy services, the petitioner does not provide documentary evidence that it will supervise the beneficiary onsite. For example, the record does not include the names of the petitioner’s employee(s) who will be onsite providing the direct supervision of the beneficiary. Although not specifically requested, the record does not include the petitioner’s organizational chart or other information setting out the chain of command. As the beneficiary will be working at another location using the tools and instrumentalities provided by a third party, the importance of establishing direct supervision with documentary evidence cannot be over emphasized. In addition, although the petitioner states that it is contractually required to assume liability for medical malpractice, the record does not include evidence that the petitioner purchased medical malpractice insurance or addressed the issue through other means. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm’r 1972)). In this matter, the petitioner has not established that it is the entity which supervises or otherwise controls the beneficiary’s work. Thus, contrary to counsel’s claim, the record lacks sufficient indicia to establish the petitioner’s control of the beneficiary’s work.

Based on the tests outlined above and the complete record of proceedings, 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).

Next, the record does not establish that the proffered position is a specialty occupation. The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d 382, 387 (5<sup>th</sup> Cir. 2000) (hereinafter *Defensor*), 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. *Id.* at 387-388. Such evidence must be sufficiently detailed to

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<sup>2</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.

demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

Although the petitioner in this matter describes the proffered position as comprising the duties of a physical therapist, a specialty occupation, the record does not include evidence that the end client, [REDACTED] will use the beneficiary's services as a physical therapist. [REDACTED] does not provide a description of what the beneficiary will be required to do on a day-to-basis. The petitioner's contract with [REDACTED] indicates in the attached exhibit "A" outlining the work to be performed that the petitioner will provide therapy services and references the petitioner's "supervision" of therapists, assistants, and aides. Thus, it is unclear whether the beneficiary will perform the duties of a physical therapist or will perform the duties of a physical therapy assistant or aide. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. As the record is insufficient to substantiate the actual duties of the proffered position where the beneficiary will work, the petitioner has not established the proffered position as a specialty occupation.

The AAO next addresses whether the petitioner failed to establish that the LCA corresponds to the petition by encompassing all of the work locations and related wage requirements for the beneficiary's full employment period.

In pertinent part, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B) states:

The petitioner shall submit the following with an H-1B petition involving a specialty occupation: (1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application . . . .

The regulation at 8 C.F.R. § 103.2(b)(1) states, in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In addition, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1), states, as part of the general requirements for petitions involving a specialty occupation, that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Moreover, while DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the

content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition*, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

[Italics added.]

The petitioner's acknowledgement in its employment agreement with the beneficiary that she may be moved to different facilities if there is low patient volume or as otherwise directed by the petitioner undermines the petitioner's claim that it has sufficient H-1B caliber work for the beneficiary for the duration of the H-1B employment period. Moreover, the petitioner has not provided supporting evidence that its contract with [REDACTED] continued to be in effect when the petition was filed on February 12, 2009. The last document in the record between the two parties is dated June 1, 2007 almost two years prior to the filing of the instant petition. The petitioner does not provide evidence such as billing statements or other information that confirms the continuing relationship between the petitioner and [REDACTED]. Moreover, the evidence does not demonstrate conclusively that the beneficiary will work in Streator, Illinois for the entire duration of the petition. Counsel's assertion on appeal that the director's determination on this issue is speculative and premature is not persuasive. The record lacks sufficient evidence establishing that the petitioner has sufficient H-1B caliber work at the location identified on the LCA for the duration of the beneficiary's requested H-1B classification. In light of the fact that the record of proceeding is insufficient to establish the beneficiary's work location for the duration of the classification, USCIS cannot conclude that this LCA actually supports and fully corresponds to the H-1B petition. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 248.

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.