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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: **JUN 01 2012** 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to continue to employ the beneficiary in the position of software engineer as an H-1B nonimmigrant 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 petitioner claims to be a software development and consulting firm with 119 employees.

The director denied the petition, finding that the petitioner failed to: (1) submit an itinerary for all work locations and specific periods of employment at each location; and (2) establish that the beneficiary will be working at the two locations indicated on the petition and the Labor Condition Application (LCA). On appeal, counsel for the petitioner submits a brief in support of the contention that it has met all regulatory requirements.

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

In the letter of support dated July 20, 2010, the petitioner claimed that it is "a rapidly growing Information Technology [hereinafter IT] Consulting and Software Development firm providing systems and business solutions to business clients in the United States" and that the "company's headquarters are located in [REDACTED] USA." The petitioner stated that it seeks to employ the beneficiary as a software engineer. The petitioner also provided an overview of the beneficiary's qualifications as well as a statement of the duties of the proffered position.

The petitioner submitted the following, *inter alia*, with the petition filed on July 21, 2010: (1) a copy of a Master Services Agreement, entered into on January 1, 2009, by [REDACTED] and the petitioner; (2) copies of the beneficiary's foreign degrees, certificates, and transcripts; (3) copies of prior approval notices for the beneficiary's H-1B employment; (4) copies of payroll statements for the beneficiary; and (5) copies of the beneficiary's 2007-2009 W-2s.

Finding the initial evidence insufficient to establish eligibility, the director issued an RFE on August 3, 2010. The petitioner was asked to submit an itinerary and evidence establishing an employer-employee relationship with the beneficiary. The director also requested evidence that demonstrates that the petitioner has sufficient specialty occupation work for the entire requested validity period, if the beneficiary will work on an in-house project. The director further requested that the petitioner submit evidence demonstrating that the beneficiary was maintaining valid H-1B nonimmigrant status at the time the petition was filed.

On August 19, 2010, the petitioner submitted a response to the director's RFE. The petitioner explained that the beneficiary was currently on assignment with its client, [REDACTED]. In support of this contention, the petitioner submitted the following documents:

- A letter dated July 21, 2010, from [REDACTED] Director IT Sourcing and Governance Office, [REDACTED] and
- A Master Services Agreement, dated January 1, 2009.<sup>1</sup>

The petitioner's letter provides the following under a section entitled, "Itinerary of Services":

The Service has requested that the Petitioner submit a statement clarifying the physical location where the beneficiary shall be assigned. The beneficiary shall be providing services as a Software Engineer to Petitioner's client, [REDACTED] at its [REDACTED] Massachusetts location. The beneficiary needs to use the following languages and tools: Java, J2EE, Java Security, JSP, Web services, SAML 2.0, Public Key Cryptography, JBoss, DB2, Struts, log4j, ClearCase, Maven, JUnit, XML, EJB, JSP, Servlets, Weblogic, Websphere, WSAD, UML, Struts, Hibernate, MQ Series, JMS, Oracle, DB-2 and SQL Server. The beneficiary is currently assigned to work on the Petitioner's Client Project: IPS Release Items (Portal/SSO/Sponsor Connect/Pay Benefits) Project. [The petitioner] is a direct Vendor for its client [REDACTED]. The Petitioner has provided the letter in support from its client, [REDACTED] **Exhibit I**. The letter from the Client, clearly states that Petitioner retains fully [sic] control over its employee, [the beneficiary]. Additionally, we have enclosed a copy of the Master Service Agreement between the Petitioner and its client. (Page 4 of Master Service Agreement) **Exhibit II**. We have provided a detailed description of the Project and the beneficiary's role within the technical team during the development of the project.

The petitioner also provided a description of the project and an overview of the beneficiary's duties. The petitioner stated that the beneficiary's role in the project is "Software Engineer." The petitioner's response included a chart with a breakdown of the beneficiary's duties and the percentages of time the beneficiary spends on each duty. The petitioner also claimed that because it is a "primary Vendor," it does not provide services through third parties.

In addition, the petitioner contended that it has an employer-employee relationship with the beneficiary because: (1) pursuant to its contract with [REDACTED] the petitioner is solely responsible for the "acts and omissions of its employees"; (2) "the status of the Petitioner is of an independent contractor wherein all its personnel (employees) are employees of [the petitioner]"; (3) the petitioner is "solely responsible for all salaries, compensation, withholdings, contributions,

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<sup>1</sup> The AAO notes that pages 17-23 of the Master Service Agreement were not submitted. Thus, the evidentiary value of this document is minimized by the fact that it is only a partial submission.

workers' compensation and employment insurance"; (4) the petitioner controls all aspects of its employment relationship with the beneficiary; and (5) the petitioner has the sole ability change the project assignments for the beneficiary. The petitioner claimed that no third parties control the beneficiary, the beneficiary's work, and/or benefits that the beneficiary receives.

In support of its contention that it has an employer-employee relationship with the beneficiary, the petitioner submitted the letter from Mr. [REDACTED] referenced above as well as (1) a copy of an employment agreement between the petitioner and the beneficiary, dated January 3, 2007, (2) a copy of a Master Service Agreement between the petitioner and [REDACTED] referenced above, (3) copies of the beneficiary's health and dental insurance cards, (4) a copy of a job offer letter, dated January 3, 2007, and (5) an organizational chart.

Mr. [REDACTED] letter, referenced above, states the following:

July 21, 2010

To [the petitioner]:

This letter is in reference to [REDACTED] engagement of [the petitioner] to provide technical development services pursuant to a services agreement between [the petitioner] and [REDACTED]

[The beneficiary], an employee of [the petitioner], has been assigned as a Software Engineer to the IPS Release Items (Portal/SSO/Sponsor Connect/Pay Benefits) Project at [REDACTED] Massachusetts offices located at [REDACTED] [REDACTED] from January, 2007 to present. The project is a Time and Material Engagement.

Please be advised that at all times, [the petitioner] retains full control of [the beneficiary's] employment and is responsible for his salary, benefits and training needed to perform his job duties at the work site, in addition to any discretionary decision making, such as hiring and firing and performance evaluations.

Regards,

[signature]

[REDACTED]  
Director IT Sourcing Governance Office  
IT Sourcing Governance Office  
[REDACTED]

While the letterhead on Mr. [REDACTED] letter provides an Atlanta, Georgia, address, there are no phone numbers or any other contact information for Mr. [REDACTED]

In addition to the [REDACTED] letter and the Master Services Agreement, the petitioner submitted the same LCA that it submitted with the petition, with the addition of Addendum #1 which lists the petitioner's office in [REDACTED] New Jersey, as a second place of employment.

With respect to the director's request that the petitioner submit evidence pertaining to in-house projects, the petitioner stated that the beneficiary "is assigned to a Client project and as such the request for in-house project details is not applicable." In response to the director's request that the petitioner submit evidence that the beneficiary has been maintaining valid H-1B nonimmigrant status, the petitioner stated the following: "On July 16, 2010, Petitioner received the denial notice. Immediately, a new petition was filed on July 21, 2010, less than ten days from [the] date the Petitioner received notice."

On September 3, 2010, the director denied the petition, finding that the petitioner failed to: (1) submit an itinerary for all work locations and specific periods of employment at each location; and (2) establish that the beneficiary will be working at the two locations indicated on the petition and the Labor Condition Application (LCA).

On appeal, counsel for the petitioner submits a brief in support of the contention that it has met all regulatory requirements and submits the following, *inter alia*: (1) copies of emails between the petitioner and [REDACTED] discussing the beneficiary's H-1B status; (2) a letter dated, April 26, 2010, from Mr. [REDACTED]; (3) a copy of Requisition No. [REDACTED] issued on October 19, 2009; (4) a copy of a job offer letter, dated January 3, 2007; and (5) a copy of an employment agreement.

Mr. [REDACTED] April 26, 2010 letter, states the following:

4/26/2010

To [the petitioner]:

[REDACTED] is providing this letter pursuant to [the petitioner's] recent request for an end client letter for purposes of submission to the U.S. Citizen [sic] and Immigration Services.

[The beneficiary] is currently employed by [the petitioner] and provides services on behalf of [the petitioner] to [REDACTED] pursuant to a services agreement between [the petitioner] and [REDACTED]

[The beneficiary] has been performing services for the [REDACTED] office located at [REDACTED] from January, 2007 to present. [He] is currently assigned as a Senior Software Developer to the IPS Release Items (Portal/SSO/Sponsor Connect/IPay Benefits) Project.

[The petitioner] is solely responsible for controlling [the beneficiary's] employment.

While performing services at [REDACTED] [the beneficiary] is supervised by [REDACTED] employee [REDACTED] Application Development Manager.

[signature]

[REDACTED]  
Director IT Sourcing Governance Office  
IT Sourcing Governance Office  
[REDACTED]

The first issue before the AAO is whether the petitioner complied with the itinerary requirement at 8 C.F.R. § 214.2(h)(2)(i)(B).

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(B) provides the following:

*Service or training in more than one location.* A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

The itinerary language at 8 C.F.R. § 214.2(h)(2)(i)(B), with its use of the mandatory "must" and its inclusion in the subsection "Filing of petitions," establishes that the itinerary as there defined is a material and necessary document for an H-1B petition involving employment at multiple locations, and that such a petition may not be approved for any employment period for which there is not submitted at least the employment dates and locations.

In the instant case, the petitioner filed the Form I-129 with USCIS on July 21, 2010. On the Form I-129, the petitioner indicated that the beneficiary would work in two locations - [REDACTED] [REDACTED]. As mentioned above, in response to the director's RFE, the petitioner claimed that the beneficiary is currently working on a project for [REDACTED] [REDACTED]. However, neither the petitioner's Form I-129 filing letter nor its letter submitted in response to the director's RFE provide employment dates for the beneficiary at each location. The letters penned by Mr. [REDACTED] similarly fail to provide employment dates for the beneficiary. None of the letters mentioned when the [REDACTED] project will end and when the petitioner would place the beneficiary at its [REDACTED] New Jersey office.

The petitioner also failed to submit work orders or statements of work outlining the duration of the [REDACTED] address. The petitioner also failed to submit

a copy of the "Project Order" referenced in the Master Services Agreement (MSA) which states: "[The petitioner] will not initiate any Services unless and until the execution of the Project Order. Upon execution of the Project Order by the Parties, the Project Order will be deemed an amendment to and part of this Agreement." While the petitioner submitted a copy of Requisition [REDACTED] indicating the extension of the beneficiary's work for [REDACTED] to begin on January 1, 2010, and ending on December 31, 2010, this document also indicates that the beneficiary's work during that period will be performed at a third location, [REDACTED] which appears to be another [REDACTED] location.

Thus, the AAO cannot determine where and when the beneficiary will be employed by [REDACTED] and/or the petitioner. As the petitioner failed to provide an itinerary covering all work locations for the beneficiary during the requested validity period, the petition may not be approved for this reason.<sup>2</sup>

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<sup>2</sup> It is further noted that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. If a petitioner's intent changes with regard to a material term and condition of employment or the beneficiary's eligibility, an amended or new petition must be filed. To allow a petition to be amended in any other way would be contrary to the regulations. Taken to the extreme, a petitioner could then simply claim to offer what is essentially speculative employment when filing the petition only to "change its intent" after the fact, either before or after the H-1B petition has been adjudicated. The agency made clear long ago that speculative employment is not permitted in the H-1B program. A 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

Furthermore and as identified by the director as another issue in this case, even if the petitioner had submitted the itinerary in response to the RFE, the petitioner has failed to submit a certified LCA that corresponds to all three of the claimed employment locations of the proffered position. The U.S. Department of Labor (DOL) regulations governing Labor Condition Applications states that “[e]ach LCA shall state . . . [t]he places of intended employment.” 20 C.F.R. § 655.730(c)(4) (emphasis added). “Place of intended employment” is defined as “the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant.” 20 C.F.R. § 655.715. Moreover, the instructions for Section G of Form ETA 9035 require that the employer list the place of intended employment “with as much geographic specificity as possible” and notes that the employer may identify up to three physical locations, including street address, city, county, state, and zip code, where work will be performed. Petitioners who know that an employee will be working at additional worksites at the time of filing must include all worksites on Form ETA 9035. Failure to do this will result in a finding that the employer did not file an LCA that supports the H-1B petition.

In this matter, while the submitted LCA lists two employment locations, i.e., [REDACTED] and [REDACTED] the third employment location of [REDACTED] is not included and has not been certified by DOL as one of the beneficiary’s worksites. It is further noted that the petitioner provided no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

While DOL is the agency that certifies LCA applications before they are submitted to U.S. Citizenship and Immigration Services (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 (emphasis added):

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.

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the beneficiary. Here, the petitioner has failed to

submit the required itinerary as well as a valid LCA that corresponds to all of the proposed work locations. Thus, the appeal will be dismissed and the petition will be denied for these reasons.

Furthermore, beyond the decision of the director, the petitioner has not established that it meets the regulatory definition of a United States employer. § 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." *Id.*

Section 101(a)(15)(H)(i)(b) of the Act defines an H-1B nonimmigrant in pertinent part as an alien:

subject to section 212(j)(2), who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . , who meets the requirements for the occupation specified in section 214(i)(2) . . . , and with respect to whom the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1) .

...

"United States employer" is defined in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The record is not persuasive in establishing that the petitioner or any of its clients will have an employer-employee relationship with the beneficiary.

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" and "employer-employee relationship" are not defined for purposes of the H-1B visa classification. 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) (2012). The intending employer is described as offering full-time or part-time "employment" to the H-1B "employee." Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that "United States employers" must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary "employees." 8 C.F.R. § 214.2(h)(1), (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 USCIS defined the terms "employee" 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." *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

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)).

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). On the contrary, 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.<sup>3</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to engage a person to work within 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

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<sup>3</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." *See, e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *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).

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).

United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. *Cf. Darden*, 503 U.S. at 318-319.<sup>4</sup>

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" and "employer-employee relationship" 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>5</sup>

Therefore, in considering whether or not one will be 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) (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. *Darden*, 503 U.S. at 323-324; *Clackamas*, 538 U.S. at 445; *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 445; *see also* *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1) (adopting a materially identical test and indicating that said test was based on the *Darden* decision); *see also* *Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000) (determining that hospitals, as the recipients of beneficiaries' services, are the "true employers" of H-1B nurses under 8 C.F.R. § 214.2(h), even though a medical contract service agency is the actual petitioner, because the hospitals ultimately hire, pay, fire, supervise, or otherwise control the work of the beneficiaries).

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<sup>4</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>5</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).

It is important to note, however, 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 relevant to control 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).

Furthermore, 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.

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."

Specifically, in response to the director's RFE, the petitioner claimed that the beneficiary was working for [REDACTED]. Although the petitioner submitted evidence such as the MSA and letter from ING discussed above, the petitioner did not submit any document which outlined in detail the nature and scope of the beneficiary's employment from the end client [REDACTED]. Therefore, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

On appeal, counsel contends that the beneficiary is employed by the petitioner and that the petitioner "continues to retain full control over its employees" and that none of its clients "exercise control over the beneficiary, the beneficiary's work and/or benefits the beneficiary receives except for the Petitioner/Respondent." However, as mentioned above, the April 26, 2010 [REDACTED] letter states that the beneficiary will be supervised by an [REDACTED] employee and will work at [REDACTED]. Furthermore, it appears based on this information that the beneficiary will use the tools and instrumentalities of [REDACTED] and will work on an [REDACTED] project.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. In light of the

contradictory statements by counsel and [REDACTED] and without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming that the petitioner exercises complete control over the beneficiary, without evidence supporting the claim, does not establish eligibility in this matter. 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)). The evidence of record prior to adjudication did not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary.

Based on the tests outlined above, the petitioner has not established that it or any of its clients 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 petition must be denied for this additional reason.

Beyond the decision of the director, the petition must also be denied due to the petitioner's failure to establish that the proffered position qualifies as a specialty occupation. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location in order to properly ascertain the minimum educational requirements necessary to perform those duties. *See Defensor v. Meissner*, 201 F.3d, at 387-388. In other words, as the nurses in that case would provide services to the end-clients and not to the petitioning staffing company, the petitioner provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. *See id.*

Here, the record of proceeding in this case is similarly devoid of sufficient information from the end-client [REDACTED] regarding the job duties to be performed by the beneficiary for that company. The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary, therefore, precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, the appeal will be dismissed and the petition denied.

Finally, petition must also be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). In this matter, the petition that the petitioner sought to extend expired on January 21, 2010. The instant petition was filed on July 21, 2010, six months after the original petition's expiration.

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "harmless error" and stating that it is not grounds for reversal).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). For this additional reason, the appeal must be dismissed and the petition denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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