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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

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**U.S. Citizenship  
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Services**



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Date: **MAY 31 2012**

Office: VERMONT SERVICE CENTER

File: 

IN RE:

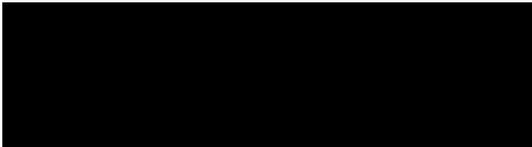
Petitioner:

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:

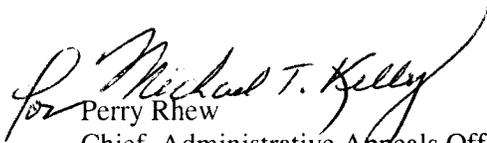


INSTRUCTIONS:

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,

  
for Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition, and, thereafter, the petitioner filed a motion to reconsider. The director subsequently granted the motion but issued a decision affirming the earlier decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the petition will be denied.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the Vermont Service Center on May 1, 2009. On the Form I-129, the petitioner stated that its type of business is "art dealer" and that its gross annual income is "unknown" and its net annual income is also "unknown."<sup>1</sup> The petitioner was established in 2004 and currently employs one person, the beneficiary himself. The petitioning company is located in Texas and counsel stated that the beneficiary "has and will continue to conduct his business out of his home library and has gallery space therein."

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of public relations manager 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 director denied the petition, finding that the petitioner failed to establish 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). Upon granting the petitioner's subsequently filed motion to reconsider, the director affirmed the earlier decision to deny the petition. On appeal, counsel asserts that the director's basis for denial was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's denial letter; (3) the director's request for evidence (RFE); (4) the response to the RFE; (5) the petitioner's Motion to Reconsider; (6) the director's Dismissal of the Motion to Reconsider; and (7) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director's decision. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

Later in this decision, the AAO will also address two additional, independent grounds, not identified by the director's decision, that the AAO finds also precludes approval of this petition.<sup>2</sup> Specifically, beyond the decision of the director, the AAO finds that the petitioner (1) failed to establish that the beneficiary is qualified to serve in a specialty occupation position; and (2) failed to establish that the

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<sup>1</sup> As noted above, the petitioning company was established in 2004. The petitioner's 2008 Federal Tax Returns and 2009 Texas Franchise Tax Report indicate that the petitioning company has no revenue and no income.

<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Labor Condition Application (LCA) submitted with the petition properly supports the Form I-129. For these additional reasons also the petition may not be approved, with each considered as an independent and alternative basis for denial.

The AAO will now address the director's basis for denial of the petition, namely that the petitioner failed to establish 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). Applying a common-law test provided by the Supreme Court of the United States, the director concluded that the record does not establish that the petitioner will have an "employer-employee relationship" with respect to the beneficiary. The record reflects that the beneficiary is the general manager, president and sole shareholder of the petitioning company. The beneficiary is also the petitioner's sole employee. The director concluded that the beneficiary will not be an "employee" as required by 8 C.F.R. § 214.2(h)(4)(ii)(2). The director stated that the evidence indicates that the beneficiary will be a proprietor and that he will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his own work; and he will share in all profits and losses. Accordingly, the director concluded that the petitioner will not be a "United States employer" with respect to the beneficiary.

On appeal, counsel contends that the director's decision is erroneous.<sup>3</sup> Counsel asserts that because the beneficiary's business is dependent upon the services he provides for third-party clients, his

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<sup>3</sup> Counsel for the petitioner submitted a Form I-290B to the United States Citizenship and Immigration Services (USCIS) on December 22, 2009. However, the form was not properly completed as counsel checked multiple boxes, requesting both an appeal and a motion to reconsider. The USCIS regulations clearly require that every application, petition, appeal or motion be filed in accordance with the instructions on the form. See 8 C.F.R. § 103.2(a)(1); 8 C.F.R. § 103.2(b)(1). A benefit request that is not properly executed may be rejected. See 8 C.F.R. § 103.2(a)(7)(i). Moreover, Form I-290B (Rev. 02/10/09) provides the following instructions at Part 2. Information About the Appeal or Motion: "Check the box below that best describes your request. (*Check one box.*)" By failing to adhere to the form's instructions and checking more than one box, counsel submitted an improperly filed request.

Counsel's improperly filed Form I-290B was processed as a motion to reconsider. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the Director of the Vermont Service Center. See 8 C.F.R. § 103.5(a)(1)(ii). The director issued a decision on the merits of the case on February 3, 2010 and noted the following in the decision:

You have simultaneously filed an appeal and a motion to reopen/reconsider the decision. Please note that a separate Form I-290B, Notice of Appeal or Motion, must be filed for each individual action. As such, the immediate filing has been treated as a motion.

In the appeal, counsel for the petitioner acknowledges that the Form I-290B was treated as a motion, stating "[o]n December 22, 2009 the petitioner filed a motion to reconsider." However, counsel incorrectly asserts that "if an unfavorable decision was to be rendered on [sic] his [sic] case after it was reopened it should have been forwarded to the AAU" and cites 8 C.F.R. § 103.3(a)(2)(iv). Moreover, counsel states that "since this case was not forwarded to the AAU, request is hereby made that the original \$585 fee be returned." However, the AAO notes that counsel is mistaken. The citation of law referenced by counsel relates to **appeals** not to

proposed employment qualifies for approval under the regulations. Counsel maintains that the petitioner will be a "United States employer" with respect to the beneficiary even though the beneficiary owns and controls 100% of the petitioning company and is the sole employee. Counsel further asserts that, because the petitioner is a corporation and thus a separate entity and person from the beneficiary, the petitioner qualifies as a United States employer.

In support of his arguments, counsel relies on several the Board of Immigration Appeals (BIA) cases, including *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980), and unpublished AAO decisions. Counsel argues that these decisions establish that a corporation, as an entity having a legal existence separate from its owner, may hire the sole owner and operator of that corporation and create an employer-employee relationship for purposes of the H-1B visa classification.

The primary 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).

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

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motions.

Specifically, 8 C.F.R. § 103.3(a)(2)(iv) states the following (emphasis added):

If the reviewing official will not be taking favorable action or decides favorable action is not warranted, that official shall promptly forward **the appeal** and the related record of proceeding to the AAU in Washington, DC.

There is no corresponding regulation requiring the reviewing official to forward **a motion** to the AAO. If the petitioner and counsel had wanted the Form I-290B to be treated as an appeal, they should have properly completed the form to reflect such a request. Instead, counsel improperly filed the Form I-290B and the request was treated as a motion to reconsider. Thus, the director was correct in his decision not to forward counsel's *motion* to the AAO after affirming the earlier decision to deny the petition.

The AAO notes that when a petitioner pays a filing fee for an application or petition, it is seeking a decision from USCIS regarding eligibility for the benefit(s) being sought. In general, USCIS does not refund a fee regardless of the decision on the application or petition. There are only a few exceptions to this rule, such as when an incorrect fee was collected or when USCIS made an error which resulted in the application or petition being filed inappropriately. Here, an error was made by counsel. Counsel has not established that the petitioner is entitled to a refund of the fee.

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) . . . .

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).

Upon review, the AAO concurs with the director's decision. The record is not persuasive in establishing that the petitioner will have an employer-employee relationship with the beneficiary. Applying the tests mandated by the Supreme Court of the United States for construing the terms "employee" and "employer-employee relationship," the record is not persuasive in establishing that the beneficiary will be an "employee" of the petitioner as its sole member, sole employee, and managing member.

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 U.S. Citizenship and Immigration Services ("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)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, 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). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.

- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

*Clackamas*, 538 U.S. at 449-450; see also *New Compliance Manual*, Equal Employment Opportunity Commission, § 2-III(A)(1)(d), (EEOC 2006).

Again, this list need not be exhaustive and such questions cannot be decided in every case by a "shorthand formula or magic phrase." *Clackamas*, 538 U.S. at 450 (citing *Darden*, 503 U.S. at 324).

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>4</sup>

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<sup>4</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

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 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>5</sup>

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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).

Finally, it is also noted that 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 likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be 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.

<sup>5</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))).

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>6</sup>

In the past, the legacy INS considered the employment of principal stockholders by petitioning business entities in the context of employment-based classifications. However, these precedent decisions can be distinguished from the present matter.

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) 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 a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship." *See id.*; 8 C.F.R. § 214.2(h)(4)(ii).

Although 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. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

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

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<sup>6</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).

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).

Moreover and as detailed above, in addition to the sixteen factors relevant to the broad question of whether a person is an employee, there are six factors to be considered relevant to the narrower question of whether a shareholder-director is an employee. *See Clackamas*, 538 U.S. at 449. These factors include whether the organization can hire or fire the individual; whether and to what extent the organization supervises the individual's work; whether the individual reports to a more senior officer or employee of the organization; and whether the individual shares in the organization's profits, losses, and liabilities. *Id.* at 449-450.

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.

In applying the test as outlined in *Clackamas*, 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).

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 petitioning company is solely owned, controlled, and operated by the beneficiary. The beneficiary owns a 100% interest in the petitioning company and is the president and managing member of the company. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, the evidence indicates that the beneficiary will be a proprietor of this business and will not be an "employee" having an "employer-employee relationship" with a "United States employer." It has not been established that the beneficiary will be "controlled" by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. The AAO also notes that there is no record of employment actions or any employment history for this corporation that would establish that it ultimately controls the work of the beneficiary. Therefore, based on the tests outlined above, the petitioner has failed to establish 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).

Accordingly, the petitioner and the beneficiary are not eligible for the benefit sought, and the appeal must be dismissed and the petition denied for this reason.<sup>7</sup>

Beyond the decision of the director, the AAO notes that even if the petitioner had established that petitioner was a qualifying U.S. employer, the petition could not be granted because the petitioner

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<sup>7</sup> As noted above, counsel also cites to unpublished AAO opinions in support of his contention that the beneficiary may be "employed" by the petitioner even though he is the sole owner and operator of the enterprise. However, counsel's reliance on these decisions is misplaced. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, these decisions have no precedential value, and the AAO is under no obligation to adopt their reasoning.

It is noted that the unpublished AAO decisions correctly determined that corporations are separate and distinct from their stockholders and that corporations may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 *Allan Gee* decision discussed above, the unpublished AAO decisions do not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship," which is the issue in this matter. Therefore, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Again, the prior, unpublished AAO decisions do not address the issue being addressed in the instant matter, and counsel's reliance on them is misplaced for this additional reason. Moreover, based upon a complete review of the record, the petitioner has not met its burden of proof to establish that it will have an "employer-employee relationship" with the beneficiary of this particular H-1B filing.

failed to establish that the Labor Condition Application (LCA) submitted with the petition properly supports the Form I-129.<sup>8</sup> More specifically, the AAO will now highlight an aspect of the petition that undermines the petitioner's credibility with regard to the actual nature and requirements of the proffered position. This particular aspect is the discrepancy between what the petitioner and counsel claim about the level of responsibility inherent in the proffered position, on the one hand, and, on the other, the contrary level of responsibility conveyed by the wage level indicated by the LCA submitted in support of the petition.

The petitioner and counsel repeatedly claim that the duties of the proffered position are specialized and complex. Counsel states that the job duties of the required position require a "level of sophistication and professionalism" as well as "specialized knowledge" because of the "complex nature of the business." Counsel asserts that in this position, the beneficiary must meet a "higher level of standards and needs." The petitioner and counsel claim that the beneficiary will be responsible for "assigning, supervising and reviewing the activities of staff."

In this regard, the claims of the petitioner and counsel are questionable when reviewed in connection with the LCA submitted with the Form I-129 petition. The AAO notes that the petitioner provided an LCA in support of the instant petition that indicates the occupational classification for the position is "Public Relations Managers" - SOC (ONET/OES Code) 11-2031, at a Level 1 (entry level) wage.

Wage levels should be determined only after selecting the most relevant *O\*NET* occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.<sup>9</sup> Prevailing wage determinations start with an entry level wage and progress to a wage that is commensurate with that of a Level 2 (qualified), Level 3 (experienced), or Level 4 (fully competent worker) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties.<sup>10</sup> The

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<sup>8</sup> As previously mentioned, the AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>9</sup> DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

<sup>10</sup> A point system is used to assess the complexity of the job and assign the wage level. Step 1 requires a "1" to represent the job's requirements. Step 2 addresses experience and must contain a "0" (for at or below the level of experience and SVP range), a "1" (low end of experience and SVP), a "2" (high end), or "3" (greater than range). Step 3 considers education required to perform the job duties, a "1" (more than the usual education by one category) or "2" (more than the usual education by more than one category). Step 4 accounts

U.S. Department of Labor (DOL) emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels.<sup>11</sup> A Level 1 wage rate is described by DOL as follows:

**Level 1** (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

The petitioner and counsel repeatedly claim that the duties of the proffered position are complex and specialized. However, the AAO must question the level of complexity, independent judgment and understanding required for the position as the LCA is certified for a Level 1 entry-level position. The LCA's wage level indicates the position is actually a low-level, entry position relative to others within the occupation. In accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation; that he will be expected to perform routine tasks that require limited, if any, exercise of judgment; that he will be closely supervised and his work closely monitored and reviewed for accuracy; and that he will receive specific instructions on required tasks and expected results.

This aspect of the LCA undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands and level of responsibilities of the proffered position. 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. 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).

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for Special Skills requirements that indicate a higher level of complexity or decision-making with a "1" or a "2" entered as appropriate. Finally, Step 5 addresses Supervisory Duties, with a "1" entered unless supervision is generally required by the occupation.

<sup>11</sup> DOL, Employment and Training Administration's *Prevailing Wage Determination Policy Guidance* (Revised Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/Policy\\_Nonag\\_Progs.pdf](http://www.foreignlaborcert.doleta.gov/pdf/Policy_Nonag_Progs.pdf).

As noted below, the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(2) specifies that certification of an LCA does not constitute a determination that an occupation is a specialty occupation:

Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

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 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 a valid LCA that corresponds to the claimed duties of the proffered position, that is, specifically, that corresponds to the level of work and responsibilities that the petitioner ascribed to the proffered position and to the wage-level corresponding to such a level of work and responsibilities in accordance with the requirements of the pertinent LCA regulations. For this reason also, the petition may not be approved.

The AAO will now address an additional issue that precludes the approval of the petition. Upon review of the record, the AAO notes that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation.

The statutory and regulatory framework that the AAO must apply in its consideration of the evidence of the beneficiary's qualification to serve in a specialty occupation follows below.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
  - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In implementing section 214(i)(2) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must also meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Therefore, to qualify a beneficiary for classification as an H-1B nonimmigrant worker under the Act, the petitioner must establish that the beneficiary possesses the requisite license or, if none is required, that he or she has completed a degree in the specialty that the occupation requires. Alternatively, if a license is not required and if the beneficiary does not possess the required U.S. degree or its foreign degree equivalent, the petitioner must show that the beneficiary possesses both (1) education, specialized training, and/or progressively responsible experience in the specialty equivalent to the completion of such degree, and (2) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

In the present matter, the petitioner stated that "[t]o perform this job, one must have the specialized knowledge which is acquired by achieving at least a Bachelor's Degree."<sup>12</sup> In its letter of support dated April 6, 2009, the petitioner stated that the beneficiary "has a degree in Business Administration and has the necessary experience" but did not provide any supporting documentation to support this assertion.<sup>13</sup>

In the RFE, the director requested the petitioner submit documentation that the beneficiary qualifies for a specialty occupation, along with college transcripts and an evaluation of the beneficiary's credentials and/or other probative documentation. The RFE outlined the specific evidence to be submitted by the petitioner.

In response to the RFE, counsel stated that the beneficiary "has completed all the necessary courses and received all the education necessary to achieve a Degree in Business Administration. Accordingly, it is equivalent to a U.S. Bachelor's degree in Business Administration." The petitioner also submitted a letter, dated August 7, 2009, stating that the beneficiary "has a [sic] six semesters in Business Administration and has the necessary experience."

The petitioner provided the following documents regarding the beneficiary's qualifications for the proffered position:

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<sup>12</sup> In its letters dated April 6, 2009 and August 7, 2009, the petitioner stated that "[t]o perform this job, one must have the specialized knowledge which is acquired by achieving at least a Bachelor's Degree." It must be noted that the petitioner's requirement of a bachelor's degree, without further specification, is inadequate to establish that the proffered position qualifies as a specialty occupation. The petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of any bachelor's degree without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988). To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Thus, for this reason as well, the petition cannot be approved.

<sup>13</sup> USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. *See Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

- Beneficiary's curriculum vitae, which includes an entry stating [REDACTED]<sup>4</sup>
- A letter dated August 6, 2009 (with a translation) from the Universidad de las Americas Puebla, stating that the beneficiary completed all of the studies for a degree in business administration but had not completed the exam. The letter does not provide the dates of the beneficiary's attendance, courses completed, number of credit hours completed, information regarding the length of the program, requirements for the degree, etc.
- Transcript of courses taken by the beneficiary at the [REDACTED] (with a translation). The transcript is partially illegible. It appears that the beneficiary attended the university, at most, for five semesters (including at least one semester when he received no credits or points) – specifically, Spring 1984 (no credits), Fall 1984, Spring 1985 (illegible), Spring 1985 (illegible) and Fall 1986.<sup>15</sup> The transcript does not indicate that the beneficiary graduated. Furthermore, the AAO notes that the translation contains omissions and errors, which raises concerns about the accuracy of the translation.

The record reflects inconsistent statements and evidence regarding the beneficiary's academic credentials and whether or not the beneficiary possesses a bachelor's degree from a foreign institution. As previously discussed, 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. The petitioner did not submit an evaluation of the beneficiary's academic qualifications by a reliable credentials evaluation service, which specializes in evaluating foreign educational credentials, or other probative evidence to establish that the beneficiary's education is the equivalent of a U.S. bachelor's degree in a specific specialty. Counsel's assertion that the beneficiary possesses "the equivalent to a U.S. Bachelor's degree in Business Administration" is not sufficient. There is no evidence to suggest that counsel

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<sup>14</sup> On his curriculum vitae, the beneficiary claims to possess a "B.A. Degree." However, the record does not establish that he was awarded such a degree. Moreover, the petitioner should note that the evidentiary weight of the beneficiary's curriculum vitae is insignificant. It represents a claim by the beneficiary, rather than evidence to support that claim. As such, its evidentiary weight does not exceed the cumulative corroborative information other documents of record provide about the beneficiary's credentials. This record of proceeding lacks documentary evidence that establishes or corroborates the substantive nature of the beneficiary's academic credentials and professional experience. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

<sup>15</sup> The AAO notes that a United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm'r 1977).

possesses any particular knowledge, expertise or experience evaluating foreign educational credentials, and he provided insufficient facts to support his contention. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record does not establish that the beneficiary possesses (1) a U.S. bachelor's or higher degree from an accredited college or university, (2) a foreign degree determined to be equivalent to such a degree, or (3) a pertinent license. Thus, the only remaining avenue for the beneficiary to qualify for the proffered position is pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). Under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the petitioner must establish both (1) that the beneficiary's combined education, specialized training, and/or progressively responsible experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and (2) that the beneficiary has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

For purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the provisions at 8 C.F.R. § 214.2(h)(4)(iii)(D) require one or more of the following to determine whether a beneficiary has achieved a level of knowledge, competence, and practice in the specialty occupation that is equal to that of an individual who has a baccalaureate or higher degree in the specialty:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;<sup>16</sup>
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of

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<sup>16</sup> The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . .

The petitioner has failed to satisfy any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1)-(4), and the AAO will next perform a Service evaluation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>17</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Upon review of the record, the petitioner has not provided corroborating evidence as outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in a field related to the proffered position or that the beneficiary has recognition of expertise in the industry.

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<sup>17</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

As such, since evidence was not presented that the beneficiary has at least a bachelor's degree or the equivalent in a specific specialty, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.<sup>18</sup>

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).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.

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<sup>18</sup> As previously mentioned, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143. However, in this case, the AAO will not address any further issues and deficiencies that it notes in the record of proceeding.