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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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MAY 31 2012

Date:

Office: CALIFORNIA SERVICE CENTER

FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director for entry of a new decision.

On the Form I-129 the petitioner stated that it performs health care recruitment for hospitals. To employ the beneficiary in a position it designates as a [REDACTED], the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because she found that the petitioner was subject to numerical limitations under section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A). On appeal, counsel asserted that the beneficiary is exempt from the H-1B cap.

In a separate case, the AAO found that [REDACTED] within the meaning of section 214(g)(5)(A) of the Act. As the petitioner seeks to engage the beneficiary to work at a nonprofit entity related to an institution of higher education, the instant visa petition should be deemed exempt from the cap. The director's decision is therefore withdrawn.

However, the petition may not be approved as the record suggests additional issues that were not addressed in the decision of denial. The AAO will next address whether the petitioner has demonstrated that it would employ the beneficiary in a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted (1) a copy of a contract, dated June 1, 2004, between the petitioner and [REDACTED] (2) a copy of a letter, dated August 9, 2006, from the director of recruitment at [REDACTED] (3) a copy of the January 7, 2009 employment agreement between the petitioner and the beneficiary; and (4) a document that purports to be a description of a Clinical Nurse II position issued by [REDACTED]

The June 1, 2004 contract between the petitioner and [REDACTED] sets out terms pursuant to which [REDACTED] might, "from time to time on an intermittent basis," utilize nursing staff provided by the petitioner. That contract does not oblige [REDACTED] to utilize any of the petitioner's nurses. That contract is for a term of 30 months.

The AAO observes that the agreement with [REDACTED] does not oblige [REDACTED] to utilize the beneficiary's services for any period of time or for any number of hours per week. The AAO further notes that, when the instant visa petition was filed on March 23, 2009, that contract had expired. That contract does not demonstrate that the petitioner has any work at all for the beneficiary to perform during the period of requested employment. The record contains no evidence that the petitioner has any other work for the beneficiary to do. That the petitioner has not demonstrated that it has work to which it could assign the beneficiary is sufficient reason, in itself, to dismiss the instant appeal and deny the visa petition. The AAO, however, will continue its analysis of the specialty occupation issue assuming, *arguendo*, that the beneficiary would work at [REDACTED]

The director of recruitment's August 9, 2006 letter confirms a favorable review of the beneficiary's credentials and indicates that she is eligible to be assigned to [REDACTED]. It does not state the term of any such assignment.

The beneficiary's January 7, 2009 employment agreement states that the hospital at which the beneficiary would work would supervise the beneficiary's performance at their hospital. The term of that agreement is 30 months. An addendum to that agreement indicates that the beneficiary would be assigned to [REDACTED]. It does not state the term of that assignment or any number of hours of work the beneficiary is guaranteed per week.

The document from [REDACTED] contains the following description of the duties of the proffered position:

- A. Provides competent care for families based on practice patterns which reflect new levels of awareness of suffering, patient/family psychosocial needs, and complexity of clinical judgment.
 1. Assesses and collects data in a comprehensive manner identifying underlying family needs to implement an individualized plan of care.
 2. Demonstrates competence in the delivery of nursing care.
 3. Evaluates and revises plan of care based on evolving needs.
 4. Utilizes problem-solving approaches which compare one situation with another.

5. Provides comprehensive, individualized teaching based on identified learning needs of families.
 6. Recognizes impact of personal involvement in therapeutic relationship.
- B. Demonstrates effective use of communications skills.
1. Communicates in an accurate, objective manner.
 2. Recognizes and accesses multidisciplinary team members in meeting identified patient/family needs.
 3. Responds to verbal and nonverbal communication.
 4. Identifies problems and reports these to appropriate personnel.
- C. Participates in the development of professional and educational activities.
1. Assists in identifying learning needs of staff nurses and other health care workers.
 2. Assists in developing strategies to meet identified learning needs.
 3. Supports and/or maintains membership in a professional organization.
 4. Shares pertinent information gained from professional seminars, conferences, books, or journals.
- D. Demonstrates competence in professional practice.
1. Seeks evaluation of self from peers and clinically advanced professionals to improve professional practice.
 2. Incorporates unit based goals into nursing process.
 3. Is a member of a unit based committee/project/task force.
 4. Utilizes standards to develop plans of care for primary patients.
 5. Preceptor for novice/beginners.
- E. Applies nursing research to clinical practice.
1. Reads and evaluates current nursing research that has implications for clinical practice.
 2. Modifies own practice based on nursing research and quality improvement findings.
 3. Evaluates clinical practice to identify problems for potential study.
 4. Participates in research and/or quality improvement activities.

Where, as here, the petitioner is doing business as a healthcare staffing firm that is petitioning for a beneficiary that it would assign to a client hospital (here, ██████████ that would directly determine and supervise the substantive work of the nursing position to which the beneficiary would be assigned, it is the content of the documentation submitted by that client hospital that is determinative on the specialty occupation issue. Specialty occupation classification is dependent upon the extent and

quality of the evidence of record about the actual work to be performed, the associated performance requirements, and the nature and educational level of specialized knowledge in a specific specialty necessary for or usually associated with such performance requirements. Thus, where, as here, the substantive nature of the work to be performed is determined not by the petitioner but by its client, the AAO focuses on whatever documentary evidence the client entity generating the work has issued or endorsed about the work and the educational credentials necessary to perform it.

In support of this approach, USCIS routinely cites *Defensor v. Meissner*, 201 F.3d 384, in which an examination of the ultimate employment of the beneficiary was deemed necessary to determine whether the position constitutes a specialty occupation. The petitioner in *Defensor*, Vintage Health Resources (Vintage), was a medical contract service agency that brought foreign nurses into the United States and located jobs for them at hospitals as registered nurses. The court in *Defensor* found that Vintage had “token degree requirements,” to “mask the fact that nursing in general is not a specialty occupation.” *Id.* at 387.

The court in *Defensor* held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” *Id.* at 388. The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The *Defensor* court held that the legacy Immigration and Naturalization Service (INS) had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* In *Defensor*, the court found that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner. *Id.*

The AAO recognizes the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹ As to the education required for entry into registered nurse positions in general, the *Handbook* states,

There are three typical educational paths to registered nursing—a bachelor’s of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online, accessed March 29, 2012.

In the March 20, 2009 letter provided with the visa petition, counsel asserted the following about the USCIS November 27, 2002 guidance memorandum issued by Johnny Williams, Executive Associate Commissioner, Office of Field Operations:

The memorandum notes that certain specialized nursing occupations are likely to require a bachelor's or high [sic] degree, and, accordingly, be H-1B equivalent due to an advanced level of education and training required for certification.

The record contains an evaluation, dated January 21, 2009, from an associate professor of nursing at [REDACTED]. That letter lists various duties of an RN-PS, and abstractly states, "Skills in these areas can be acquired only through Bachelor's-level classes in those areas." The professor did not indicate which of the listed duties could not be performed by a registered nurse who did not have a minimum of a bachelor's degree or the equivalent in nursing or a related discipline. The professor further stated, "The skills for the position are developed in the junior and senior years of an undergraduate program, as well as in a graduate program in Nursing, or a related field," but did not indicate which skills are not taught in, for instance, a two or three year registered nurse program at a junior college. She also did not explain why these skills could not be obtained through additional credentialing or on-the-job experience by a registered nurse (RN) with only an associate's degree.

The professor also stated, "Companies seeking to employ [an RN-PS] require prospective candidates to possess a Bachelor's degree in the area of Nursing, Pediatric Nursing, or a related field, from an accredited institution of higher learning." The professor did not indicate whether she was asserting this requirement as a universal requirement, as common in the industry, or merely as a requirement of some companies and, in any event, provided no support for that conclusory statement.

The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The AAO agrees that an RN-PS position may qualify as a specialty occupation. As correctly detailed in Part E of the Williams memorandum, to which counsel referred, "the petitioner may be able to demonstrate that the H-1B petition is approvable" for nursing specialties, including pediatrics, by establishing, pursuant to the pertinent statutes and regulations, set out above, that a particular position qualifies as a specialty occupation.

The petitioner and counsel have not stated which of the duties of the proffered position could not be performed by an "RN without at least a bachelor's degree or the equivalent in nursing, pediatric nursing, or a related field." The petitioner has not listed any duties of the proffered position that they claim cannot be performed by an RN who graduated, for instance, from a two or three-year program in nursing at a junior college. Even if such duties had been identified, the petitioner failed to demonstrate why an RN without a bachelor's degree cannot perform these skills after obtaining credentialing in pediatrics or after gaining the requisite experience, such training and/or experience

not being equivalent to a bachelor's degree in nursing. The *Handbook*, for instance, indicates that credentialing in pediatrics may be more than sufficient in this case.

For the aforementioned reasons, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position satisfies the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO will next address the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was noted above, the *Handbook* provides no support for the proposition that the hospital industry, or the pediatric hospital industry, or any other industry requires a minimum of a bachelor's degree for RN positions, or RN-PS positions. The record contains no indication that a professional association of RNs requires a minimum of a bachelor's degree or the equivalent in a specific specialty as an entry requirement. The record contains no letters from others in the petitioner's industry stating that hospitals, or pediatric hospitals, routinely employ and recruit only degreed individuals.

The only evidence in the record that suggests that pediatric hospitals insist that their nurses have a minimum of a bachelor's degree or the equivalent in a specific specialty is the above-described January 21, 2009 letter from the associate professor. For the reasons stated above, that letter is found to be of little to no evidentiary weight in demonstrating that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other RN-PS positions may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered is so complex or unique that it can be performed only by an individual with such a degree.

As was noted above, pursuant to *Defensor*, it is evidence provided by the ultimate user of the beneficiary's services, who would be assigning her duties and overseeing her performance of them, that is determinative of whether the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The only evidence pertinent to the uniqueness or complexity of the proffered position provided by [REDACTED] is the description of the duties of the proffered position, set out above. Those duties are so abstractly phrased, however, that one cannot determine whether they would require a specialty bachelor's degree.

For example, "Assess[ing] and collect[ing] data," "Evaluat[ing] and revis[ing] plan of care," "Communicat[ing] in an accurate, objective manner," etc. contain no indication that they require a minimum of a bachelor's degree or the equivalent in a specific specialty, nor do any of the other duties described.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to anyone that the petitioner has previously hired to fill the proffered position, and the petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As was noted above, the description provided by [REDACTED] is the only relevant evidence pertinent to whether the duties of the proffered position require a minimum of a bachelor's degree or the equivalent in a specific specialty. As was further noted, those duties are so abstractly stated that they cannot demonstrate any need for such a degree.

The petitioner has not demonstrated that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation position. The director will consider this issue upon remand.

The record suggests another issue that was not discussed in the decision of denial. The evidence suggests that the beneficiary would work at [REDACTED] which is a client of the petitioner.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a “United States employer” as authorized to file an H-1B petition. “United States employer” is defined 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 petitioner has not claimed and the AAO finds that the petitioner has not established that it qualifies as an agent within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(F). The remaining question, in analyzing whether the petitioner has standing to file the instant visa petition, is whether the petitioner qualifies as the beneficiary’s employer within the meaning of section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Under the test of *Nationwide Mutual Ins. Co. v. Darden (Darden)*, 503 U.S. 318, 322-323 (1992)

(hereinafter "*Darden*"), the United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Darden*, 503 U.S. 318 at 322-323 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

"In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party."

Darden, 503 U.S. at 323-324 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. at 751-752); see also *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

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.²

² 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).

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 318-319.³

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).⁴

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).

³ 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))).

⁴ 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

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).

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, [REDACTED] is in business as a hospital, and nursing is a regular part of that business. The record demonstrates that the beneficiary would work at [REDACTED] rather than at the petitioner's own location, and [REDACTED], rather than the petitioner, would apparently provide the implements necessary to practice nursing. The record contains no allegation that the petitioner, rather than an employee of the [REDACTED] would designate the beneficiary's shifts, assign duties to the beneficiary and control or supervise the beneficiary's work. In fact, the record contains an Employment Agreement, dated January 19, 2009, between the petitioner and the beneficiary, that states, ". . . [REDACTED] will provide supervision at the work site." For all of these reasons, the petitioner has not demonstrated that it would have an employer/employee relationship with the beneficiary pursuant to the test enunciated in *Darden* and *Clackamas*.

The AAO finds that the petitioner has not demonstrated that it would be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A). The petitioner has not, therefore, demonstrated that it has standing to file an H-1B visa petition for the beneficiary. The director shall consider this issue on remand.

Further still, although the visa petition requests a three-year period of employment from May 25, 2009 to May 25, 2012, the petitioner's employment contract with the beneficiary is for a 30-month period, commencing January 1, 2009 and ending, therefore, on December 31, 2011. The record contains no evidence that the petitioner and the beneficiary have mutually obliged themselves to maintain any business relationship after that date. Even if the instant visa petition were otherwise approvable, it would not be approvable for any period after December 31, 2011.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden in part. Accordingly, the decision of the director will be withdrawn and the matter remanded for entry of a new decision.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for entry of a new decision.