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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

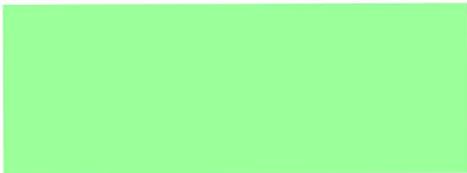


Date: **JAN 25 2013** Office: CALIFORNIA SERVICE CENTER FILE:

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 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 in accordance with the instructions on 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, (“the director”) denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner describes itself as a staffing services organization established in 1993 with 242 employees and an undisclosed gross and net annual income. The petitioner seeks to employ the beneficiary as a [REDACTED] Test Engineer and seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the petitioner had failed to demonstrate that the position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129, and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s response to the RFE; (4) the notice of decision; and (5) Form I-290B, Notice of Appeal or Motion, with counsel’s supplemental brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director’s sole ground for denying this petition.<sup>1</sup> Accordingly, the appeal will be dismissed, and the petition will be denied.

In the petition submitted on May 4, 2011, the petitioner indicated it wished to employ the beneficiary as a [REDACTED] Test Engineer in Redmond, Washington from May 15, 2011 until May 14, 2014.<sup>2</sup> The petitioner also provided a Labor Condition Application (LCA) certified on April 25, 2011, valid for a period beginning May 15, 2011 until May 14, 2014 for a Level IV (fully competent worker) [REDACTED] Test Engineer, SOC (ONET/OES) code 17-2072, (Electronics Engineer) to be located in Redmond, Washington where the prevailing wage for a Level IV electronics engineer is \$50.57 per hour. The petitioner noted the beneficiary’s wage rate would be \$60 per hour.

In the May 2, 2011 letter submitted in support of the petition, the petitioner stated that it is a

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<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). It was in this review that the AAO observed the preliminary issue that must be addressed prior to discussing whether the proffered position is a specialty occupation; that is whether the petitioner has established an employer-employee relationship with respect to the proffered position. The failure of the petitioner to establish this essential element, although not noted by the director in her decision, nevertheless precludes approval of this petition.

<sup>2</sup> In response to the director’s RFE regarding the beneficiary’s eligibility for H-1B employment beyond September 30, 2011, the petitioner amended its request for the employment period with an ending date of January 3, 2014. The petitioner asserted that the beneficiary had been in H-1B status since October 1, 2007 and that she had spent a total of 95 days outside the United States while in H-1B status and accordingly, with the recapture of the 95 days, the beneficiary is eligible to remain in H-1B status until January 3, 2014.

global staffing company serving thousands of companies through a nationwide network of regional and local branch offices providing everything from immediate job searches to full management of a company's labor procurement strategy. The petitioner stated that it wished to continue the employment of the beneficiary<sup>3</sup> as a [REDACTED] Test Engineer in its Redmond, Washington location. The petitioner described the beneficiary's duties as:

- Responsible for executing test cases, documenting them, and troubleshooting issues in the [REDACTED] Lab.
- Perform IOT and functional testing between existing NSN GSM/EDGE, WCDMA and LTE NW implementation and new Terminals or other vendor network elements.
- Perform Radio Interface Compatibility Testing (RICT) and functional testing mainly between NSN UTRAN, eUTRAN, PS CN and CS CN new SW release and commercial terminals.
- Perform integration and troubleshooting of Nokia Siemens Networks GSM/EDGE, UMTS and LTE network elements (MSC, MGW, HLR, SGSN, BSC, BTS, RNC, Node B, eNode B, MME, SGW, Flexi BTS).
- Perform software and hardware upgrade on the Nokia Siemens Networks elements to meet IOT requirements.
- Perform IOT analysis for Nokia networks element software releases.
- Carry out Terminal IOT, IODT and RICT project test planning, test case design, testing and project reporting.

The petitioner stated that the proffered position most closely resembled the OES/SOC classification of "electronics engineer, except computer" and asserted that this is a specialty occupation with a Job Zone 4 rating which encompasses positions that require considerable preparation.

The record also included Internet printouts regarding the petitioner and a list of its locations throughout the United States. The petitioner identified four locations in the State of Washington, the proposed location of the work, three of which used the petitioner's "doing business as" identity and one of which used the identity [REDACTED]

On May 13, 2011, the director issued an RFE advising the petitioner, in part, that it must establish a valid employer-employee relationship between itself and the beneficiary. The

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<sup>3</sup> United States Citizenship and Immigration Services' (USCIS) records show that the beneficiary was approved for H-1B classification pursuant to a petition filed by a different employer [REDACTED] and that the approval of this petition was automatically revoked on August 2, 2011. USCIS records also show that the petitioner in this matter filed a second H-1B petition on behalf of the beneficiary on October 14, 2011 requesting her employment from November 15, 2011 until November 14, 2012 and that the petition was approved on November 15, 2011 for this one-year period. USCIS records also reveal that the petitioner in this matter filed a third Form I-129 petition on this beneficiary's behalf on August 27, 2012 [REDACTED] and that this petition was also subsequently approved on November 16, 2012, essentially rendering the issues in this proceeding moot.

<sup>4</sup> [REDACTED] is referred to as [REDACTED] throughout the record. The record does not include articles of incorporation, business licenses, or other documentation establishing the correct iteration of its name, nor does the record include evidence of [REDACTED] ownership.

director advised the petitioner that United States Citizenship and Immigration Services (USCIS) must determine if the petitioner had specialty occupation work available and the right to control the employee for the requested employment period. The director requested clarification of the proposed work location and evidence of the contractual relationship between the petitioner and the beneficiary and between the petitioner and the end client who would actually use the beneficiary's services. The director also requested, among other items, that the petitioner submit copies of signed contractual agreements, statements of work, work orders, service agreements and letters between the petitioner and the *authorized officials of the ultimate end-client company where the work will actually be performed by the beneficiary* as well as a detailed description of the duties the beneficiary will perform and a description of who will supervise the beneficiary.

In a May 13, 2011 response, the petitioner stated that the beneficiary would be its regular full-time employee and would be supervised and controlled by one of the petitioner's managers. The petitioner indicated that at all times the beneficiary would work at [REDACTED] site under the control and supervision of the petitioner's manager. The petitioner provided a list of duties and responsibilities the beneficiary would perform in her role as a [REDACTED] Test Engineer including:

- Will play a lead role for packet core validation including architecture, engineering, design, and certification work in support of the lab and production environments.
- Will provide technical guidance and oversight of inter-vendor certifications.
- Will formalize detailed technical requirement and design criteria
- Will support the RAN Team and drive to common technical requirements and design for dependent features and functionality.

The petitioner asserted that the beneficiary's duties require a unique skill set in the industry and through the petitioner and under its direction the beneficiary would provide this expertise to the client [REDACTED] on a core project for the company. The petitioner provided a signed but undated employment agreement between the beneficiary and [REDACTED] a Delaware corporation, identifying the beneficiary's job title as a [REDACTED] Test Engineer and indicating that she would be placed for work with [REDACTED] client, [REDACTED] Redmond, Washington facility. The beneficiary acknowledged that she would be [REDACTED] employee. An addendum to the agreement dated April 13, 2011 and signed by both parties noted the hourly wage and that the beneficiary would be assigned to work at [REDACTED]. The addendum also noted that there was no term to the employee's employment and that the employment could be terminated by either party at any time for any reason or no reason at all; "[h]owever, [REDACTED] initial contract term with the Designated Client is 7 months(s) [sic]."

The petitioner also provided a work order dated April 15, 2011 on [REDACTED] letterhead indicating the work order was pursuant to a service agreement between [REDACTED]. The record does not include a copy of the referenced service agreement. The work order included the same description of duties as described by the petitioner in its May 13, 2011 RFE response with the addition of the following two elements:

- Provide technical guidance & oversight specific to SGSN around lab work (LEP, TOL, etc.)

- Provide technical input and co-authorship of key documentation: JRD, HLA, DA

The work order indicates the start date of the term of service as May 9, 2011 and the end date as December 31, 2011 with the note that the term may be extended by mutual written agreement of the parties. The work order is not signed by representatives of either [REDACTED]. The petitioner also provided a copy of an electronic mail transmission between a representative of [REDACTED] and the petitioner's counsel regarding the work order in which [REDACTED] representative stated that the [REDACTED] project is ongoing and could go well beyond three years but that [REDACTED] only approved projects on an annual basis. The representative also indicates: "Her name is not on the document as we control who will support this project."

The director denied the petition on June 10, 2011, determining that the petitioner had not established the proffered position as a specialty occupation. The director specifically determined that the petitioner is not the entity that will provide the duties to the beneficiary but that the firm needing the computer related position would determine the job duties to be performed. The director found that the petitioner had not submitted sufficient evidence of a contractual relationship with the end client for specialty occupation work and that without a sufficient description and documentary evidence of the project described in the petition, it appeared the position may not exist or may not meet the statutory definition of a specialty occupation.

On appeal, counsel for the petitioner asserts that the petitioner meets the legal definition of "employer" for H-1B purposes. Counsel contends that the petitioner controls the beneficiary's behavior and the financial aspects of the relationship and dictates the type of relationship and, thus, under the common law doctrine regarding employer-employee relationships, the petitioner is the beneficiary's employer. Counsel appends a template of the petitioner's "Right to Control Agreement" stating that the petitioner cannot provide the actual agreement due to confidentiality concerns. The unsigned "Right to Control Agreement" references an unknown client company and [REDACTED] and notes that as the client company does not regularly maintain professionals with the skill set required of this project, and S.Com is in the business of employing specialized professionals [REDACTED] will provide the professional to the client company as per an attached SOW (Statement of Work). The unsigned "Right to Control Agreement" also states that [REDACTED] retains the right to control the professional placed at the client site; will be responsible for the professional's salary, benefits, scheduling, and performance evaluations; will retain the right to set the professional's schedule and hours; and will retain supervisory rights over the professional, including managing the professional's workload, vacation time, and the manner and means in which the professional's work product is completed. The unsigned "Right to Control Agreement" specified that the client company would be responsible for providing the day-to-day tools to the professional.

Counsel also notes that the petitioner: has the right to instruct the beneficiary through its agreement with the beneficiary; provides subject matter experts for projects whose expertise is not fully integrated into the clients' business; maintains the right to hire a substitute subject matter expert and assign the substitute to the project under its service agreement; hires and employs any necessary assistant for the benefit of the subject matter expert; and the subject matter expert is on site at the client's location at the direction of the petitioner and can be reassigned as needed to other clients or projects, accordingly the subject matter expert has an

ongoing expectation of employment with the petitioner and no ongoing expectation of employment with the client.

Counsel reiterates that the beneficiary under her employment agreement with the petitioner and the "Right to Control Agreement" is required to report to her supervisor at the petitioner regarding her weekly progress. Counsel confirms that the client will provide the beneficiary the computer and tools she needs to complete her tasks. Counsel also asserts that the petitioner retains the right to establish the beneficiary's routines and workload as she progresses toward each deadline and also controls the nature and extent of work toward each deadline whereas the client maintains control over larger project deadlines. Counsel avers that the petitioner hires the subject matter experts and controls payment of their wages and benefits and thus has financial control of the beneficiary. Counsel claims that the beneficiary's relationship with the petitioner will continue beyond its agreement with the current client.

Counsel asserts that the petitioner has met the definition of control under the common law doctrine regarding the employer-employee relationship. Counsel also questions the legality of the January 8, 2010 guidance memorandum (Neufeld memo) issued to the field offices regarding the issue of employer-employee relationship and contends that the memorandum unlawfully requires a petitioner to establish both the "right of control" and "actual control" to establish an employer-employee relationship. Counsel avers, however, that even with the impermissible addition of this requirement, the petitioner has met the more stringent standard of control as delineated in the USCIS guidance memorandum.

We note that to ascertain the intent of a petitioner, USCIS must look to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera, for the duration of the requested employment.

In making those determinations, the issue that must first be analyzed 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). Here we observe that the beneficiary's employment agreement, the April 15, 2011 work order for the beneficiary's work, the referenced but not included service agreement with the end client [REDACTED] and the unsigned "Right to Control Agreement" all identify the beneficiary's employer as [REDACTED] not the petitioner in this matter. Although the petitioner includes a list of its locations and identifies s.com as one of its businesses and includes an electronic mail transmission between a representative of [REDACTED] and its general counsel, the record does not include documentary evidence of the claimed ownership relationship between the petitioner and [REDACTED]. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

However, assuming *arguendo*, that the petitioner and [REDACTED] are one and the same and accordingly the first and third prongs of the below referenced definition of United States employer has been satisfied, 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:

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).

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.

Although “United States employer” is defined in the regulations at 8 C.F.R. § 214.2(h)(4)(ii), it is noted that the terms “employee” and “employer-employee relationship” are not defined for purposes of the H-1B visa classification. Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a Labor Condition Application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1) (2012). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee.” Subsections 212(n)(1)(A)(i) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i), (2)(C)(vii) (2012). Further, the regulations indicate that “United States employers” must file a Petition for a Nonimmigrant Worker (Form I-129) in order to classify aliens as H-1B temporary “employees.” 8 C.F.R. § 214.2(h)(1), (2)(i)(A). Finally, the definition of “United States employer” indicates in its second prong that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire,

pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii) (defining the term “United States employer”).

Neither the legacy Immigration and Naturalization Service (INS) nor USCIS defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term “United States employer” to be even more restrictive than the common law agency definition.<sup>5</sup>

<sup>5</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,

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>6</sup>

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*e.g., Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff’d*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

However, in this matter, the Act does not exhibit a legislative intent to extend the definition of “employer” in section 101(a)(15)(H)(i)(b) of the Act, “employment” in section 212(n)(1)(A)(i) of the Act, or “employee” in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term “United States employer” was defined in the regulations to be even more restrictive than the common law agency definition. A federal agency’s interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-845 (1984).

The regulatory definition of “United States employer” requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an “employer-employee relationship” with the H-1B “employee.” 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term “United States employer” not only requires H-1B employers and employees to have an “employer-employee relationship” as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms “employee,” “employed,” “employment” or “employer-employee relationship” indicates that the regulations do not intend to extend the definition beyond “the traditional common law definition.” Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the “conventional master-servant relationship as understood by common-law agency doctrine,” and the *Darden* construction test, apply to the terms “employee,” “employer-employee relationship,” “employed,” and “employment” as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h). That being said, there are instances in the Act where Congress may have intended a broader application of the term “employer” than what is encompassed in the conventional master-servant relationship. *See, e.g.*, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (referring to “unaffiliated employers” supervising and controlling L-1B intracompany transferees having specialized knowledge); section 274A of the Act, 8 U.S.C. § 1324a (referring to the employment of unauthorized aliens).

<sup>6</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>7</sup>

When 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 and contrary to the assertions of counsel, 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

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<sup>7</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).

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.

Lastly, 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, . . . the answer to whether [an individual] 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.” We observe first that the work to be performed by the beneficiary as described by the petitioner is not work that is part of the petitioner’s business except for the provision of the beneficiary’s services itself. The petitioner in this matter is a sourcing or staffing company. It finds subject matter experts for third party companies. That is, without a third party company’s need for an additional worker, the petitioner would have no reason to employ a subject matter expert, i.e., the beneficiary. The petitioner clearly states and counsel confirms that the beneficiary will work at [REDACTED] facility and that the beneficiary will use [REDACTED] tools and the computer she needs to complete her tasks. Accordingly, [REDACTED] is the actual source of the instrumentalities and tools used to perform the work. These three factors (the work to be performed is not part of the petitioner’s business, the work is not performed at the petitioner’s location, and the petitioner does not provide the instrumentalities and tools to perform the work) weigh against a determination that the petitioner has not established an employer-employee relationship under the common-law master-servant relationship test.

In addition, the petitioner has provided no evidence from [REDACTED] that it accepts the petitioner’s claim that it supervises the beneficiary in the performance of her work at [REDACTED] that the petitioner has the right to control the manner and means by which [REDACTED] product is accomplished, and that the petitioner controls who has the right to support [REDACTED] project. In this regard we have reviewed the template for the “Right to Control Agreement” submitted on appeal.

First, the “Right to Control Agreement” was submitted for the first time on appeal. In the RFE, the director specifically asked for valid contracts and agreements between the petitioner and the end client using the beneficiary’s services and the petitioner failed to produce any documentation signed by the end client. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. *See* 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of*

*Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted for the first time on appeal.

Second, the "Right to Control Agreement" is a template and is not signed or dated. Counsel's claim that the petitioner cannot provide the actual agreement due to confidentiality concerns is without merit. The petitioner has not attempted to submit similar or secondary evidence. *See* 8 C.F.R. § 103.2(b)(2). Again, the record includes no statements, contracts, letters, or other documentary information signed by an authorized representative of [REDACTED]. The petitioner does not explain why such information is not included in the record. While a petitioner should always disclose when a submission contains confidential commercial information, the claim of confidentiality does not provide a blanket excuse for the petitioner's failure to provide such documentary evidence if the documentary evidence is material to the requested benefit.<sup>8</sup> Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Despite the director's specific request, the petitioner failed to submit the requested material evidence. As observed above, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are still relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. In this matter, as observed above, the work to be performed by the beneficiary is not part of the petitioner's business, the work is performed at [REDACTED] facility, [REDACTED] provides the instrumentalities and tools for the beneficiary to perform the work, and the record includes no validation from [REDACTED] that the petitioner has the right to supervise and instruct the beneficiary in the performance of her work at [REDACTED] or that the petitioner has the right to otherwise control the manner and means by which [REDACTED] product is accomplished. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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<sup>8</sup> Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." Exec. Order No. 12,600, 1987 WL 181359 (June 23, 1987).

The evidence is insufficient in this matter to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the petitioner has not satisfied its burden and established that it qualifies as a United States employer with standing to file the instant petition in this matter. See section 214(c)(1) of the Act (requiring an “Importing Employer”); 8 C.F.R. § 214.2(h)(2)(i)(A) (stating that the “United States employer . . . must file” the petition); 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991) (explaining that only “United States employers can file an H-1B petition” and adding the definition of that term at 8 C.F.R. § 214.2(h)(4)(ii) as clarification). As such, and beyond the decision of the director, the petition must be denied for this reason.

The AAO will now turn to the director’s sole ground for denying the petition, i.e., the failure of the petitioner to establish that the proffered position qualifies as a specialty occupation. Having determined that the petitioner failed to establish that it will have a qualifying employer-employee relationship with the beneficiary and that her work is likely determined by the end-client, USCIS must evaluate what the specific job duties, as described by [REDACTED] would entail and what [REDACTED] minimum entry requirements are for that particular position. As recognized in *Defensor v. Meissner*, it is necessary for the end-client to provide sufficient information regarding the proposed job duties to be performed at its location(s) in order to properly ascertain the minimum educational requirements necessary to perform those duties. See *Defensor v. Meissner*, 201 F.3d at 387-388. In other words, as the nurses in that case would provide services to the end-client hospitals and not to the petitioning staffing company, the petitioner provided job duties and alleged requirements to perform those duties were irrelevant to a specialty occupation determination. See *id.*

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

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

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 (9th 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.

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

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