



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 20 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

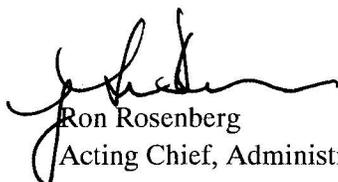
ON BEHALF OF PETITIONER:

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 service center director denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a "[t]elecoms engineering business[sic] solutions provider" with 82 employees. It seeks to employ the beneficiary in what it describes as a full-time telecommunications engineer position and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the evidence submitted by the petitioner fails to demonstrate that a bona offer of employment was made to the beneficiary.

On appeal, the petitioner submits a letter and additional evidence, and contends that the director's findings were erroneous.

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

In a letter submitted in support of its Form I-129 dated January 31, 2011, the petitioner stated that it "will continue to employ [the beneficiary] as a Telecommunications Engineerworking [sic] to provide design, testing and development specialized skills to our customers using multiple operating systems, web-based technologies and electronic standards and protocols."

The petitioner also submitted, *inter alia*, a certified Labor Condition Application (LCA) with the petition. The LCA submitted with the petition was certified on January 28, 2011 (1) for a telecommunications engineer, (2) pursuant to O\*NET/OES code 17-2072.00, SOC (ONET/OES) occupation Electronics Engineers, Except Computer, (3) for employment at [REDACTED] Washington, and (4) at a prevailing wage of \$33.87 per hour.

On July 11, 2011, the director requested additional information from the petitioner to establish that the petitioner made a bona fide offer of employment as well as evidence establishing that the beneficiary was in a valid nonimmigrant status at the time the petition was filed. The director outlined the specific evidence to be submitted. On, July 21, 2011, the petitioner submitted, *inter alia*, the following documents in response to the director's RFE: (1) a one-page agreement between the petitioner and [REDACTED] dated July 1, 2005; (2) copies of the beneficiary's 2009 and 2010 income tax returns; (3) a copy of the beneficiary's 2009 Oregon income tax return; (4) copies of the beneficiary's 2008, 2009, and 2010 Form W-2s.

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In a letter dated July 20, 2011, the petitioner stated that the beneficiary resides in [REDACTED] Washington, and that he is employed at the site address of [REDACTED] which is the customer of the petitioner's client [REDACTED]. The petitioner also stated the following:

We respectfully point out that, as stated in our Petition, there has been **NO** change in the conditions of [the beneficiary's] employment either on this occasion or on our previous Petition. Specifically, we first petitioned and received approval to employ [the beneficiary] in April 2005 ([REDACTED] **enclosed**). Shortly thereafter, we petitioned and were approved for a change of worksite ([REDACTED] **enclosed**). Since that date he has only worked at [REDACTED]. We petitioned for an extension in April 2008 which was again approved ([REDACTED] **enclosed**). There has still been **NO** change of work place so we are a little confused by your questions.

The director denied the petition on September 6, 2011. In her decision, the director noted the petitioner's address in [REDACTED] Oklahoma, and its contradictory claims in Part 5 of the Form I-129 that the beneficiary (1) would work at [REDACTED], WA [REDACTED], and (2) would not work off-site. The director also noted the petitioner's claim that the beneficiary has been and will continue to solely work at [REDACTED] Washington; however, the director pointed out that a review of the beneficiary's tax documentation revealed otherwise. The director stated the following:

For one, the petitioner submitted the beneficiary's 2009 Oregon Income Tax Return. An individual would not file an Oregon Income Tax Return if they did not work in the State of Oregon. Furthermore, the beneficiary's 2009 W-2 shows that the beneficiary earned \$20,087.18 while working in the State of Oregon in 2009. Moreover, the beneficiary's 2010 W-2 shows that the beneficiary earned \$15,726 while working in the State of Florida in 2010. This evidence clearly demonstrates that the beneficiary worked in Washington, Oregon and Florida in [sic] during his previous approval period while claiming that the beneficiary has only worked in Washington.

On appeal, in a letter dated October 5, 2011, the petitioner explains that while the petitioner's headquarters are located in Oklahoma, the beneficiary will be "servicing [its] client in [REDACTED]." With respect to the beneficiary's work location, the petitioner stated the following:

The beneficiary **HAS** lived in [REDACTED] WA since 2005 until this year. His last three years approved H-1B Visa had him based working and based living in [REDACTED] WA. He **HAS** been on a number of temporary secondments to sub-facilities of his primary base. And the fact that he has kept his home, throughout, in [REDACTED] WA tends to support the A → B → A secondments. We even understood the regulations to mean that he could do this for up to 90 days per annum without this requiring a permanent

change in location for the purposes of paying the correct prevailing wage. These are unscheduled events that pop up at a moments notice.

The petitioner also stated that it sent the beneficiary to work in Oregon for "one week" in April 2009, but that it had determined in May 2009 that it would be "useful" for the beneficiary to stay longer. According to the petitioner, it "immediately filed a new LCA to "insure [sic] full compliance with his status." The petitioner also explained that the beneficiary was sent to Florida from September 25, 2010, to October 15, 2010, and that the "project was expanded and he was put on an LCA filed on October 13, 2010 to insure [sic] he received the correct prevailing wage."

The petitioner also claimed that based on its filings of the LCAs for the beneficiary's employment in Oregon and Florida, the petitioner "therefore, [did not violate] the H-1B wage and hour requirements for the previous H-1B."

The petitioner submitted the following with its appeal: (1) an LCA certified on May 6, 2009, for a telecommunications engineer at a [redacted] Oregon, work location; (2) an LCA certified on October 19, 2010, for a telecommunications engineer at a [redacted] Florida, work location; (3) the beneficiary's pay records; (4) letters from the beneficiary regarding time off; and (5) a letter dated October 23, 2003, from [redacted] Director, Business and Trade Branch, U.S. Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), to [redacted] of the [redacted].

On November 6, 2012, the AAO sent an RFE to the petitioner. Specifically, the AAO noted that the the record did not contain the petitioner's certificate of incorporation or any other evidence issued by any state indicating that it is, in fact, incorporated or formed as a business entity other than a corporation. Accordingly, the AAO requested the following:

1. Documentary evidence that the petitioner was incorporated or formed as a business entity other than a corporation on or before February 18, 2011, the date the visa petition was submitted, and that it has remained, and continues to be a business entity in good standing; and
2. Evidence, including invoices, banking statements, and Federal income tax returns for 2011, showing that the petitioner has done business since February 18, 2011, and continues to do business in the United States.

The AAO further noted that the petitioner stated in response to the director's RFE that the beneficiary will work for [redacted] ) which is the customer of [the petitioner's] client [redacted]. The AAO also noted that the petitioner stated that the beneficiary will work at [redacted] Washington," which is the "site address of [redacted] " To assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary, the AAO requested that the petitioner submit copies of any contracts or written, signed agreements between (1) the petitioner and [redacted] and (2) [redacted] and

[REDACTED] in addition to any other evidence demonstrating that the beneficiary will work at the [REDACTED] site located at [REDACTED] WA [REDACTED] for the duration of the requested validity period.<sup>1</sup>

The AAO specified that "[t]he petitioner should also submit **original** letters from [REDACTED] and [REDACTED] that describe their relationships with the petitioner, the project that the petitioner has been hired to perform, and the nature of the beneficiary's work." The AAO also requested specific information regarding the beneficiary's duties and the project that he will be assigned to as evident in the following:

The letters should also describe the beneficiary's duties in the context of the specific project to which the beneficiary has been assigned as well as detail who will oversee and direct the beneficiary's work, who is providing the tools that the beneficiary is using to perform that work, the number of people assigned to work on the project, and the duration of the project as well as the expected duration of the beneficiary's work on the project. The letters should also provide the full contact information for the [REDACTED] and [REDACTED] employees overseeing and directing the beneficiary's work. The petitioner should also provide information and corroborating evidence regarding the person employed by the petitioner to whom the beneficiary will report, including the name, position title, position duties, and physical location of this individual as well as the role of this individual, if any, in the [REDACTED] project for the petitioner.

On December 10, 2012, the petitioner responded to the AAO's RFE. The petitioner pointed out that the "H-1B regulations at 8 CFR § 214.2(h) do not require a petitioner to provide as initial evidence a certificate of incorporation . . . ." To demonstrate that it is a "bona fide employer," the petitioner submitted a copy of its 2011 Federal income tax return as well as a letter from the U.S. Internal Revenue Service assigning the petitioner its employer identification number. Despite its claim that it was not required to submit a copy of its certificate of incorporation, the petitioner submitted a copy of its State of Oklahoma Certificate of Incorporation. The petitioner also contended that it "enjoys an employer-employee relationship with [the beneficiary]."

In addition, the petitioner submitted the following in response to the AAO's RFE: (1) a copy of a Master Services Agreement, number [REDACTED] between [REDACTED] effective February 17, 2004, including attachments; (2) a copy of a letter from [REDACTED], US Account Manager for [REDACTED] dated December 5, 2012, and an attached work order; (3) a copy of a one-page agreement between the petitioner and [REDACTED] made on April 1, 2011; and (4) a copy of the petitioner's employee handbook.

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<sup>1</sup> The petitioner submitted a one-page agreement it made on July 1, 2005, with [REDACTED] however, the agreement is over seven years old and does not provide the name of the signatory for [REDACTED] as well as other information indicating that there actually exists a contractual relationship between the petitioner and [REDACTED]

The letter from Mr. [REDACTED] states that the Master Service Agreement, number [REDACTED] between [REDACTED] and [REDACTED] referenced above is still in force and that the work order attached to his letter demonstrates that the beneficiary's telecommunications engineering services were subcontracted to [REDACTED]. Mr. [REDACTED] also states that "[a]t no time was [the beneficiary] an employee of [REDACTED] or [REDACTED] and, was at all times an employee of [REDACTED]."

The computer-generated work order attached to [REDACTED] letter was printed on November 28, 2012, and indicates that the beneficiary was assigned to a project located at [REDACTED] WA [REDACTED] with a January 18, 2011 start date, and a July 31, 2011 end date.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has failed to demonstrate that a bona offer of employment was made to the beneficiary. Accordingly, the appeal will be dismissed, and the petition will be denied.

As a preliminary matter, however, the AAO will first address an additional, independent ground for denial of the petition not identified by the director's decision that also precludes approval of this petition. Specifically, the AAO finds that the petitioner has failed to establish that it meets the regulatory definition of an intending United States employer. 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the petitioner has not established that it will have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." *Id.*

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

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

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

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

- (1) Engages a person to work within the United States;

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

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

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

Neither the legacy Immigration and Naturalization Service ("INS") nor 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)).

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>2</sup>

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<sup>2</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and

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>3</sup>

Therefore, in the absence of an express congressional intent to impose broader definitions, both the "conventional master-servant relationship as understood by common-law agency doctrine" and the *Darden* construction test apply to the terms "employee" and "employer-employee relationship" as used in section 101(a)(15)(H)(i)(b) of the Act, section 212(n) of the Act, and 8 C.F.R. § 214.2(h).<sup>4</sup>

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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>3</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

<sup>4</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

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.

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

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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).

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."

Specifically, despite the AAO's request for **original** letters from [redacted] and [redacted] with the information outlined above, the petitioner failed to submit the requested material evidence. While the petitioner submitted a letter from Mr. [redacted] of [redacted] that letter does not include the following information that was specifically requested by the AAO: (1) the beneficiary's duties in the context of the specific project to which the beneficiary has been assigned; (2) who is providing the tools that the beneficiary is using to perform that work; and (3) the number of people assigned to work on the project. Furthermore, no letter from Verizon Corporation was submitted. The petitioner claims that it is "not privy" to the Verizon contract as it is a "highly confidential contract and will not be shared due to the extremely competitive nature of the telecommunications industry." However, the AAO's request was not limited to the contract, and, the petitioner has not provided an explanation for why it could not produce a letter from [redacted] the claimed work location of the beneficiary. The petitioner also failed to submit information and corroborating evidence regarding the person employed by the petitioner to whom the beneficiary will report, including the name, position title, position duties, and physical location of this individual as well as the role of this individual, if any, in the [redacted] project for the petitioner. 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). For this reason, the petition must be denied.

Despite the petitioner's claim that an employer-employee relationship exists because the beneficiary is an employee of the petitioner and pays the beneficiary his wage and provides his benefits, the key element in this matter, which is who exercises control over the beneficiary, has not been substantiated.

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. Without full disclosure of all of the relevant factors, the AAO is unable to find that the requisite employer-employee relationship will exist between the petitioner and the beneficiary.

The evidence, therefore, is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The evidence of record prior to adjudication did

not establish that the petitioner would act as the beneficiary's employer in that it will hire, pay, fire, or otherwise control the work of the beneficiary. Despite the director's specific request for evidence that an employer-employee relationship exists, the petitioner failed to submit such evidence. 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).

Based on the tests outlined above, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." 8 C.F.R. § 214.2(h)(4)(ii).

The next issue before the AAO is whether the petitioner has made a *bona fide* offer of employment to the beneficiary.

In the instant case, upon review of the entirety of the record, it is unclear that the beneficiary will be working at the [REDACTED] work site during the requested validity period, i.e., April 1, 2011, to March 31, 2014, as claimed by the petitioner. As noted above, the petitioner failed to detail the nature and scope of the beneficiary's employment at the [REDACTED] site, the only claimed work site of the beneficiary. No communication from [REDACTED] was submitted by the petitioner despite the AAO's specific request, and no explanation was proffered for this failure. Again, 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).

Furthermore, the petitioner claims that the beneficiary would work only at the [REDACTED] site throughout the duration of the requested validity period; however, only one document, the work order attached to Mr. [REDACTED] letter substantiates any part of this requested period. The work order, which appears to corroborate the beneficiary's work at the [REDACTED] WA location, however, only covers six months and 13 days of the nearly three years requested in the petition. Thus, the AAO cannot determine where and when the beneficiary will be employed during the entirety of the requested validity period.

In view of the foregoing, the petitioner has not overcome the director's basis for denying the petition. For this reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground and shall deny the petition on the additional ground that the petitioner failed to establish that an employer-employee relationship exists between the petitioner and the beneficiary.<sup>5</sup>

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<sup>5</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 (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).

(b)(6)

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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.