



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

JUN 28 2013

DATE: OFFICE: CALIFORNIA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

ON BEHALF OF PETITIONER:

[Redacted]

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,

for Michael T. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center 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 be denied.

On the Form I-129 visa petition and supporting documents, the petitioner described itself as a business engaged in software development and consulting with over 1500 employees and a gross annual income of \$293 million. In order to employ the beneficiary in a position to which it assigned the job title "network and computer systems administrator," the petitioner seeks 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 basis of her determination that the petitioner had failed to demonstrate the existence of an employer-employee relationship between the petitioner and the beneficiary.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

Upon review of the entire record of proceeding, the AAO finds that the petitioner has failed to overcome the director's ground for denying this petition. 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." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the AAO will not disturb the director's decision.

The evidence of record does not establish the petitioner as being in a United States employer status relative to the beneficiary with regard to the particular position for which the petition is filed (namely, that of a network and computer systems administrator assigned to, and to perform work as contractually specified by, a client [REDACTED] at that client's location in California). Based upon its review of the entire record of proceeding as presently constituted, the AAO finds that the petitioner has failed to establish that it actually had secured the requested the position for the beneficiary. Consequently, as the evidence of record does not establish that the position with reference to which the petitioner's status with regard to the beneficiary must be established would exist, the petition fails to establish 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," as required to establish U.S Employer status in accordance with the definition at 8 C.F.R. § 214.2(h)(4)(ii) and the related common-law standard for establishing an underlying employer-employee relationship. Thus, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds an additional aspect which, although not addressed in the director's decision, nevertheless also preclude approval of the petition, namely, the petitioner's failure to establish that the proffered position qualifies for classification as a specialty occupation.¹ For these additional two reasons, the petition must also be denied. (This issue will be directly addressed towards the end of this decision.)

Before addressing the substantive aspects of the record of proceeding, the AAO will explain why neither of the two memoranda cited by counsel will have any impact upon the AAO's consideration of this appeal.

The first of these two documents that counsel cites is the memorandum entitled "*Guidance Memorandum on H1B Computer Related Positions*," from [REDACTED] NSC Director, to Center Adjudication's Officers (Nebraska Service Center, December 22, 2000).

The AAO finds that counsel's reliance on this December 22, 2000 service center memorandum is misplaced, as the memorandum is irrelevant to this proceeding. By its very terms, the memorandum was issued by the then Director of the NSC as an attempt to "clarify" an aspect of Nebraska Service Center (NSC) adjudications; and, framed as it was, as a memorandum to NSC "Adjudication's Officers," it was addressed exclusively to NSC personnel within that service center director's chain of command. As such, even if it were still in effect, this memorandum would have no force and effect upon the present matter, which was initially adjudicated by the California Service Center, not NSC.

It is also noted that this legacy memorandum cited by counsel does not bear a "P" designation. According to the Adjudicator's Field Manual (AFM) § 3.4, "correspondence is advisory in nature, intended only to convey the author's point of view. . . ." AFM § 3.4 goes on to note that examples of correspondence include letters, memoranda not bearing the "P" designation, unpublished AAO decisions, USCIS and DHS General Counsel Opinions, etc. Regardless, the NSC no longer adjudicates H-1B petitions and, therefore, the memorandum is not followed by any USCIS officers even as a matter of internal, service center guidance.

Additionally, while counsel asserts that the combination of the petitioner's letter of support and the NSC memorandum "clearly shows that the Petitioner is in control of the beneficiary," counsel provides no analysis to support this contention or to explain why this memorandum, which does not address the employer-employee issue, would even be relevant to the employer-employee issue. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

¹ The AAO conducts appellate review on a *de novo* basis (See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the course of this review that the AAO identified this additional ground for denial.

Even if the AAO were bound by this memorandum either as a management directive or as a matter of law – which is not the case – the AAO notes that the memorandum was issued more than a decade ago, during what the NSC Director perceived as a period of "transition" for certain-computer related occupations; that the memorandum referred to now outdated versions of the *Handbook* (the latest of those being the 2000-2001 edition); and that the memorandum also relied partly on a perceived line of relatively early unpublished (and unspecified) AAO decisions in the area of computer-related occupations, which did not address the computer-related occupations as they have evolved since those decisions were issued more than a decade ago.² In any event, the memorandum reminds adjudicators that a specialty-occupation eligibility determination is not based on the proffered position's job title but instead on the actual duties to be performed. For all of the reasons articulated above, the memorandum is immaterial to the analysis that the AAO must bring to bear in this appeal.

Next, there is counsel's reliance upon the Memorandum from [REDACTED] Associate Commissioner, Office of Examinations, *Supporting Documentation for H-1B Petitions*, HQ 214h-C (November 13, 1995). The import of While it states that requests for contracts should not be a normal requirement for the approval of an H-1B petition from an employment contractor, the memorandum does not prohibit such RFE requests. Read as a whole, the memorandum counsels against issuing RFEs for contracts from employment contractors without a specific need that the requesting officer can articulate for requesting the documents. The memorandum, the AAO notes, does not require the requesting officer to actually articulate the need. Nor does the memorandum purport to bar agency officers from issuing RFEs as a matter of policy on any category of H-1B petitioners. Further, this internal memorandum must be read in the context of the current regulations that invest USCIS officers with broad authority to pursue such evidence as they determine necessary in the reasonable exercise of their responsibility to adjudicate H-1B petitions in accordance with the applicable statutes and regulations. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the legal authority as well as the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Also, the AAO finds that the language of the RFE in the present petition and the context of the record of proceedings as it existed at the time the RFE was issued demonstrate that the RFE was issued on a basis relevant to the proper adjudication of the petition, namely, the petitioner's failure to submit documentary evidence substantiating the petitioner's claim that it would be in an employer-employee relationship with the beneficiary sufficient to establish it as entitled to file the proffered position as a United States employer within the meaning of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) for the period of employment requested in the petition.

In line with the above discussion of the content and import of the referenced [REDACTED] memorandum, the AAO finds no support therein to counsel's arguments that the RFE request for copies of Statements of Work related to the Master Service Agreement that is fundamentally related to this petition was improper because not accompanied by what the petitioner deemed adequate explanation for the director's need for it.

² While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Next as a preliminary matter, the AAO concurs with counsel's assertion that the "preponderance of the evidence" standard must be applied.

With respect to the preponderance of the evidence standard, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), states in pertinent part the following:

Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.

* * *

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case.

* * *

Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

In its consideration of this appeal, the AAO has applied the preponderance of the evidence standard as described above, having examined each piece of evidence in this record of proceeding for relevance, probative value, and credibility, both individually and also within the context of the totality of the evidence. However, as will be evident in the remainder of this decision, the AAO's application of this standard to the evidence in this record of proceeding leads the AAO to conclude that the petitioner has not submitted relevant, probative, and credible evidence sufficient for the AAO to find that the petitioner's claim is "more likely than not" or "probably" true.

The AAO will now focus directly upon the evidence in this record of proceeding. At the outset, the AAO will highlight some salient aspects of the evidentiary record that bear significantly upon the merits of this appeal.³

As already noted, the H-1B petition that is the subject of this appeal was filed for a position to which the petitioner assigned the job title “network and computer systems administrator,” which is to be performed at and for [REDACTED] in California.

As the Labor Condition Application (LCA) supporting the petition, the petitioner submitted one that had been certified for a job prospect that would be within the Network and Computer Systems Administrators occupational category (SOC (ONET/OES) code 15-1142) at a Level I wage-level.

In the petitioner’s November 9, 2011 letter of support, the petitioner’s Director of Human Resources provided the following statements regarding the proposed position and its constituent duties:

The Network and Computer Systems Administrator will install, configure, and support the organization’s LAN and internet system. He will continue to maintain network hardware and software, monitor the network to ensure availability to users and provide maintenance and support. Job duties for the position include:

- Confer with users regarding system problems in specific input and output
- Design, configure, and test computer hardware, network, and operating system hardware
- Diagnose hardware and software problems and replace defective components
- Maintain and administer computer networks, system software, applications and configurations
- Monitor network performance for necessary adjustments
- Coordinate network access and use
- Review overall computer system capabilities to determine if current and new programs will operate efficiently within the existing framework
- Conduct studies and recommend changes pertaining to the development and improvement of systems and networks to meet current and projected needs

³ It should be noted that this same documentary evidence is material to the petitioner’s claim that the position for which the petition was filed qualifies as a specialty occupation.

- Plan and prepare technical reports, memoranda, and guidebooks as documentation of the program development
- Oversee system upgrades, including website and database configuration, and implement security measures to protect data, software, and hardware

Additionally, [the beneficiary's] job duties also include:

- Improving [redacted] Support Process engagement.
- Installation and Configuration of SAP Servers.
- Working on SAP Production Server Performance Improvement.
- System refresh of the ABAP stack, Java Stack, and Dual Stack system from offline Backup.
- Gathering Knowledge transfer from client regarding Bolt on applications and support from offshore

To summarize our offer to [the beneficiary]:

Job location: [redacted] Santa Ana, CA [redacted]

Job Title: Network and Computer Systems Administrator

Salary: \$63,808.00/yr

The Form I-129, the LCA, and the petitioner's "Itinerary" document attest that the beneficiary would perform his work at [redacted] at the California address stated in the job-offer summary above.

Significantly, both the Form I-129 and the LCA attest that the petitioner's address is in Edison New Jersey, which the AAO notes is thousands of miles from the work place claimed by the petitioner.

There is no evidence in the record of proceeding that the petitioner has assigned any of its staff to perform day-to-day management and supervision over the particular work assignments that the beneficiary would have to perform in order to perform whatever onsite services for which [redacted] may contract with the petitioner.

The AAO finds that neither the copies of the [redacted] petitioner Master Services Agreement (to be discussed later in this decision) nor any other documentation establishes that the petitioner, rather than [redacted] would specify, direct, manage, and supervise the beneficiary and the specific work that he would perform on a day-to-day basis, if, in fact he were ever actually assigned

to [REDACTED] The AAO specifically finds that the quarterly-performance-review sheet submitted into the record is not indicative of any such day-to-day control over the beneficiary or any work that he would perform.

With further regard to that quarterly-performance-review document, the AAO notes that the document does not relate to the proffered position. The right-side marginal note indicates that the beneficiary would be signing the form in "Chennai, India, April 23, 2012" a place very remote from the asserted workplace of Santa Ana, California. Further, while the form identifies the Project Name as [REDACTED], a marginal note in the "Project" column states SAP-Basis Consultant under the beneficiary's name.

Next, the AAO notes that the October 7, 2010 Offer of Employment letter from the petitioner to the beneficiary references work not related to the proffered position, as it relates to the beneficiary that he would be based at its "Proposed SEZ Unit Project at IT and ITES SEZ."

The AAO will now address the Master Services Agreement between [REDACTED] and the petitioner (to which we will hereafter refer as the [REDACTED]). The discussion will focus on the particular aspects of this document that render it of no probative value towards establishing an employer-employee relationship between the petitioner and the beneficiary.

The AAO finds that the record of proceeding contains no documentary evidence from [REDACTED] – the client and asserted location of the beneficiary's work – that adopts or endorses any of the petitioner's duty descriptions as accurate depictions of any work that the beneficiary would perform for it, at any time, let alone if this petition were approved. The AAO also finds that, as will be evident in its discussion of the extent of the contractual documentation in the record, there are no contractual documents signed by the petitioner and by [REDACTED] that specify any of the above duties as work to be performed for [REDACTED] by the beneficiary, for any period of time. This factor alone is sufficient to preclude the petitioner both from establishing itself as a U.S. employer and from establishing the proffered position as a specialty occupation. The petitioner can prevail in neither pursuit without establishing that the proffered position would be performed, what its performance would be require as specified by the client, and the nature of the areas and relative degrees of control over the beneficiary and his work that would be exercised by the client and by the petitioner, respectively.

The [REDACTED] must be viewed in its proper role. In this regard, the AAO finds that the cardinal aspect of the [REDACTED] is that its terms do not bind either party to any particular contractual obligation, other than to accept the terms specified in the [REDACTED] as automatically incorporated into any contract for services that the petitioner may enter into with [REDACTED] during the pendency of the [REDACTED]. In this regard, the AAO notes that section 2 (SERVICES AND DELIVERABLES) specifically states that any services that the petitioner would agree to provide would be specified in a related "properly executed Statement of Work ("SOW") that references the [REDACTED] that any such SOW would be attached to the [REDACTED] "upon the written agreement of the parties," and that the SOW would in the

form attached to the [REDACTED] as schedule 1 (Form of Statement of Work). Accordingly, the [REDACTED] does not establish a sufficient basis for establishing an employer-employee relationship.

The AAO observes that no such SOW is attached to the [REDACTED] or provided anywhere else in the record of proceeding. The AAO further observes that a copy of a standard Form of Statement of Work is not even attached. Rather, at the place in the [REDACTED] for Schedule 1 appears a Windows document symbol bearing below it the label "SOW template" – but no template. The AAO further finds that nowhere in this record of proceeding is there any copy of any [REDACTED] that includes an SOW that has been executed by the petitioner and by [REDACTED]

The AAO also notes that, per subsection 3.3 ("Service Employees") of the [REDACTED], whenever [REDACTED] and the petitioner would, by the appropriate contractual formalities, commit themselves to an SOW, [REDACTED] would have the authority to request the removal of anyone assigned by the petitioner pursuant to an SOW, and the petitioner would have to immediately remove such person upon receipt of a written request from [REDACTED] that specifies any reasonable grounds for the request. Such power is at least indicative that [REDACTED] would exert significant control over the beneficiary and his work – that is, of course, if in fact, he were ever assigned to [REDACTED] pursuant to a contract that would incorporate the terms of the [REDACTED]

While the AAO observes that, by its terms, if the [REDACTED] were to become operative by virtue of an effectively executed, attached, and included SOW – not the case here - the petitioner would be responsible for the worker's compensation, liability, and other insurance coverage that might be required; but it is also noted that, significantly, subsection 13.3 (Ownership) of the [REDACTED] recognizes that performance of work by the petitioner for [REDACTED] pursuant to an SOW may involve "data, equipment, and/or materials" provided by [REDACTED] there is no mention of the petitioner providing any such items. Further, there is no credible indication anywhere in the [REDACTED] or anywhere else in the record of proceeding that the petitioner would provide any proprietary materials if there ever were a contractual commitment to perform specific work pursuant to a properly executed SOW. These factors are not indicative of the petitioner's maintaining control over the beneficiary and his work if an SOW is ever executed.

Next, the AAO is negatively impressed by the fact that Attachment 2-1 (Change Order Form) to the [REDACTED] has been signed by representatives of the petitioner and [REDACTED]. By its very terms, the change order applies to an SOW – but none is identified or attached anywhere to the [REDACTED]. Further, the AAO notes that the Table which is to identify the modifications is blank. The fact that the petitioner would sign such an empty and apparently useless form as if to render it effective, weighs against the credibility of the petition.

Additionally, the AAO finds the terms at Schedule 3 (Acceptance Procedures) as further evidence of the centrality of a duly executed SOW to the effectiveness and enforceability of the [REDACTED] and the AAO repeats its finding that there is none in this record of proceeding.

Also bearing negatively against the credibility of this petition is the untitled chart that appears to assign pricing or charge rates to the types of positions that appear in the first column, by locations in

the other columns. Notably, the petitioner has here submitted a chart that contains no mention of Network and Systems Administrator – yet, the petitioner claims that the beneficiary would be assigned to work in that capacity for [REDACTED]

Additionally, as reflected in the above review of documentary evidence, while claiming that the beneficiary would be assigned to Network and Computer Systems Administrator work for [REDACTED] the record of proceeding lacks persuasive evidence of any contractual commitment by [REDACTED] to hire this particular beneficiary for any specific work or for any particular period of time. Further, while the record indicates that, if the [REDACTED] were to become operational - necessarily pursuant to a mutually executed and mutually binding SOW signed by the petitioner and by [REDACTED] (and none appear in this record) – the petitioner would be responsible for the worker’s compensation, liability, and other insurance coverage that might be required, the [REDACTED] also indicates that [REDACTED] would have the right to immediate removal of any petitioner-assigned worker upon a written request that specifies any reasonable grounds for removal. Hence, if ever [REDACTED] were to accept assignment of the beneficiary, it would retain removal-authority control over the beneficiary. Further, documentary evidence does not indicate that, if assigned pursuant to the [REDACTED] and an executed SOW, the beneficiary would be employing proprietary information or applications of the petitioner or would be using the petitioner’s equipment or instrumentalities. Further, there is no evidence in the record that the petitioner would substantially supervise or control the substantive work, specific tasks, performance requirements, or work-quality evaluations during the course of the beneficiary’s day-to-day job activities. These aspects of the documentary record also weigh against the petitioner’s claim of an employer-employee relationship.

Given the evidentiary record discussed above, application of the requisite common-law standards to this record of proceeding also indicates that the petitioner has not established the requisite employer-employee relationship, as will be seen below. .

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.⁴

⁴ While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

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

The regulatory definition of "United States employer" requires H-1B employers to have a tax identification number, to employ persons in the United States, and to have an "employer-employee relationship" with the H-1B "employee." 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee," "employed," "employment" or "employer-employee relationship" indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition." Therefore, in the absence of an intent to impose broader definitions by either Congress or USCIS, the

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 318-319.⁵

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).⁶

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

"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).

⁵ 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))).

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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 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."

In sum, the evidence in the record of proceeding establishes neither any work-related relationships between the petitioner, [REDACTED] and the beneficiary, nor any relative levels of control that the petitioner and [REDACTED] might separately hold over the beneficiary and his work, because the

that evidence establishes no actual work that has been secured for the beneficiary to perform in the purported position for which the petition was filed.

The AAO hereby incorporates as the basis for this conclusion all of the comments and findings that this decision has presented with regard to the weaknesses of the documentary evidence in the record – particularly the [REDACTED]; and the significant absences of evidence (such as the absence of an SOW and other contractual documents from [REDACTED], that would both confirm that the beneficiary would work for it and indicate the terms and conditions under which such work would be performed). The AAO finds that, applying to the totality of the evidence in this record of proceeding the above-discussed principles regarding establishment of an employer-employee relationship, the AAO is compelled to conclude that the evidence of record fails to even establish that the petitioner has secured the work for the beneficiary as claimed in the petition, and, therefore, ultimately, fails to establish an employer-employee relationship between the beneficiary and any entity within the context of the position for which this petition was filed.

To emphasize the lack of credible evidence towards even establishing that either the petitioner or the [REDACTED] would actually exert any control over the beneficiary and his work, the AAO again reminds the petitioner that there is no evidence of any contract between the petitioner and [REDACTED] for work by the beneficiary – and yet the petitioner's claim of such is the core of the petition as well as critical to any attempt by the petitioner to establish the employer-employee relationship with the beneficiary that it claims.

Again, the following section of the [REDACTED] is absolutely decisive in establishing that the [REDACTED] has no relevance to the employer-employee-relationship issue before us because the petitioner has not submitted the SOW:

The [petitioner] agrees to provide such services and to perform to such service level requirements ("SLA") as are set forth in any properly executive Statement of Work ("SOW") referencing this Agreement that are attached hereto and made part of this agreement as well as any services that are inherent, necessary, or customary to the performance of the services set forth in such SOW (the "Services"). SOWs may be added to this Agreement upon the written agreement of the parties hereto, and shall be in the form attached as Schedule 1 (Form of Statement of Work) hereto. Each Statement of Work more fully describes the scope, duration, and fees for the Services. Changes to any Statement of Work shall be undertaken pursuant to the change order procedures provided in Schedule 2 (Change Order Procedure) hereto.

Although the [REDACTED] references an SOW, the record of proceeding does not contain one. Therefore, the record does not evidence the existence of the contractual or work relationship between the claimed parties that the petitioner claims would exist if this petition were approved.

For all of the reasons stated above, the AAO concludes that 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). Accordingly, the appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO will also deny this petition due to its failure to establish that the proffered position qualifies for classification as a specialty occupation.

As reflected in the preceding discussions regarding the absence of evidence establishing that there in fact exists any contractual commitment by [REDACTED] for accepting the beneficiary to work for it at all, let alone in the capacity claimed by the petitioner. Thus, the petition must also be denied for the petitioner's failure to establish that it was filed for a specialty occupation position. The petitioner's failure to establish the substantive nature of definite work to be performed by the beneficiary 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 such work that would determine (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. Accordingly, the petition will be denied on this basis also.

Also, USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. As evidence of record does not establish definite, non-speculative work for the beneficiary, the petition must be denied for this reason also.

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.

(b)(6)

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

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