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U.S. Citizenship
and Immigration
Services

DATE: **MAY 29 2014** 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

N.R.
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a Notice of Intent to Revoke (NOIR), and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will remain revoked.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on December 12, 2006. The petitioner stated that it is a medical practice, established in 2006, with one employee. In order to employ the beneficiary in what it designates as an "Internist" position, the petitioner seeks to classify the beneficiary 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 petition was initially approved on December 15, 2006. On June 3, 2013,¹ the director issued a NOIR, and after reviewing the petitioner's response to the NOIR, ultimately revoked the petition's approval on October 4, 2013 by issuing a Notice of Revocation of Nonimmigrant Petition. Thereafter, the petitioner filed a timely appeal.

The record of proceeding before us contains, among other things, the following: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the director's revocation notice; and (5) the petitioner's Notice of Appeal or Motion (Form I-290B) and supporting documentation. We reviewed the record in its entirety before issuing our decision.

As will be evident in the discussion below, we find that the petitioner has failed to overcome the grounds specified in the director's decision for revoking the approval of the H-1B petition, specifically, that the petitioner has failed to establish 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). Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and approval of the petition will remain revoked.

I. PROCEDURAL AND FACTUAL BACKGROUND

In this matter, the petitioner indicated on the Form I-129 that it intends to employ the beneficiary in a position that it designated as an internist from December 15, 2006 to December 14, 2009, on a full-time basis, at the following locations:

[REDACTED] IN [REDACTED]
[REDACTED] IN and [REDACTED]
[REDACTED] IN [REDACTED]

Subsequent to the petition's approval, U.S. Citizenship and Immigration Services (USCIS)

¹ The director previously issued the same NOIR on January 10, 2013.

received information regarding the petitioner, namely that the petitioner is solely owned and operated by the beneficiary, who is also the only employee of the petitioner. The director issued a NOIR on January 10, 2013 and June 3, 2013, notifying the petitioner that the record did not establish an employer-employee relationship between the petitioner and the beneficiary and affording the petitioner the opportunity to respond.

In response to the director's NOIR, the petitioner's former counsel submitted a letter, dated July 1, 2013, stating that the approval of the petition was not in gross error. Specifically, counsel stated the following:

- (1) The USCIS's approval of the petition in 2006 reflected the USCIS policy and interpretation of the regulations at that time and therefore does not reflect gross error;
- (2) The USCIS's retroactive application of the policy memorandum issued [on] January 8, 2010 is impermissible; and
- (3) The revocation of the H-1B petition – seven years after its approval and four years after the validity period has expired – is an abuse of discretion.

In support of these assertions, counsel also submitted, among other things, a copy of the Memorandum from Donald Neufeld, Associate Director, Service Center Operations, to Service Center Directors, *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*, (January 8, 2010) (hereinafter, the Neufeld Memorandum).

The director ultimately revoked the approval of the petition on October 4, 2013, finding that the petitioner did not establish that it was a United States employer having an employer-employee relationship with the beneficiary as an H-1B temporary employee. The director noted that the beneficiary is the Chief Executive Officer and the sole owner of the petitioning organization, owning 100 percent of both the common and preferred stocks. The director also noted that in the NOIR, USCIS cited to 8 C.F.R. § 214.2(h)(4)(ii), a regulation that was in effect at the time the petition was filed in 2006, and that the Neufeld Memorandum, which counsel referenced, did not alter USCIS's policies and/or adjudications, but simply provided additional guidance on determining whether an employer-employee relationship exists. Finally, the director noted that it is not an abuse of discretion for USCIS to revoke a previously approved petition based on information that was not disclosed at the time of filing of the petition.²

On appeal, counsel for the petitioner asserts that the director's revocation of the approval of the petition was erroneous. In his memorandum in support of the appeal, dated November 1, 2013, counsel asserts that the director's decision "erroneously applies the U.S. Supreme Court's methodology in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Clackamas*

² The director stated that "the petition, as filed in 2006, did not include any documentation to suggest that the beneficiary was in fact the sole owner of the petitioning organization, which would have opened another line of inquiry during the 2006 adjudication and likely would have led to denial."

Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440 (2003) to conclude that [the beneficiary] and [the petitioner] did not have an employer-employee relationship." Counsel further asserts that the factors under the common-law analysis show that the petitioner exercises sufficient control over the beneficiary to be his employer. Counsel also states the following:

[The beneficiary] can show not only that he has separately incorporated [the petitioner] so it is distinct from him as an individual, he can also show that he received oversight and supervision in his work from an outside group of physicians who acted in practice like a Board of Directors and who have since formalized that role.

On appeal, counsel submits, among other things, the following additional evidence:

- An affidavit of the beneficiary, dated November 1, 2013, in which the beneficiary states the following:

My arrangement with Drs. [REDACTED] and [REDACTED] has worked out so well that I have now decided to formalize it by making them members of a Board of Directors which will oversee my practice. I consider them to have been practically serving in this role since they first agreed to advise me on my work for [the petitioner] many years ago. I view creating this Board as simply making official what has long been my practice.

- Copies of the beneficiary's Form W-2, Wage and Tax Statements, for the years 2007-2012 issued by the petitioner.
- A copy of a document entitled "Amended and Restated Operating Agreement" for the petitioner, dated October 31, 2013, signed by the beneficiary as the "Member" and by Drs. [REDACTED], and [REDACTED] as the "Management Committee."
- Affidavits of Drs. [REDACTED] and [REDACTED] all dated October 31, 2013. The three affidavits are similar in content and state that the doctors have consulted with the beneficiary on the operation of his medical practice and directed him on how to handle billing and financial issues.
- A copy of a letter on [REDACTED]'s letterhead, addressed to the beneficiary, dated June 12, 2013, signed by Dr. [REDACTED] Medical Staff President and by [REDACTED] CEO/Administrator, informing the beneficiary's that his clinical privileges are approved for the period of July 1, 2013 through June 30, 2015.
- A copy of a letter on [REDACTED]' letterhead, addressed to the beneficiary, dated August 9, 2013, signed by [REDACTED] President/CEO, informing the beneficiary of his "reappointment/promotion to the Active Staff in the Division of

Medicine for two years, effective 08/10/2013."

II. LAW AND ANALYSIS

A. Grounds for Revocation and Notice Requirements

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice and states the following:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The record supports the conclusion that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed the grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and as it also allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B).

B. Lack of Standing to File the Petition as a United States Employer

The primary issue in the present matter is whether the petitioner has established that it met the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii) at the time the petition was filed and maintained a valid employer-employee relationship during the validity period of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). Specifically, as the petitioner has satisfied the first and third prongs of the definition of United States employer; the remaining question is whether the petitioner has established that it had "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).

Upon review, we concur with the director's decision. The record is not persuasive in establishing that the petitioner had an employer-employee relationship with the beneficiary and that the

beneficiary was an "employee" of the petitioner as its sole shareholder, sole employee, and its Chief Executive Officer.

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 former 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. 440, 445

(2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

Within the context of H-1B nonimmigrant petitions, when an alien beneficiary is also a partner, officer, member of a board of directors, or an owner of the corporation, the beneficiary may only be defined as an "employee" having an "employer-employee relationship" with a "United States employer" if he or she is subject to the organization's "control." 8 C.F.R. § 214.2(h)(4)(ii). The Supreme Court decision in *Clackamas* specifically addressed whether a shareholder-director is an employee and stated that six factors are relevant to the inquiry. 538 U.S. at 449-450. According to *Clackamas*, the factors to be addressed in determining whether a worker, who is also an owner of the organization, is an employee include:

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

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

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

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations

define the term "United States employer" to be even more restrictive than the common-law agency definition.³

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 318-319.⁴

³ 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).

Finally, it is also noted that if the statute and the regulations were somehow read as extending the definition of employee in the H-1B context beyond the traditional common-law definition, this interpretation would likely thwart congressional design and lead to an absurd result when considering the \$750 or \$1,500 fee imposed on H-1B employers under section 214(c)(9) of the Act, 8 U.S.C. § 1184(c)(9). As 20 C.F.R. § 655.731(c)(10)(ii) mandates that no part of the fee imposed under section 214(c)(9) of the Act shall be paid, "directly or indirectly, voluntarily or involuntarily," by the beneficiary, it would not appear possible to comply with this provision in a situation in which the beneficiary is his or her own employer, especially where the requisite "control" over the beneficiary has not been established by the petitioner.

⁴ 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

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).⁵

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

The decisions in *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) and *Matter of Allan Gee, Inc.*, 17 I&N Dec. 296 (Reg. Comm'r 1979) both conclude that corporate entities may file petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. The AAO does not question the soundness of this particular conclusion and does not take issue with a corporation's ability to file an immigrant or a nonimmigrant visa petition. The cited decisions, however, do not address an H-1B petitioner's burden to establish that an alien beneficiary will be a bona fide "employee" of a "United States employer" or that the two parties will otherwise have an "employer-employee relationship" as understood by common-law agency doctrine. See *Clackamas*, 538 U.S. at 440; 8 C.F.R. § 214.2(h)(4)(ii).

Although an H-1B petitioner may file a visa petition for a beneficiary who is its sole or primary owner, this does not necessarily mean that the beneficiary will be a bona fide "employee" employed by a "United States employer" in an "employer-employee relationship." See *Clackamas*, 538 U.S. at 440. Thus, while a corporation that is solely or substantially owned by a beneficiary is not prohibited from filing an H-1B petition on behalf of its alien owner, the petitioner must nevertheless establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law agency doctrine.

Therefore, in considering whether or not one will be an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; see also 8 C.F.R. § 214.2(h)(4)(ii) (defining a "United States employer" as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may

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)).

⁵ 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).

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).

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

It is important to note, however, that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties relevant to control may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Furthermore, when examining the factors relevant to determining control, USCIS must assess and weigh each actual factor itself as it exists or will exist and not the claimed employer's right to influence or change that factor, unless specifically provided for by the common-law test. *See Darden*, 503 U.S. at 323-324. For example, while the assignment of additional projects is dependent on who has the *right to* assign them, it is the *actual* source of the instrumentalities and tools that must be examined, and not who has the *right to* provide the tools required to complete an assigned project. *See id.* at 323.

In applying the test as outlined in *Clackamas*, the mere fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether

he or she is an employee or a proprietor." *Clackamas*, 538 U.S. at 450; cf. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988) (stating that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it was a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee," at the time the petition was filed and during the validity period of the petition. The record indicates that the petitioner is a limited liability company that is solely owned, controlled, and operated by the beneficiary. The beneficiary owns a 100 percent membership interest in the petitioning company and is the Chief Executive Officer of the company. We note that the petitioner submitted a copy of an employment agreement that was signed by the beneficiary and the petitioner's director.⁶ However, this document carries little weight for purposes of demonstrating an employer-employee relationship, because in the instant case, the employer and the employee are one and the same.

On appeal, counsel claims that "[the beneficiary's] work is supervised by three senior physicians, Drs. [REDACTED] and [REDACTED] who acted in practice as his Board of Directors" and the petitioner submits almost identical affidavits from Drs. [REDACTED] and [REDACTED] stating that they have advised the beneficiary on patient care and practice management issues, including how to handle billing and financial issues. However, we note that Drs. [REDACTED] and [REDACTED] are not employed by the petitioner and the beneficiary does not report to them. Moreover, Drs. [REDACTED] and [REDACTED] have no authority to hire and fire the beneficiary, and determine and modify the beneficiary's duties and pay. The petitioner did not submit sufficient documentary evidence to establish that someone at the petitioning entity, other than the beneficiary himself, supervised and controlled the beneficiary's work. 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)).

On appeal, the petitioner and counsel also submit a copy of a document entitled "Amended and Restated Operating Agreement for the petitioner, dated October 31, 2013, showing Drs. [REDACTED] and [REDACTED] as members of the "Management Committee." However, the amended operating agreement was created after the revocation of the approval of the petition, and counsel acknowledges that "[the beneficiary's] arrangement with Drs. [REDACTED] and [REDACTED] was not

⁶ According to counsel on appeal, the beneficiary used the volunteer services of his brother, who was on an F-1 student visa at the time, to sign the petition as the director of the petitioning company. The beneficiary's brother also signed the employment agreement as the petitioner's director.

formalized at the time that [the petitioner] filed the H-1B petition. . . ." The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248. Further, counsel states that "creating a formal Board of Directors would not give them more control over [the beneficiary] . . . because as sole owner, [the beneficiary] would have power to dismiss his Board of Directors."

In the instant case, it has not been established that the beneficiary was "controlled" by the petitioner. To the contrary, the beneficiary *is* the petitioner for all practical purposes. He controlled the organization; he could not be fired; he reported to no one; he set the rules governing his work; and he shared in all profits and losses.

We note that the petitioner submitted a copy of the beneficiary's W-2 forms. However, the fact that the petitioner pays the beneficiary a salary and issues him a Form W-2 as an employee does not in and of itself establish an employer-employee relationship between the petitioner and the beneficiary. 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, in the instant case, they carry less evidentiary weight, because the petitioner and the beneficiary are one and the same. Also, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, and who has the right or ability to affect the work to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will control the beneficiary. Here, as previously noted, the record does not contain documentary evidence that someone at the petitioning entity (other than the beneficiary himself) will control the beneficiary. Also, we note that there is no record of employment actions or any employment history for this petitioner that would establish that it ultimately controls the work of the beneficiary.

Therefore, 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).

On appeal, counsel asserts that the factors announced in the *Darden* and *Clackamas* decisions have been imposed by USCIS's interpretation in the Neufeld Memorandum of the regulation at 8 C.F.R. § 214.2(h)(4)(ii) and are *ultra vires*. We note that in the revocation notice, the director stated that the Neufeld Memorandum did not alter USCIS's policies and/or adjudications, but simply provided guidance on determining whether an employer-employee relationship exists. The Supreme Court's decisions in *Darden* and *Clackamas* were in effect at the time that the Neufeld Memorandum was issued and were referenced in the memorandum. On page 2 of the Neufeld Memorandum, it states that "[t]o date, USCIS has relied on common law principles and two leading Supreme Court cases [*Darden* and *Clackamas*] in determining what constitutes an employer-employee relationship."

In addition, counsel asserts that USCIS's "interpretation of its regulations in this instance is unreasonable because it is in conflict with other provisions of the regulations that endorse self-employment for physicians." Counsel further states that "8 C.F.R. § 204.12(c)(1)(ii) explicitly allows prospective immigrant physicians to use work at their own medical practice in a medically underserved area to qualify for a national interest waiver of the labor certification process." However, the regulation at 8 C.F.R. § 204.12(c)(1)(ii) applies to certain *immigrant* visa petitions, whereas the instant H-1B petition is a *nonimmigrant* visa petition where the petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). Thus, the regulation cited by counsel is not relevant to the instant petition.

Finally, we note that counsel refers to an unpublished AAO decision in support of the contention that the beneficiary may be "employed" by the petitioner even though he is the sole owner and sole beneficiary of the enterprise. However, counsel's reliance on the unpublished decision is misplaced. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Accordingly, the unpublished decision has no precedential value, and we are under no obligation to adopt its reasoning.

Upon review of the entire record of proceeding, we find that the submitted evidence is not sufficient to overcome the stated grounds for revocation. Accordingly, the petitioner and the beneficiary are not eligible for the benefit sought, and the appeal will be dismissed and the approval of the petition will remain revoked for this reason.

III. CONCLUSION

The petition's approval will remain revoked and the appeal dismissed for the above stated reasons.⁷ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The director's decision will remain undisturbed.

⁷ As the grounds discussed above are dispositive of the petitioner's eligibility for the benefit sought in this matter, we will not address and will instead reserve our determination on the additional issues and deficiencies that we observe in the record of proceeding with regard to the approval of the H-1B petition.