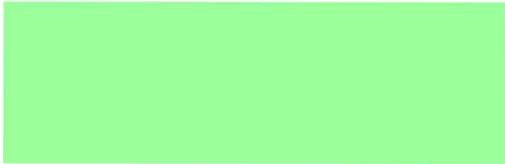


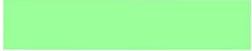


U.S. Citizenship
and Immigration
Services

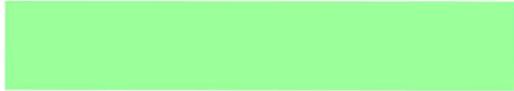
(b)(6)



DATE: **SEP 22 2014** OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

Ron Rosenberg
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. The appeal will be dismissed. The petition will be denied.

In the Petition for a Nonimmigrant Worker (Form I-129) visa petition, the petitioner describes itself as a two-employee "[a]ssisted living for seniors" business established in [REDACTED]. In order to employ the beneficiary in what it designates as a registered nurse position, the petitioner seeks to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on December 12, 2013, finding that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation in accordance with the applicable statutory and regulatory provisions. On appeal, counsel for the petitioner emphasizes the supervisory nature of the proffered position, and contends that the petitioner satisfied the evidentiary requirements.

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

For the reasons that will be discussed, we agree with the director's decision that the record of proceeding does not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions. Beyond the director's decision, we also find that the petitioner failed to establish that it qualifies as a United States employer.¹ Accordingly, the petition will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner stated on the Form I-129 that it seeks the beneficiary's services as a part-time registered nurse. The petitioner also indicated on the Form I-129 that the beneficiary will work on-site at the petitioner's business premises, and will not work off-site. On the H Classification Supplement to Form I-129, the petitioner described the proposed duties as to "render nursing care to the elderly residents and give medications as instructed by the physician in assisted living facility."

In a letter dated April 1, 2013 submitted by counsel on behalf of the petitioner, counsel stated the following: "The beneficiary is a registered nurse. She is coming to the United States to perform registered nurse's duties for the petitioner, to take care of elderly residents, rendering nursing services, [and] giving medication according to physician's instructions."

The petitioner submitted a Labor Condition Application (LCA) in support of the instant H-1B petition. The petitioner indicated on the LCA that the proffered position corresponds to the

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

occupational category "Registered Nurses" – SOC (ONET/OES Code) 29-1111, at a Level II (qualified level) wage. On the LCA, the petitioner provided a North American Industry Classification System (NAICS) Code of 623312, which pertains to "Assisted Living Facilities for the Elderly," and representing that it is "primarily engaged in providing residential and personal care services (i.e., without on-site nursing care facilities)." U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "623312, Assisted Living Facilities for the Elderly," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Sept. 11, 2014).

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE on September 13, 2013. The director outlined the evidence to be submitted.

Counsel for the petitioner responded to the RFE by submitting a letter, dated October 20, 2013, and additional evidence in support of the H-1B petition. In his letter, counsel stated: "The proffered job requires a bachelor's degree in nursing to perform proposed job duties and responsibilities of a registered nurse and supervisory duties. The percentage of time spent in performing the duties of nursing care and supervision of the staffs [sic] is 100 percent." Counsel explained that the petitioner currently has 14 beds for 14 seniors with "multiple health problems of heart disease, respiratory breathing, diabetes, dementia, Alzheimer [sic], Parkinson [sic], renal, kidney, poor mobility, high risk for fall, brittle bone, poor vision, etc." Counsel stated that these are "serious risky seniors who need special RN attention with a bachelor's degree in nursing" In the same letter, counsel depicted the petitioner's organizational hierarchy as consisting of the President at the top, directly overseeing the beneficiary. The beneficiary would then directly supervise an RN – Delegating Nurse, [REDACTED] who in turn would oversee the following Nursing Staff: [REDACTED]

The petitioner submitted an "Offer of Employment" signed by its President, and an "Employment Contract" between the petitioner and the beneficiary, both of which list the job duties of the proffered position as follows:

[S]upervises and coordinates activities of nursing care personnel, serves as liaison between staff and the administration, develops standards and procedures for senior care, gives medications by tablets or syringes intravenous or intramuscular with approved nursing techniques as prescribed by physicians[,] [c]hecks vital signs, thermometer to check body temperature, checks heart rate using stethoscope, auscultation of respiration, pulse oxi meter, glucometer for glucose monitoring,, [sic] check bed sores, skin disorder and reaction to drugs, treatments and significant incidents and report to physician, supervise home aide care, assign duties, scheduling and monitor their performance.

No further explanation of the duties was provided in either document.

The "Employment Contract" states that the petitioner "has the right to control the [beneficiary's] work, including the ability to hire, fire, pay and supervise the [beneficiary]," and that the beneficiary "will be assigned to work by employer upon her arrival in the U.S. at the [petitioner's business

premises]." The contract further states that "[i]f the employee is placed at the third-party work site, employer will continue to have the right to control the employee."

The petitioner also submitted an opinion letter, dated October 16, 2013, from [REDACTED] who claims to be a registered nurse and "a recognized professional in the nursing field." Ms. [REDACTED] letter substantially repeats the duties of the proffered position that are listed in the "Employment Contract," and concludes that she "can evaluate the proffered position of registered nurse is a specialty occupation in that [sic] [her] industry customarily requires the attainment of a bachelor's degree for a similar position" based upon these duties.

The director reviewed the record of proceeding, and determined that the petitioner did not establish eligibility for the benefit sought. The director denied the petition on December 12, 2013. Thereafter, counsel submitted an appeal of the denial of the H-1B petition. As noted above, counsel emphasizes the supervisory nature of the proffered position, asserting that the beneficiary will "perform 100% supervisory nursing duties on a daily basis." Counsel asserts that the proffered position's supervisory and managerial duties are "so specialized and complex that [the] knowledge required to perform the duties is associated with the attainment of a baccalaureate degree."

II. SPECIALTY OCCUPATION

The primary issue before us is whether the petitioner has provided sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. Based upon a complete review of the record of proceeding, and for the specific reasons described below, we agree with the director and find that the evidence fails to establish that the position as described constitutes a specialty occupation.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable statutory and regulatory requirements.

A. The Law

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

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

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See*

Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

B. Analysis

As a preliminary matter, we note that there are numerous inconsistencies and discrepancies in the petition and supporting documents which undermine the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position. When a petition includes numerous errors and discrepancies, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions.

In the instant case, the petitioner has provided varying descriptions of the proffered position. For instance, counsel initially characterized the proffered position as a registered nurse position that will provide direct nursing care duties such as giving medication, checking vital signs, and checking for bed sores. Specifically, counsel stated in his letter dated April 1, 2013 that the beneficiary "is coming to the United States to perform registered nurse's duties for the petitioner, to take care of elderly residents, rendering nursing services, [and] giving medication according to physician's instructions." No documents submitted with the petition mention the proffered position as involving supervisory or managerial duties. In response to the RFE, counsel vaguely stated that the proffered position would include both "job duties and responsibilities of a registered nurse and supervisory activities." Counsel stated that "[t]he percentage of time spent in performing the duties of nursing care and supervision of the staffs is 100 percent," but did not provide a breakdown of the percentages of time spent on providing nursing care as opposed to supervision of staff. On appeal, counsel now asserts that the beneficiary will "perform 100% supervisory nursing duties on a daily basis." Counsel repeatedly emphasizes the supervisory and managerial nature of the proffered position's duties on appeal. In sum, the petitioner appears to have incrementally expanded the scope and level of responsibility of the beneficiary's duties by adding supervisory and managerial duties to the proffered position throughout these proceedings.

When responding to a request for evidence or in support of an appeal, a petitioner cannot materially change the proffered position's associated job responsibilities and level of authority within the organizational hierarchy. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Similarly, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

With regards to the claimed supervisory and managerial nature of the proffered position, counsel asserted in his October 20, 2013 letter that the beneficiary would directly supervise an RN – Delegating Nurse, who in turn would oversee the four nursing staff. Some of the duties listed in the "Employment Contract" between the petitioner and the beneficiary include "supervis[ing] and coordinat[ing] activities of nursing care personnel," and "serving as a liaison between staff and the administration." However, the petitioner stated under penalty of perjury on the Form I-129 that it has only two employees. The record of proceeding contains no independent, objective documentary evidence to establish the actual size and staffing of the petitioner's business. The discrepancy regarding the actual size and staffing of the petitioner's operations critically undermines the petitioner's credibility with regard to the services the beneficiary will perform, as well as the actual nature and requirements of the proffered position.

It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). Thus, the size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position. In matters where a petitioner's business is relatively small, we review the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in position requiring the theoretical and practical application of a body of highly specialized knowledge that may be obtained only through a baccalaureate degree or higher in or its equivalent in a specific specialty. Additionally, when a petitioner employs relatively few people, it may be necessary for the petitioner to establish how the beneficiary will be relieved from performing non-qualifying duties. If the petitioner employs only two employees, as claimed on the Form I-129, then we must question how the petitioner could employ the beneficiary in a supervisory capacity or otherwise relieve her from performing non-qualifying duties.

The record of proceeding is also unclear as to the actual scope and nature of the petitioner's business services. While counsel explained in his October 20, 2013 letter that the petitioner provides nursing care to 14 seniors "who need special RN attention," the petitioner provided a NAICS code of 623312, "Assisted Living Facilities for the Elderly," on the certified LCA and on the Form I-129 H-1B Data Collection Supplement which pertains to facilities that *do not* provide nursing care. The NAICS code chosen by the petitioner is significant, in that it represents that the petitioner is "primarily engaged in providing residential and personal care services . . . *without on-site nursing care facilities* (emphasis added)." This NAICS code further lists corresponding index entries such

as "[a]ssisted living facilities *without on-site nursing care facilities*," "[h]omes for the aged *without nursing care*," "[h]omes for the elderly *without nursing care*," and "[o]ld age homes *without nursing care*." (emphasis added). U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, "623312, Assisted Living Facilities for the Elderly," <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Sept. 11, 2014).² Accordingly, we must question the credibility of the petitioner's claim that it (1) provides nursing care for seniors who have "multiple health problems," and (2) will employ the beneficiary as a supervisory nurse overseeing five other nursing staff.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

We also find that the record lacks sufficient evidence that it has a 14-bed facility as claimed by counsel. Moreover, we find the descriptions of the proffered position – particularly with respect to the claimed supervisory and managerial duties – to be overly broad and vague. For example, counsel asserted in response to the RFE that the "percentage of time spent in performing the duties of nursing care and supervision of the staffs is 100 percent." However, counsel does not further break down what percentage of time is spent on nursing care duties as opposed to supervisory duties, and does not further explain the actual, specific tasks that the beneficiary will perform on a day-to-day basis with respect to the "supervisory duties." On appeal, counsel states that the beneficiary will "perform 100% supervisory nursing duties," but again, does not provide any further explanation as to the actual, specific supervisory tasks that the beneficiary will perform on a day-to-day basis. Such generalized information does not convey sufficient substantive information to

² If the petitioner truly has the nursing staff and provides the specialized nursing services as depicted by counsel, it appears that other NAICS codes would be more appropriate than the code of 623312 chosen by the petitioner. One such NAICS code that appears to be more appropriate, for example, would be the NAICS code of 623110 for Nursing Care Facilities (Skilled Nursing Facilities).² The NAICS code of 623110 is defined by the U.S. Department of Commerce, Census Bureau as follows:

This industry comprises establishments primarily engaged in providing inpatient nursing and rehabilitative services. The care is generally provided for an extended period of time to individuals requiring nursing care. These establishments have a permanent core staff of registered or licensed practical nurses who, along with other staff, provide nursing and continuous personal care services.

U.S. Dep't of Commerce, U.S. Census Bureau, 2012 NAICS Definition, 623110 – Nursing Care Facilities (Skilled Nursing Facilities), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last visited Sept. 11, 2014).

The code of 623110 would reasonably encompass facilities with on-site nursing care, as opposed to the NAICS code of 623312 chosen by the petitioner, which does not encompass facilities with on-site nursing care.

establish the relative complexity, uniqueness and/or specialization of the proffered position or its duties.

Overall, we find the evidence of record does not substantiate the petitioner's claims regarding its business activities and the actual work that the beneficiary will perform to establish eligibility for this benefit. That is, the petitioner has not established the nature of the proffered position and in what capacity the beneficiary will actually be employed within the petitioner's business operations. The petitioner's failure to establish the substantive nature of the 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 that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Further, even if the petitioner had established the substantive nature of the work to be performed by the beneficiary and shown that the proffered position is a registered nurse position, a review of the U.S. Department of Labor's *Occupational Outlook Handbook*³ does not indicate that such a position qualifies as a specialty occupation. The *Handbook's* information on the educational requirements for the occupational classification "Registered Nurses" indicates that a bachelor's or higher degree in a specific specialty, or the equivalent, is not a normal minimum entry requirement. U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited Sept. 11, 2014). Rather, the occupation accommodates a wide spectrum of educational credentials, including less than a bachelor's degree in a specific specialty.

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

C. The Letter Submitted as Expert Testimony

We will now address the opinion letter from [REDACTED] and explain why we accord no probative value to this letter.

Foremost, the opinion is not based upon sufficient information about the registered nurse position proposed here. Specifically, nowhere in the letter does Ms. [REDACTED] reference the petitioner nor does she relate any personal observations of the operations or the work that the beneficiary would perform. Ms. [REDACTED] also does not state what facts or evidence she relied upon to conclude that the

³ We recognize the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

proffered position is a specialty occupation, and that the nursing industry customarily requires the attainment of a bachelor's degree. Ms. [REDACTED] failed to specify and discuss any studies, treatises, surveys, authoritative industry sources or other relevant authoritative publications with respect to what she claims are customary industry requirements. As such, Ms. [REDACTED] letter contains no more than conclusory assertions that have no probative value. 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)).

In addition, the petitioner did not provide any evidence to establish that Ms. [REDACTED] can be considered an expert in the field or is otherwise qualified to provide an evaluation of the proffered position. Ms. [REDACTED] conclusory claim that she is "a recognized professional in the nursing field," without corroborating evidence, is not sufficient to establish her level of experience and expertise in the industry.

Accordingly, as a reasonable exercise of our discretion, we decline to regard the advisory opinion letter as probative evidence. We may, in our discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

III. EMPLOYER-EMPLOYEE RELATIONSHIP

Finally, beyond the decision of the director, the petitioner has not established that it meets the regulatory definition of a United States employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii). 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.*

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). 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). 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)).

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

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

Accordingly, 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 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

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).

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))).

⁶ 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).

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, and 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."

As detailed above, the record of proceeding lacks sufficient evidence demonstrating that the petitioner has a 14-bed facility in which it provides on-site nursing care and does not sufficiently demonstrate where the beneficiary will be assigned to work and who will assign such work. The employment contract suggests the possibility that the beneficiary would be assigned to work at third-party worksites. In contrast, the petitioner claims on the I-129 that the beneficiary would not work off-site.

Given the lack of evidence and the inconsistencies in the record, the scope of the beneficiary's duties and who would have actual control over the beneficiary's work or duties cannot be determined. In other words, the record fails to establish that the petitioner will have the requisite employer-employee relationship with the beneficiary for the duration of the requested employment period. *See* 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "United States employer" and requiring the petitioner to engage the beneficiary to work such that it will have and maintain an employer-employee relationship with respect to the sponsored H-1B nonimmigrant worker).

We acknowledge the petitioner's submission of its "Employment Contract" with the beneficiary, which states that the petitioner "has the right to control the employee's work, including the ability to hire, fire, pay and supervise the employee" even if the petitioner is assigned to work off-site. However, merely claiming that the petitioner has the right to control the beneficiary's work, without evidence supporting the claim and evidence that another entity would not exercise control over the employment, does not establish eligibility in this matter. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In addition, 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.

The record of proceeding fails to establish the relevant factors necessary to determine who will control the beneficiary's employment, such as who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, the location of the work to be performed, and who has the right or ability to affect the projects to which the beneficiary is assigned. Without full disclosure of all of the relevant factors, we are unable to properly assess whether the requisite employer-employee relationship will exist between the petitioner and the beneficiary for the entire duration of the validity period requested. Therefore, the petition will be denied for this additional reason.

IV. CONCLUSION

The evidence of record does not establish that the proffered position qualifies as a specialty occupation. The evidence of record also does not establish that the petitioner qualifies as a United States employer that will have an employer-employee relationship with the beneficiary. For these reasons, the appeal will be dismissed and the petition denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we conduct appellate review on a *de novo* basis).

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 petition is denied.