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Services

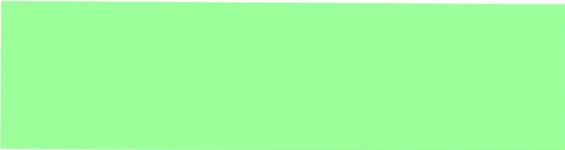
(b)(6)



DATE: **JAN 28 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:  


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Director, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner claims to be a ten-employee "Custom Computer Software Analysis, Programming, Development & Administration" business established in [REDACTED]. In order to continue to employ the beneficiary in a position it designates as a "Computer Programmer" position, 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 revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after conducting a site visit at the beneficiary's work location as designated on the petition.

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to this notice, the service center director revoked approval of the petition on March 28, 2014. The director determined that the petitioner had not overcome the grounds of revocation in that the petitioner had not submitted evidence that it was in compliance with the Labor Condition Application (LCA) submitted with the petition; and that it maintained an employer-employee relationship with the beneficiary.

The record of proceeding before this office contains: (1) the Form I-129 and supporting documentation; (2) the director's initial denial of the petition; (3) the petitioner's motion to reopen the decision; (4) the director's approval of the petition; (5) the NOIR; (6) the petitioner's response to the NOIR; (7) the director's notice of revocation (NOR); and (8) the Form I-290B, Notice of Appeal or Motion, the appeal brief, and additional documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

## I. GROUNDS FOR REVOCATION

We turn first to the bases for the director's revocation, and whether these bases provided the director with sufficient grounds for revoking the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(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

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

- (2) The statement of facts contained in the petition or on the application for a temporary labor certification 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.

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and 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). As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

A. Failure to Comply with the Requirements Governing the LCA

We will first address the director's determination that the petitioner failed to comply with the requirements governing LCAs as set forth by U.S. Citizenship and Immigration Services (USCIS) and the U.S. Department of Labor (DOL).

In this matter, the petitioner submitted documentation in support of the contention that the beneficiary will work as a computer programmer for the end client, [REDACTED] located in [REDACTED] California. The record includes an August 16, 2012 letter, authored by [REDACTED] Applications Manager, not on letterhead.<sup>2</sup> Mr. [REDACTED] confirms that the

<sup>2</sup> Mr. [REDACTED] subsequently submitted a February 19, 2013 letter on [REDACTED] letterhead indicating that the beneficiary was employed by the petitioner, and that [REDACTED] had contracted with [REDACTED] and that [REDACTED] had, in turn, contracted with the petitioner for the beneficiary's services at [REDACTED], California.

beneficiary "has been working as a [REDACTED] consultant at [REDACTED]" The record also includes a "Schedule of Assignment" indicating that [REDACTED] is the client, the petitioner, located in [REDACTED] California, is the consultant, and that the individual providing the services is the beneficiary. The document is signed by an individual on behalf of [REDACTED] and on behalf of a "contractor." The record further included a September 4, 2012 letter on [REDACTED] letterhead indicating that "[the beneficiary], an employee of [the petitioner], . . . is providing services on behalf of our organization, [REDACTED] at one of our clients as an EBS R12 Senior Business Analyst consultant."

The record also includes the certified LCA filed with the Form I-129 which identifies the prevailing wage for the occupational category of Computer Programmer – SOC (ONET/OES) code 15-1131, for a Level II position in [REDACTED] California and also for [REDACTED] California, the petitioner's location.

On September 7, 2013, a USCIS investigator visited the [REDACTED] location in [REDACTED] California. On December 26, 2013, USCIS issued the NOIR and informed the petitioner that the investigation revealed that the beneficiary was not working at the [REDACTED] California address full time, but rather he was working from his home in [REDACTED] California, over 200 miles away, at least 30 percent of the time.

In response to the NOIR, the petitioner, through counsel, indicated that the beneficiary never revealed to the petitioner that he was working remotely 30 percent of the time or that he continued to do so beyond the 30-day limit for a short-term assignment. Counsel asserts that if the petitioner had been aware of the "material change in the employment . . . they most certainly would have filed a new LCA to cover the new work site." The petitioner also provided a new LCA, certified on January 7, 2014, which included the employment location in [REDACTED] California, as well as the employment location in [REDACTED] California.

The director found the explanations provided insufficient and revoked the petition's approval.

On appeal, counsel reiterates that the petitioner was unaware of the beneficiary's work remotely at his home rather than at the end client.

In pertinent part, the Act defines an H-1B nonimmigrant worker as:

[A]n alien . . . 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) . . . .*

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).<sup>3</sup>

<sup>3</sup> In accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Pub. L. No.

In turn, section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A) (2012), requires an employer to pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.<sup>4</sup> See 20 C.F.R. § 655.731(a); *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-97, 2009 WL 2371236, at \*8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. See, e.g., 65 Fed. Reg. 80,110, 80,110-111, 80,202 (2000). The LCA currently requires petitioners to describe, *inter alia*, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

To promote the U.S. worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the U.S. Department of Homeland Security (DHS), a prospective employer must file an LCA and receive certification from DOL before an H-1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2).<sup>5</sup> If an employer does not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. See section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); see also 56 Fed. Reg. 37,175, 37,177 (1991); 57 Fed. Reg. 1316, 1318 (1992) (discussing filing sequence).

In the event of a material change to the terms and conditions of employment specified in the original petition, the petitioner must file an amended or new petition with USCIS with a corresponding LCA. Specifically, the pertinent regulation requires:

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107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Act describing functions which were transferred from the Attorney General or other Department of Justice official to DHS by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. See 6 U.S.C. § 557 (2003) (codifying HSA, tit. XV, § 1517); 6 U.S.C. § 542 note; 8 U.S.C. § 1551 note.

<sup>4</sup> The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii).

<sup>5</sup> Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H-1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies," and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H-1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b); see generally 8 C.F.R. § 214.2(h)(4)(i)(B).

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. *In the case of an H-1B petition, this requirement includes a new labor condition application.*

8 C.F.R. § 214.2(h)(2)(i)(E) (emphasis added). Furthermore, petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H-1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H-1B status and is, therefore, a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A).<sup>6</sup> When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E).

The Form I-129 and section G of the LCA state that the beneficiary's intended work sites are [REDACTED] California [REDACTED] CA Metropolitan Statistical Area) and [REDACTED] California [REDACTED] CA Metropolitan Statistical Area) as set forth above. The petitioner acknowledges that the beneficiary worked in [REDACTED] California [REDACTED] CA Metropolitan Division) at least 30 percent of the time.

Here, the Form I-129 and the originally submitted LCA identified the [REDACTED] California and [REDACTED] California locations as the places of employment. The LCA did not cover the [REDACTED] home of the beneficiary noted in response to the NOIR. In addition, the petitioner

<sup>6</sup> This interpretation of the regulations clarifies but does not depart from the agency's past policy pronouncements that "the mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid." *See, e.g.,* Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm'r, Office of Programs, Immigration and Naturalization Serv., Amended H-1B Petitions 1-2 (Aug. 22, 1996), 73 *Interpreter Releases* No. 35, 1222, 1231-32 (Sept. 16, 1996); *see also* 63 Fed. Reg. 30,419, 30,420 (1998) (stating in pertinent part that the "proposed regulation would not relieve the petitioner of its responsibility to file an amended petition when required, for example, when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application"). To the extent any previous agency statements may be construed as contrary to this decision, *see, e.g.,* Letter from Efren Hernandez III, Dir., Bus. and Trade Branch, USCIS to Lynn Shotwell, Am. Council on Int'l Pers., Inc. (Oct. 23, 2003), those statements are hereby superseded. We need not decide here whether, for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E), there may be material changes in terms and conditions of employment that do not affect the alien's eligibility for H-1B status but nonetheless require the filing of an amended or new petition.

attested on the Form I-129 that it would pay the beneficiary a salary approximately \$14,282 less than would be required for the subsequently-identified [REDACTED] place of employment, contrary to sections 101(a)(15)(H)(i)(b) and 212(n)(1) of the Act.<sup>7</sup> Such changes in the terms and conditions of the beneficiary's employment may, and in this case did, affect eligibility under section 101(a)(15)(H) of the Act.

Having materially changed the beneficiary's authorized place of employment to a geographical area not covered by the original LCA, the petitioner was required to immediately notify USCIS and file an amended or new H-1B petition, along with a corresponding LCA certified by DOL, with both documents indicating the relevant change.<sup>8</sup> 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file an amended petition with a new LCA, a petitioner may impede efforts to verify wages and working conditions. Full compliance with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the U.S. worker protection scheme established in the Act and necessary for H-1B visa petition approval. The petitioner failed to comply with the requirements governing LCAs; therefore, the approval of the petition must be revoked.

B. The Employer-Employee Relationship

Next we will address the director's determination that the petitioner failed to maintain an employer-employee relationship with the beneficiary at the end-client location.

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) . . . .

<sup>7</sup> The LCAs list the prevailing wage for the designated occupational category at a Level II wage as \$48,235 per year in [REDACTED] California [REDACTED] CA Metropolitan Statistical Area); \$67,850 per year in [REDACTED] California [REDACTED] CA Metropolitan Statistical Area); and \$84,282 per year in [REDACTED], California [REDACTED] CA Metropolitan Division). The petitioner identified the source of the prevailing wage as the DOL Office of Foreign Labor Certification's Occupational Employment Statistics.

<sup>8</sup> Here the petitioner submitted a new LCA certified for the beneficiary's place of employment in [REDACTED] in response to the NOIR. This LCA was not previously certified to USCIS with respect to the beneficiary and, therefore, it had to be submitted to USCIS as part of an amended or new petition before the beneficiary would be permitted to begin working in those places of employment. See 8 C.F.R. § 214.2(h)(2)(i)(E).

[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).

The record is not persuasive in establishing that the petitioner had or 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." *See* 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." *See* 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, however, 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)).

The Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. See generally 136 Cong. Rec. S17106 (daily ed. Oct. 26, 1990); 136 Cong. Rec. H12358 (daily ed. Oct. 27, 1990). On the contrary, in the context of the H-1B visa classification, the regulations define the term "United States employer" to be even more restrictive than the common law agency definition.<sup>9</sup>

Specifically, the regulatory definition of "United States employer" requires H-1B employers to have a

<sup>9</sup> While the *Darden* court considered only the definition of "employee" under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(6), and did not address the definition of "employer," courts have generally refused to extend the common law agency definition to ERISA's use of employer because "the definition of 'employer' in ERISA, unlike the definition of 'employee,' clearly indicates legislative intent to extend the definition beyond the traditional common law definition." See, e.g., *Bowers v. Andrew Weir Shipping, Ltd.*, 810 F. Supp. 522 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 800 (2nd Cir.), *cert. denied*, 513 U.S. 1000 (1994).

There are also 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).

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." See 8 C.F.R. § 214.2(h)(4)(ii). Accordingly, the term "United States employer" not only requires H-1B employers and employees to have an "employer-employee relationship" as understood by common-law agency doctrine, it imposes additional requirements of having a tax identification number and to employ persons in the United States. The lack of an express expansion of the definition regarding the terms "employee" or "employer-employee relationship" combined with the agency's otherwise generally circular definition of United States employer in 8 C.F.R. § 214.2(h)(4)(ii) indicates that the regulations do not intend to extend the definition beyond "the traditional common law definition" or, more importantly, that construing these terms in this manner would thwart congressional design or lead to absurd results. Cf. *Darden*, 503 U.S. at 318-319.<sup>10</sup>

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).

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 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

<sup>10</sup> To the extent the regulations are ambiguous with regard to the terms "employee" or "employer-employee relationship," the agency's interpretation of these terms should be found to be controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945))).

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).

Moreover, 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." The petitioner indicated that the beneficiary will work offsite in [REDACTED] California, over 300 miles away from its office. The petitioner initially stated that it monitored its employees closely from its office in [REDACTED], California through weekly status reports and weekly regular communications. Mr. [REDACTED], in his February 19, 2013 letter, stated that the beneficiary would report to the petitioner's technical resource manager. In response to the NOIR, counsel noted the difficulty of monitoring an employee working from afar, as well as acknowledging that the petitioner had no mechanism in place when its end client allowed the beneficiary to work remotely, to inform the petitioner. Counsel explained that the petitioner does not have a contract with the end client but rather with [REDACTED] a staffing company. Counsel also indicated that the end user in this matter, [REDACTED] had issued the beneficiary his laptop, essentially allowing the beneficiary to work anywhere.

On appeal, counsel reiterates the above and acknowledges that the petitioner was unaware that the beneficiary took it upon himself, with the approval of [REDACTED] to work from his home a significant amount of time. Counsel also concedes that the petitioner is not in position to command or direct in any great detail because the duties are being performed at a location where the petitioner is not physically present.

Although the petitioner repeatedly claims that the beneficiary will be in its direct employ and that it will maintain control over the beneficiary, the petitioner, through its counsel, acknowledges that it was surprised that the beneficiary was working from his home over 200 miles from the end user's location. Similarly, the petitioner, through counsel, notes the difficulty of monitoring an employee from afar. These admissions are tantamount to an acknowledgement that the petitioner, in fact,

does not actually exercise direct control over the beneficiary. That is, a petitioner who maintains direct control over a beneficiary would have known that the beneficiary was not working at the location designated on the petition.

While social security contributions, worker's compensation contributions, unemployment insurance contributions, federal and state income tax withholdings, and other benefits are relevant factors in determining who will control an alien beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the beneficiary, who will provide the instrumentalities and tools, where the work will be located, and who has the right or ability to affect the projects to which the alien beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the beneficiary's employer. In this matter the petitioner has no obvious control over where the beneficiary will work. The end client in this matter is the entity that provides the instrumentalities and tools for the beneficiary's work. The record lacks probative evidence that the petitioner actually manages or otherwise exercises control over the beneficiary's daily work.

The evidence is insufficient to establish that the petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). The petitioner's claim that it exercises complete control over the beneficiary, without evidence supporting the claim, 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. Based on the tests outlined above, the petitioner has not established that it has maintained or will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee." See 8 C.F.R. § 214.2(h)(4)(ii). The approval of the petition must be revoked for this additional reason.

## II. SUBSEQUENTLY APPROVED PETITIONS

We will now address an issue regarding an additional petition submitted on behalf of the beneficiary after the revocation of the instant petition. Specifically, a review of USCIS records indicates that on April 25, 2014, a date subsequent to the revocation of the instant petition, the petitioner filed a Form I-129 petition [REDACTED] seeking to continue the employment of the beneficiary as an H-1B nonimmigrant. USCIS records also indicate that the petitioner stated on the Form I-129 that the basis for H-1B classification was "[c]ontinuation of previously approved employment without change with the same employer." The petition was approved on May 6, 2014. However, pursuant to 8 C.F.R. § 214.2(h)(14), a petition extension may be filed only if the validity of the original petition has not expired. In the instant case, the petition that the petitioner sought to extend ([REDACTED]) was revoked on March 28, 2014.<sup>11</sup> Thus, the petition extension was filed after the original petition had expired. Accordingly, we will further order that the director review the

<sup>11</sup> We also observe that the instant petition [REDACTED] was originally approved with validity dates from November 1, 2012 to July 31, 2014. The extension petition ([REDACTED]) was submitted on April 25, 2014 – a month after the original petition's revocation. Thus, for this reason also, we request that the director review the extension petition [REDACTED] and consider whether initiation of revocation action on the affected petition is appropriate.

extension petition ( [REDACTED] ) and consider whether initiation of revocation action on the affected petition is appropriate.

### III. CONCLUSION AND ORDER

Based upon a complete review of the appeal and the record of proceeding, the petitioner has failed to overcome the revocation grounds specified in the NOIR and the subsequent revocation decision. The petitioner has not established that it has complied with the requirements governing LCA validity, nor has the petitioner demonstrated that it maintained an employer-employee relationship with the beneficiary. Accordingly, the appeal is dismissed. The approval of the petition remains revoked.

The appeal will be dismissed and the approval of the petition revoked 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 approval of the petition remains revoked.

**FURTHER ORDERED:** The service center director shall review the approval of the H-1B petition with receipt number [REDACTED] for possible revocation consistent with the eligibility issues identified in this decision.