



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-, LLC

DATE: MAY 4, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a computer company, seeks to temporarily employ the Beneficiary as a “quality test analyst” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded: (1) that the proffered position is not a specialty occupation; and (2) that the Beneficiary is not qualified to perform the duties of a specialty occupation.¹

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that both grounds of the Director’s decision were reached in error.

Upon *de novo* review, we will dismiss the appeal.

I. SPECIALTY OCCUPATION

A. Legal Framework

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

¹ The Director also found that the evidence of record did not indicate that the Beneficiary had maintained valid nonimmigrant status. As we do not exercise jurisdiction over maintenance of status issues, this portion of the Director’s decision will not be discussed.

(b)(6)

Matter of R-, LLC

- (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) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed 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"); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

As recognized by the court in *Defensor*, 201 F.3d at 387-88, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-88. The court held that the former Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work.

B. The Proffered Position

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a "quality test analyst." Although the Petitioner is located in [REDACTED] Virginia, it stated in the petition that the Beneficiary would perform her duties for [REDACTED] ("end-client") in [REDACTED] Indiana pursuant to an agreement executed between the Petitioner and [REDACTED] ("vendor").

The Petitioner stated that the Beneficiary will perform the following job duties:²

- Provide test execution/coordination with IT resources.
- Work with other members of the development team to ensure accurate and timely communication around and delivery of assigned tasks in order to ensure that end-products will perform as expected upon release to production[.]
- Review project goals, current and future state systems and existing test plans, artifacts, and ideas.
- Create and maintain test traceability matrix (RTM).
- Perform manual test script execution, defect reporting, and create test summary report.
- Ensures effectively communication and logs the Defects as per the defect life cycle. Provide testing status on all activities including participating in defect and team meetings.
- Test, Maintain and monitor computer programs and systems.
- Develop Requirement Traceability Matrix (RTM) to track requirements.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category “Computer Systems Analysts” corresponding to the Standard Occupational Classification code 15-1121.³

According to the end-client, the position requires a bachelor’s degree “in a related field,” such as “Pharmacy, Pharmaceutical Science/Pharmaceutical Systems Management/Pharmaceutical Manufacturing/Engineering, and/or Regulatory Affairs/Biology/ Biochemistry.”

C. Analysis

Upon review, we find that the Petitioner has not credibly and sufficiently demonstrated the substantive nature of the proffered position and that, consequently, it cannot be found that it is a specialty occupation.

² The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

³ The “Prevailing Wage Determination Policy Guidance” issued by the Department of Labor provides a description of the wage levels. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner’s job opportunity. The Petitioner classified the proffered position at a Level II wage (the second-lowest of four assignable wage levels). We will consider this selection in our analysis of the position. A Level II wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to perform moderately complex tasks that require limited judgement. For additional information, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

The job description consists of eight job duties listed in bullet-pointed fashion, which we find overly broad and generalized. For example, according to the job description, the Beneficiary will “[p]rovide test execution/ coordination with IT resources.” However, this statement provides little insight into the Beneficiary’s actual tasks with regard to test execution and coordination, nor does it identify the “IT resources.” The abstract nature of the proposed duties is further illustrated by the statement that the Beneficiary will “[w]ork with other members of the development team” and “[r]eview project goals.” Again, these statements do not explain the Beneficiary’s actual role in “work[ing] with” or “review[ing].” The generalized nature of the duties is also exemplified by the statements that the Beneficiary will “[d]evelop, document and revise system design procedures,” “[t]est, maintain, and monitor computer programs,” and “[c]reate and maintain test traceability matrix.” In short, the overall responsibilities for the proffered position contain general functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the end-client’s business operations. Nor has the Petitioner described the project upon which the Beneficiary would work in sufficient detail.

This type of general description may be appropriate when defining the range of duties that may be performed within an occupational category, but it does not adequately convey the substantive work that the Beneficiary will perform within the end-client’s business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner’s business operations (or the end-client’s business operations, as in this case), demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. Here, the Petitioner has not done so.

Nor do the evaluations submitted by the Petitioner as opinion letters establish the proffered position as a specialty occupation. First, they do not cure the inadequacy of the job description contained in the record of proceedings. To the contrary, the conclusions reached in these evaluations appear to have been based on the same broad, general job duty-description listed above. As these stated job duties provide little insight into what the Beneficiary would actually be doing, we decline to afford significant evidentiary weight to any conclusions based upon those stated duties. Moreover, we note that none of the authors discusses the wage-level designated by the Petitioner on the LCA which, as discussed above, is appropriate for positions in which the worker would perform moderately complex tasks and which require only limited judgement. We consider this a significant omission, in that it suggests incomplete reviews of the proffered position by all of the authors. In any event, it diminishes even further the evidentiary weight of their evaluations. We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). 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. *Id.*

Further problematic is the fact that the evidence of record does not establish the existence of non-speculative work to be performed by the Beneficiary for the duration of the period of requested

employment.⁴ The Petitioner requested a period of H-1B approval commencing October 1, 2015 and ending June 30, 2018. The record of proceeding contains two work orders executed between the Petitioner and the vendor: (1) the first, executed on March 30, 2015, calls for the Beneficiary to provide services to the end-client until October 30, 2015; and (2) the second, executed on July 17, 2015, calls for the Beneficiary to provide services to the end-client until December 31, 2015.

As will be discussed below, these work orders do not establish the existence of non-speculative work for the Beneficiary during the requested period of H-1B approval. First, the “General Subcontractor Services Agreement” executed between the Petitioner and the vendor specifically limits the legal weight of representations made in any work order, stating that “[a]ll parties acknowledge that the period of services is an estimate only and that the period of services may be shorter or longer than that stated in the Work Order[.]” They do not establish the existence of work for the Beneficiary to perform until October 30 or December 31, 2015, let alone through June 30, 2018. Furthermore, we note that the second work order was executed more than three months after the H-1B petition was filed. A petitioner must establish eligibility at the time of filing a 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. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg’l Comm’r 1978). The second work order, has little evidentiary value for this additional reason.⁵

While the general assertions regarding the availability of work for the Beneficiary are acknowledged, we do not find them persuasive. First, as noted, they are not supported by

⁴ The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor’s degree. See section 214(i) of the Immigration and Nationality Act (the “Act”). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

⁵ In other words, even if we overlook the statements in the General Subcontractor Services Agreement which discount the value of these work orders and accept them at face value, we would note nonetheless that at the time it filed the H-1B petition, the Petitioner had only secured work for the Beneficiary to perform through October 30, 2015 – a date 29 days after the requested start date. However, the Petitioner requested far more than 29 days of H-1B approval.

documentary evidence. “[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The statement by the end-client that the Beneficiary will work on the project until it is complete is also acknowledged. However, given that in July 2015 the parties were only willing to execute a work order covering an additional five months it is not clear that enough work existed at that time to keep the Beneficiary employed on the project until June 30, 2018.

Finally, the record contains a copy of the referenced agreement executed between the Petitioner and the vendor, which provided the authority for the work orders submitted by the Petitioner. However, the record does not contain a corresponding agreement executed between the vendor and the end-client, or between the end-client and the Petitioner. Absent such documentation, it is not clear that there is any binding obligation on the part of the end-client to provide any work for the Beneficiary, which further undermines the Petitioner’s claim that there exists work for the Beneficiary to perform. While the record contains a letter from the end-client stating that it did not submit a copy of the agreement between itself and the vendor due to its “policy not to share documents related to contract with third party/agency,” such policy does not excuse the Petitioner from meeting its burden.

While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for a petitioner not providing such a document if that document is material to the requested benefit.⁶ Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the Petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977) (holding the “respondent had every right to assert his claim under the Fifth Amendment[; however], in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application.”).

For all of these reasons, we find that when considered as a whole, the evidence of record lacks a sufficient, detailed explanation of what the Beneficiary would actually be doing during the entire requested validity period. The tasks as described do not communicate (1) the actual work that the Beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The record therefore does not establish the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at

⁶ Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner’s confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, “Predisclosure Notification Procedures for Confidential Commercial Information.” Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (June 23, 1987).

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.

For the reasons related in the preceding discussion, the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

II. BENEFICIARY'S QUALIFICATIONS

The Director also found that the Beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the proffered position does not require a baccalaureate or higher degree in a specific specialty, or its equivalent. Therefore, we need not and will not address the Beneficiary's qualifications further.

III. EMPLOYER-EMPLOYEE RELATIONSHIP

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings.⁷

Specifically, the record does not currently demonstrate that the Petitioner will be a "United States employer" having "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).

A. Legal Framework

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

⁷ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's 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) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

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* Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act 56 Fed. Reg. 61,111, 61,121 (Dec. 2, 1991) (to be codified at 8 C.F.R. pt. 214).

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 a foreign national 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 foreign nationals 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 U.S. Citizenship and Immigration Services (“USCIS”) defined the terms “employee” or “employer-employee relationship” by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B

beneficiaries as being “employees” who must have an “employer-employee relationship” with a “United States employer.” *Id.* Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter “*Darden*”) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”

Id.; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445 (2003) (quoting *Darden*, 503 U.S. at 323) . 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 Am.*, 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.⁸

⁸ 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).

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

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 318-19.⁹

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).¹⁰

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 323-24; *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* EEOC Compl. Man. at § 2-III(A)(1) (adopting a materially identical test and indicating that

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 Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

⁹ 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 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

¹⁰ 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 foreign nationals).

said test was based on the *Darden* decision); *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 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 448-49; EEOC Compl. Man. 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 323-24. 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).

B. Analysis

Applying the *Darden* and *Clackamas* tests to this matter, we find that the evidence of record does not establish that the Petitioner will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee." Specifically, we find that the record of proceeding does not contain sufficient, consistent, and credible documentation confirming and describing the circumstances of the Beneficiary's claimed assignment to the Petitioner's end-client.

We preliminarily incorporate the findings made above with regard to the Petitioner not substantiating the existence of the work to be performed by the Beneficiary at the site of the claimed end-client for the duration of the period of requested H-1B employment. Consequently, we are unable to ascertain whether the Petitioner would in fact engage the Beneficiary in an employer-employee relationship while working there

However, even if we were to ignore this foundational deficiency we would still find the evidence of record insufficient to establish the requisite employer-employee relationship between the Petitioner and the Beneficiary. This is because the Petitioner, which is located in Virginia, has not sufficiently

explained and documented how it would supervise and otherwise control the Beneficiary's day-to-day activities while he works for the claimed end-client in Indiana.

We acknowledge the Petitioner's claims that it will maintain control over the Beneficiary and remain the Beneficiary's employer. However, the evidence of record does not establish that the Petitioner would supervise and otherwise exercise control over the Beneficiary's employment. The evidence of record provides little insight into how, from a remote location, the Petitioner would control the Beneficiary's work on a daily basis. Nor did the Petitioner explain how, as the Beneficiary's employer, it would evaluate the Beneficiary's performance from Virginia. While the performance evaluation forms are acknowledged, it is unclear how the evaluator was able to obtain the information upon which the evaluation was based.

Further, while the General Subcontractor Services Agreement addresses the issue of the employment relationship between the Petitioner and the Beneficiary, it does so only by noting that the Petitioner will be responsible for taxes and other compensations required by law.¹¹ However, it provides insufficient insight into the specifics of the claimed control that the Petitioner would have over the Beneficiary. In other words, the general assertions regarding control contained in the record of proceedings lack the necessary degree of specificity, and they do not specifically discuss, in probative detail, the degree of supervision, direction, or control that the Beneficiary would receive from a long-distance employer. They are not sufficient to establish that the Petitioner would supervise or otherwise control the work of the Beneficiary. "[G]oing 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.

For all of these reasons, the evidence of record does not demonstrate the requisite 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 a foreign national Beneficiary, other incidents of the relationship, e.g., who will oversee and direct the work of the Beneficiary, who will provide the instrumentalities and tools, where will the work be located, and who has the right or ability to affect the projects to which the foreign national Beneficiary is assigned, must also be assessed and weighed in order to make a determination as to who will be the Beneficiary's employer. Without full disclosure of all of the relevant factors, we are unable to find that the requisite employer-employee relationship will exist between the Petitioner and the Beneficiary.

¹¹ The Petitioner's claims that it would pay the Beneficiary's salary are noted, and the method of payment is a factor to be considered. However, in some instances, a petitioner's role is limited to invoicing and proper payment for the hours worked by a beneficiary. In such cases, with a petitioner's role limited to essentially the functions of a payroll administrator, a beneficiary is even paid, in the end, by the end-client. See *Defensor v. Meissner*, 201 F.3d at 388. It is necessary to weigh and compare on all of the circumstances in the relationship between the parties in analyzing the facts of each individual case.

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The evidence of record, therefore, is insufficient to establish that the Petitioner qualifies as a United States employer, as defined by 8 C.F.R. § 214.2(h)(4)(ii). Merely claiming in its letters that the Petitioner exercises complete control over the Beneficiary, without evidence supporting the claim, does not establish eligibility in this matter.

Therefore, 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). For this additional reason, the petition may not be approved.

IV. CONCLUSION

The burden is on the Petitioner to show 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.

Cite as *Matter of R-, LLC*, ID# 16310 (AAO May 4, 2016)