



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

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

MATTER OF K-&A- PLLC

DATE: MAY 17, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a law firm, seeks to extend the Beneficiary's temporary employment as a "lawyer" under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 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, Vermont Service Center, revoked the petition. The Director concluded that the Petitioner did not establish a valid employer-employee relationship with the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in revoking the petition.

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

I. LEGAL FRAMEWORK

A. Revocation

U.S. Citizenship and Immigration Services (USCIS) may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
 - (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

- (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

B. Employer-Employee Relationship

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

[S]ubject 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)

A United States employer seeking to classify an individual as an H-1B temporary worker must file a petition with USCIS on behalf of that individual. *See* 8 C.F.R. § 214.2(h)(2)(i)(A). In doing so, a “United States employer” petitioning to employ an individual under section 101(a)(15)(H)(i)(b) of the Act must demonstrate that it will satisfy the definitional requirements set forth in 8 C.F.R. § 214.2(h)(4)(ii), including that it will have an employer-employee relationship with the individual. The term “United States employer” is defined in 8 C.F.R. § 214.2(h)(4)(ii) as follows:

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).

C. The Supreme Court Decisions: *Darden* and *Clackamas*

The Supreme Court has determined that where the applicable federal law does not define “employee,” the term should be construed as “intend[ing] to describe the conventional master-servant relationship as understood by common-law agency doctrine.” *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (“*Darden*”) (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (“*C.C.N.V.*”). The 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 *C.C.N.V.*, 490 U.S. at 751-752); *see also Clackamas Gastroenterology Assocs. P.C. v. Wells*, 538 U.S. 440, 445, 447 & n.5 (2003) (“*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 Am.*, 390 U.S. 254, 258 (1968)) (emphasis added).

In *Clackamas*, the Supreme Court articulated the following factors to be weighed in determining whether an individual with an ownership interest is an employee:

- “Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work”;

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- “Whether and, if so, to what extent the organization supervises the individual’s work”;
- “Whether the individual reports to someone higher in the organization”;
- “Whether and, if so, to what extent the individual is able to influence the organization”;
- “Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts”; and
- “Whether the individual shares in the profits, losses, and liabilities of the organization.”

Clackamas, 538 U.S. at 449-50; (deferring to the factors enumerated in the Equal Employment Opportunity Commission's *Compliance Manual* § 605:0009 (EEOC 2000) (currently cited as § 2-III(A)(1)(d)) for determining "whether [a partner, officer, member of a board of directors, or major shareholder] acts independently and participates in managing the organization, or whether the individual is subject to the organization's control," and accordingly whether the individual qualifies as an employee).

As with the common-law factors listed in *Darden*, the factors relevant to the inquiry of whether a shareholder-director is an employee are likewise not exhaustive. *Clackamas*, 538 U.S. at 450 n.10 (citing *Darden*, 503 U.S. at 324). Not all of the listed criteria need be met; however, the fact finder must weigh its assessment of the 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 relationship. *See id.* at 448-449.

The fact that a "person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor." *Id.* at 450; *cf. Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm'r 1988) (explaining that a job title alone is not determinative of whether one is employed in an executive or managerial capacity). Likewise, the "mere existence of a document styled 'employment agreement'" shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450. "Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on 'all of the incidents of the relationship . . . with no one factor being decisive.'" *Id.* at 451 (quoting *Darden*, 503 U.S. at 324).¹

¹ The relevant H-1B regulation effectively, if not expressly, adopts the common-law approach. *See* 8 C.F.R. § 214.2(h)(4)(ii) (recognizing an employer-employee relationship "by the fact that [the employer] may hire, pay, fire, supervise, or otherwise control the work of any such employee . . .").

II. PROCEDURAL HISTORY

On the Form I-129, the Petition for a Nonimmigrant Worker, the Petitioner indicated that it is a two-employee law firm. The Director issued a notice of intent to revoke (NOIR) noting that the Beneficiary appears to own “100% of the voting stock.” In response, the Petitioner submitted documents indicating that, effective November 19, 2013, the Beneficiary has 70% membership interest and another attorney (Partner) has the other 30%. The Petitioner further asserted that it is “run by a Manager,” not the Beneficiary. In support, the Petitioner provided a revised operating agreement, dated October 1, 2013, which was signed by the Beneficiary and another attorney as “members,” and designated a Manager for the Petitioner.

The Director revoked the petition finding that the record does not establish that a valid employer-employee relationship exists. The Director noted that according to the evidence in the record the Beneficiary can terminate the Manager’s employment. The Director further noted that the evidence indicates that the Manager conducts only the business affairs of the Petitioner and not the practice of law. The Director concluded that it appears that the Manager does not control the actual work performed by the Beneficiary, and the Petitioner had not established that it meets the definition of a U.S. employer.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine the Petitioner has not established that it meets the regulatory definition of a U.S. employer as that term is defined at 8 C.F.R. § 214.2(h)(4)(ii), and the Director properly revoked the approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii). Specifically, as the Petitioner has satisfied the first and third prongs of the definition of U.S. employer, the remaining question is whether the Petitioner has established that it will have “an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii).

Because the terms “employee” and “employer-employee relationship” are not defined in the statute or controlling DHS regulations, we apply the common-law test described in *Darden* and *Clackamas* to determine whether, after weighing the combination of factors and analyzing all of the circumstances in the relationship between the parties, there exists or will exist a “conventional master-servant relationship as understood by common-law agency doctrine.”² *C.C.N.V.*, 490 U.S. at 739-740; *Darden*, 503 U.S. at 322-323; *Clackamas*, 538 U.S. at 445.

² This decision only interprets the terms “employee” and “employer-employee relationship” as used in 8 C.F.R. § 214.2(h)(4)(ii); there are instances in the Act where Congress may have intended a broader or narrower application of the term “employer” than what is encompassed in the conventional master-servant relationship.

After assessing all of the incidents of the relationship and applicable factors, here, we find that the Petitioner has not submitted sufficient evidence to establish that the Beneficiary's employment will ultimately be controlled by its "Manager," as claimed.

In general, a petitioner's statements alone are insufficient to meet its burden and satisfy the preponderance of the evidence standard unless they are amply substantiated by relevant, probative, and credible evidence. *See 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)) (clarifying that going on record without supporting evidence does not suffice to meet the burden of proof); *Matter of Chawathe*, 25 I&N Dec. at 376 (requiring relevant, probative, and credible evidence sufficient to support a finding that a "claim is 'more likely than not' or 'probably' true" in order to satisfy the standard of proof).

On appeal, the Petitioner continues to assert that, according to the operating agreement, it is the Manager "that is responsible for the day-to-day business affairs of the Petitioner including the hiring, terminating, setting of compensation rates and supervision of employees" and that it is the Manager "who can terminate employees without cause." The Petitioner also asserts that "it is the Manager that assigns the legal work to the employee to perform." However, the Petitioner's assertions are not corroborated by the evidence in the record of proceedings.

For example, the operating agreement indicates that the "business and affairs of the Professional Limited Liability Company, except for the practice of law, shall be conducted and managed by the Manager." It also states that "the Manager shall have responsibility for the day-to-day management of the business and affairs of the Professional Limited Liability Company, except the practice of law" This contradicts the Petitioner's claim that the Manager assigns legal work to the employees. Further, as noted by the Director, the Petitioner described itself as a "law practice" on the Form I-129. The operating agreement states that the Petitioner's purposes "are to primarily provide international legal and consulting services; to engage in the practice of law" Therefore, without managing the practice of law, it is not clear what the Manager's responsibilities are over "the day to day business affairs of the Petitioner." Notably, the Petitioner did not submit copies of an employment agreement that describes the terms and conditions of his employment, payroll records, or tax records for the Manager evidencing his employment with the Petitioner.

On appeal, the Petitioner acknowledges that the Manager is not a lawyer and does not practice law. However, the Petitioner asserts that the Manager "regulates the flow of work, reviews the work in that it is performed in a timely professional manner, and communicates with clients to ensure they are happy with the work performed." In support, the Petitioner submitted its timesheets. The timesheets contain limited information such as the Beneficiary's name and the hours worked each day. The timesheets also contain skeletal information regarding "service item," described generally as "consulting." The timesheets do not sufficiently demonstrate how the Manager reviews the Beneficiary's work and verifies that it is performed in a timely, professional manner. The Petitioner also asserts that "the relationship between the Beneficiary and the clients is reviewed by the Manager." In support, the Petitioner submitted a copy of contract signed by the Partner, for a virtual office, which matches the address listed on the petition. Notably, this agreement was signed by the

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Partner in his individual capacity, not as a member of the Petitioner. Nonetheless, the Petitioner has not explained how a contract for a virtual office establishes that the Manager reviews the relationship between the Beneficiary and the clients.

Further, we note that the documents in the record including income tax returns and pay stubs indicate that the Beneficiary is located in [REDACTED]. However, the mailing address for the Manager listed on the petition is a post office box address in [REDACTED] NY, and the Petitioner's virtual office is in [REDACTED] NY. While it is asserted that the Manager and the Petitioner monitor the Beneficiary's performance on a daily basis with regularly occurring status conference call, the Petitioner did not submit documentary evidence other than the contract for the virtual office.

Moreover, while the Petitioner asserts that the Beneficiary is subject to an annual performance review, the Petitioner did not submit copies of actual performance reviews. Notably, the Beneficiary has been employed with the Petitioner since 2008. In conclusion, the Petitioner has not credibly established that the Manager and the Petitioner supervise the Beneficiary's work.

We further note that it is the members (including the Beneficiary, who has 70 percent membership interest) who elect the Manager and can hire or fire the Manager. Specifically, the operating agreement states that "[t]he Manager for the [Petitioner] shall be elected, and can only be discharged with cause, as Manager by the unanimous vote or consent of the Members. . . ." Further, the members determine the Manager's compensation; the operating agreement indicates that "the Manager shall receive, as compensation for the services of the Manager to the [Petitioner], such sums as may be determined from time to time by the unanimous vote or consent of the Members"

On appeal, the Petitioner asserts that the Beneficiary "cannot unilaterally terminate the Manager" and even if the Beneficiary were to persuade his Partner to terminate the Manager, they simply would have to hire another manager, who will have the same authority including the ability to terminate the Beneficiary. While we acknowledge that according to the agreement, the Beneficiary cannot unilaterally terminate the Manager, we find that the Petitioner has not provided documentary evidence to credibly establish that the Manager, whose compensation is established by members, which includes the Beneficiary, a majority shareholder, and the Partner, who only has 30% of the membership interest, can fire the Beneficiary.

We acknowledge the Petitioner's submission of its employment agreement with the Beneficiary. However because this agreement became effective September 16, 2014, after the petition was filed on March 18, 2014, it is accorded little weight. The Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition and must continue to be eligible for the benefit through adjudication. 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, 249 (Reg'l Comm'r 1978). We therefore do not find the terms of that agreement relevant for these proceedings as they do not relate to the Beneficiary's employment effective at the time the petition was filed. Further, 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.

On appeal, the Petitioner further refers to an unpublished decision in which we determined that a sole owner can also be the sole beneficiary. However, the Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

On appeal, the Petitioner also cites to *Matter of Aphrodite Investments Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), to assert that a corporation has a separate legal identity from its owner, and it may file certain petitions on behalf of beneficiaries who have substantial ownership stakes in those entities. However, *Matter of Aphrodite Investments Ltd.* is distinguishable to the extent it does not address an H-1B petitioner's burden to establish that a beneficiary will be a bona fide "employee" of a "United States employer" and that the two parties will otherwise have an "employer-employee relationship" as understood by common-law agency doctrine. *See Clackamas*, 538 U.S. at 440; 8 C.F.R. § 214.2(h)(4)(ii). Thus, although a corporation that is solely or substantially owned by a beneficiary may file an H-1B petition on behalf of its owner, the petitioner must establish that it will have an "employer-employee relationship" with the beneficiary as understood by common-law doctrine.

Accordingly, we cannot find that the evidence of record sufficiently establishes an employer-employee relationship between the Petitioner and the Beneficiary with respect to the factors outlined in the *Darden* and *Clackamas* decisions. That is, the evidence does not establish that the Petitioner has the authority to hire and fire the Beneficiary, as this control is ultimately maintained by the Beneficiary as he is one of only two members and the company's majority stockholder. With respect to the authority to set the rules and regulations of the Beneficiary's work, whether and to what extent the organization supervises the Beneficiary's work, and whether the Beneficiary reports to someone higher in the organization, the Petitioner did not submit sufficient documentary evidence to resolve inconsistencies. Regarding the extent to which the Beneficiary is able to influence the Petitioner, it appears that the Beneficiary would possess significant influence in his position as a member and a majority shareholder. Even if the parties intended that the Beneficiary be an employee as expressed in written agreements or contracts, we find that the submitted employment agreement lacks probative weight. Lastly, as the corporation's majority stockholder (holding 70 percent of the firm's shares), the Beneficiary shares significantly in the profits, losses, and liabilities of the organization.

Based on the tests outlined above, the Petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the Beneficiary as an H-1B temporary "employee," and the Director properly revoked the approval of the petition under 8 C.F.R. § 214.2(h)(11)(iii).³

³ The Director revoked the petition under 8 C.F.R. § 214.2(h)(11)(iii)(A)(3), but it would have been proper to revoke the

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 K-&A- PLLC*, ID# 16411 (AAO May 17, 2016)