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To: Ms. Roxana Bacon, Chief Counsel
United States Citizenship & Immigration Services (USCIS)

From: AILA-USCIS HQ Liaison Committee, American Immigration Lawyers Association (AILA)

Date: January 26, 2010

Re: Recent USCIS application of *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to nonimmigrant and immigrant visa petitions

Dear Ms. Bacon:

AILA is deeply concerned about a line of recent USCIS Administrative Appeals Office decisions, subsequent USCIS Service Center adjudications, and the January 8, 2010 Memorandum and Additions to the Officer's Field Manual. [1] These actions constitute a clear and significant shift from prior policy and practice without the notice and comment afforded by a proper regulatory process. In the required rulemaking process, USCIS would have learned that it has erroneously concluded that an individual who has a controlling or substantial interest in a petitioning U.S. company or that company's foreign parent company (hereinafter a "working-owner") cannot -- in most cases -- be a beneficiary of a nonimmigrant (e.g., L-1, H-1 and O-1) or immigrant employment-based petition.

Although the Neufeld Memorandum purports to address only H-1B petitions and related third-party worksite placements, AILA believes the effect could be much broader because the reasoning underlying the guidance potentially reaches into all areas of employment based immigration and already has been getting so used of late. As such, it may have the effect of frustrating clear congressional intent to attract foreign talent and investment and to liberalize our procedures for doing so. AILA and its members will address its additional, specific concerns with the Neufeld Memorandum in subsequent correspondence to USCIS.

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[1] Memorandum to Service Center Directors, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)," HQ 70/6.2.8 (Donald Neufeld, Associate Director, Service Center Operations January 8, 2010.) (Hereinafter the "Neufeld Memorandum").

AILA considers the issuance of the Neufeld Memorandum to be in violation of the Administrative Procedure Act (APA), because the Memorandum is a substantive rule even though its "guidance" to Service Center Directors as to petition adjudications is characterized as interpretative. We note with interest the comments of the United States Court of Appeals for the District of Columbia Circuit in *Appalachian Power Company, et al. v. Environmental Protection Agency*, 208 F.3d 1015, 1024 (D.C. Cir. 2000):

> It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. S 7607 (d)) by labeling a major substantive legal addition to a rule a mere interpretation. See *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993) "We must still look to whether the interpretation itself carries the force and effect of law, ... or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe." (Citations and internal quotations omitted). See *Paralyzed Veterans*, 117 F.3d at 588.

In addition, we note the Court's comments that an agency's guidance can have a binding effect for APA purposes regardless of language to the contrary:

> But we have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect. See, e.g., *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1321 (D.C. Cir. 1988). If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.' See Robert A. Anthony, *Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?,* 41 Duke L.J. 1311, 1328-29 (1992), and cases there cited.

208 F.3d at 1021.

The Neufeld Memorandum revises the Adjudicator's Field Manual, which is binding on adjudicators pursuant to AFM Section 3.4.

Again, AILA will provide detailed comments on the specifics of the Neufeld Memorandum separately; we believe that the Neufeld Memorandum should be set aside in its entirety and that appropriate notice and comment be provided to the public as required by §553 of the APA. The agency cannot change longstanding interpretation or established practice by ukase. The APA and related federal court decisions require agencies to seeking to alter longstanding interpretations or established practices to engage in notice and comment rulemaking.

The instant correspondence relates to recent USCIS Administrative Appeals Office decisions and USCIS Service Center adjudications, as well as the Neufeld Memorandum, that misapply the reasoning of Supreme Court cases *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992) (hereinafter "Darden") and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003)(hereinafter "Clackamas") to reach the conclusion that individuals with controlling or substantial interests in a petitioning U.S. company or its foreign parent company cannot -- in most cases -- be a beneficiary of a nonimmigrant (e.g., L-1, H-1B and O-1) or immigrant employment-based petition. We strongly believe that this USCIS position departs from longstanding binding precedent, ignores the plain language of the Immigration and Nationality Act (INA) and its implementing regulations, thwarts Congressional intent respecting the purpose of the INA, and leads to absurd results.

Copies of examples of AAO decisions and Service Center adjudications are attached to this memorandum and summarized in Exhibit A.

The AAO's analysis contained in non-precedent decisions but cited repeatedly by adjudicators to justify RFEs, NOIDs and Denials -- and now expressed in the AFM revisions regarding H-1B petitions -- begins with the proposition that the beneficiary in any employment-based nonimmigrant or immigrant petition must be an "employee" of the petitioning employer. The AAO then notes that the term "employee" is not clearly defined anywhere in the INA and concludes that absent such a definition, under *Darden* and *Clackamas*, it must look to the common law definition of employee to determine who is and is not eligible for employment-based benefits under the INA.[2] While the common law definition employs a multi-factor test, the AAO and subsequent adjudications, and the Neufeld Memorandum, have focused almost exclusively on one element: control. They have concluded that anyone with a significant ownership interest in the petitioning employer cannot be an "employee" for purposes of eligibility for employer-sponsored nonimmigrant visa status or employment-based immigrant preference classification because the individual is not "controlled" by the employer. AILA believes that this sweeping conclusion is inconsistent with the statutory language, thwarts the purpose and intent of the statute and ignores decades of precedent decisions.[3]

Analysis

I. The Supreme Court Cases

In *Darden*, in 1992, the Supreme Court was faced with the question of whether an insurance agent was an employee or an independent contractor under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA defines "employee" as "any

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[2] The H-1B guidance notes that "employer" is defined in 8 C.F.R. 214.2(h)(4)(ii).

[3] See, *e.g.*, *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm.1980), *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980), *Matter of Allan Gee, Inc*., 17 I & N Dec. 296 (Acting Reg. Comm. 1979) and *Matter of M*--, 8 I&N Dec. 24 (BIA 1958, AG 1958)

individual employed by an employer." 29 USC §1002(6). The Court determined that this definition was "completely circular" and turned to the common law definition of employee after determining that:

> "…we do not find any provision either giving specific guidance on the term's meaning or suggesting that construing it to incorporate traditional agency law principles would thwart the Congressional design or lead to absurd results." *Darden* at 323.

The Court held:

> We adopt a common-law test for determining who qualifies as an 'employee' under ERISA, a test we most recently summarized in *Reid:*
>
> > 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. 490 U. S., at 751–752 (footnotes omitted).

Darden at 323-324 (footnote omitted). The Court remanded the case for a determination on whether Darden was an employee under the common law standard.

In *Clackamas*, in 2003, the Supreme Court had to determine whether four owner-physicians, who were also the directors of the professional corporation, were "employees" under the Americans with Disabilities Act of 1990 (ADA). The ADA exempts employers with fewer than 15 employees from its requirements, and the medical practice would be subject to the ADA provisions if the shareholding physicians counted as employees. The Court looked to its *Darden* analysis, finding that the common law provided helpful guidance in the absence of a statutory definition of "employee," and endorsed the EEOC's standard, which set forth six criteria to determine whether a shareholder-director is an employee. The Supreme Court held:

> Some of the District Court's findings—when considered in light of the EEOC's standard—appear to weigh in favor of a conclusion that the four director-shareholder physicians in this case are not employees of the clinic. For example, they apparently control the operation of their clinic, they share the profits, and they are personally liable for malpractice claims. There may, however, be evidence in the record that would contradict those findings or support a contrary conclusion under the EEOC's standard that we endorse today.[11] Accordingly, as

> we did in *Darden*, we reverse the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.
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> [11] For example, the record indicates that the four director-shareholders receive salaries, Tr. of Oral Arg. 8, that they must comply with the standards established by the clinic, App. 66, and that they report to a personnel manager, *ibid.*

Clackamas at 451.

The Supreme Court definitively answered the ERISA question one year after *Clackamas* in *Raymond D. Yates M.D., P.C., Profit Sharing Plan v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330 (2004) (hereinafter "Yates"), where the Court held that Dr. Yates, a working-owner is an "employee" eligible for ERISA pension benefits:

> This case presents a question on which federal courts have divided: Does the working owner of a business (here, the sole shareholder and president of a professional corporation) qualify as a 'participant' in a pension plan covered by the Employee Retirement Income Security Act of 1974 (ERISA or Act), 88 Stat. 832, as amended, 29 U. S. C. §1001 *et seq.* The answer, we hold, is yes: . . . In so ruling, we reject the position, taken by the lower courts in this case, that a business owner may rank only as an 'employer' and not also as an 'employee' for purposes of ERISA-sheltered plan participation.

Yates at 1.

This focus on eligibility for an intended statutory benefit makes *Yates* much more relevant to the question of whether a working owner is eligible for an intended benefit under the INA than *Clackamas*, where the term "employee" was being interpreted relative to provisions intended to protect employees from employers and had a completely different objective.

In *Yates*, the Court again noted that ERISA failed to define the term "employee." Rather than turning to common law, the Court concluded that the legislative history, language and interpretation of ERISA

> …contains multiple indications that Congress intended working owners to qualify as plan 'participants.' Because these indications combine to provide 'specific guidance'… there is no cause in this case to resort to common law.

Yates at 12.

Specifically, the Court noted that prior to ERISA, Congress had allowed corporate shareholders, partners and sole proprietors to participate in tax-qualified pension plans and nothing in ERISA indicated intent to overturn this. The Court also found that several provisions in ERISA partially exempt certain plans in which

working owners likely participate from otherwise mandatory ERISA provisions. These exemption provisions would be "…unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place." *Yates* at 13. Significantly the Court did not find that ERISA effectively defined the term "employee," but that there was enough specific guidance of Congressional intent gleaned from these various sources to conclude that working owners are employees under ERISA to "obviate any need to expound on common law." *Yates* at 16.[4]

The Court further cited a Department of Labor Advisory Opinion also concluding that working owners are employees under ERISA as persuasive authority of its interpretation of the statute:

> This agency view on the qualification of a self-employed individual for plan participation reflects a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance.' *Skidmore v. Swift and Co*., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.ED. 124 (1944).

Yates at 18.

Finally, as required by *Darden* and *Clackamas*, the Court also looked at whether inclusion of owner-managers furthered the statutory purpose of ERISA and concluded:

> Congress' aim is advanced by our reading of the text. The working employer's opportunity to participate and gain ERISA coverage serves as an incentive to the creation of plans that will benefit employer and nonowner employees alike. … Treating working owners as participants not only furthers ERISA's purpose to promote and facilitate employee benefit plans. Recognizing the working owner as an ERISA-sheltered plan participant also avoids the anomaly that the same plan will be controlled by discrete regimes: federal law governance for the nonowner employees; state law governance for the working owner.

Yates at 13.

In sum, although the Court found that nothing in the ERISA statute conclusively determines whether working owners are employees, it also found that there are sufficient indicia in the legislative history to conclude that Congress did not intend to exclude

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[4] This analytical approach is also consistent with a number of earlier cases interpreting the same term in the Fair Labor Standards Act. See e.g., *Goldberg v. Whitaker*, 366 U.S. 28 (1961); *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947).

working owners from ERISA plan participation, and that inclusion of working owners was consistent with the statute's intent and purpose.[5]

II. Application of Darden, Clackamas and Yates to the INA

A. The AAO Failed to Accord Proper Deference to Existing Precedent

As a threshold matter, the AAO and the Service Center Adjudicators are legally bound to follow precedent decisions. 8 C.F.R. §103.3(c): "Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public . . ." *See* also 8 C.F.R. §1003.1(g) regarding binding nature of Board of Immigration Appeals decisions. Neither the Secretary of Homeland Security, the Attorney General, nor the BIA has taken any steps to overrule or rescind existing relevant precedent decisions, and therefore any suggestion by the AAO or Service Centers that *Darden* and *Clackamas* may have indirectly overruled relevant precedent decisions is unlawful because the adjudicators "reached an exactly contrary decision on a materially indistinguishable set of facts." *Shardar v. Att'y Gen. of the U.S.*, 503 F.3d 308, 314-316 (3d Cir. 2007).

The AAO attempts to skirt its regulatory mandate to follow precedent by saying that it is addressing a different issue here than the relevant precedent cases, but this is a specious argument. The AAO is simply asking the same question, using the same set of material facts, in a different way and that does not make it a different legal inquiry. For example, the AAO says that the three leading cases, *Matter of Aphrodite Investments Limited*, 17 I & N Dec. 530 (Comm.1980), *Matter of Allan Gee, Inc*., 17 I & N Dec. 296 (Acting Reg. Comm. 1979) and *Matter of M*--, 8 I & N Dec. 24 (BIA 1958, AG 1958) concerned themselves with whether a company could file an employment-based petition for a working owner and not whether that working owner would in fact be an employee. In other words – these cases concerned themselves with who could be an employer while the AAO is presently concerned with who can be an employee. This inquiry is simply two sides of the same coin since there can be no employer without an employee and vice versa. The precedents confirm that an appropriate relationship existed for approval of employment-based petitions, and that is the essential issue.

The AAO also attempts to distinguish existing precedent by relying on the 1990 changes to the INA as they pertain to the L-1 program (and presumably bootstrap this interpretation into the cases involving H and O visas); however, unlike other situations where Congress enacted legislation to change pre-existing law or agency interpretation, there is no indication in the legislative history of IMMACT 90 that Congress intended to

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[5] This position of the Court is precisely what Justice Thomas takes issue with in a concurrence, rejected by the majority, which closely mirrors the Service's position in its application of *Darden* and *Clackamas* to the INA. *Yates* has since been followed in over 30 District and Circuit court decisions.

narrow the definition of who could qualify for an employment-based immigrant or non-immigrant petition. In fact, quite the opposite is true.

The IMMACT 90 Conference Committee stated: "With regard to the preference system, the Committee is **convinced that the number of employment-based immigrants must be substantially increased, that the procedures governing their admission must be streamlined.**" H.R. CONF. REP. 101-955, H.R. Conf. Rep. No. 955, 101ST Cong., 2ND Sess. 1990, 1990 WL 201613, 1990 U.S.C.C.A.N. 6784 (hereinafter "IMMACT 90 Committee Report"). In addition, the IMMACT 90 Committee Report stated:

> The idea of augmenting the number of employment-based visas has been supported by the President's Council of Economic Advisors, which in its February 1990 Report stated: 'Currently, U.S. immigration policy is based primarily on the humanitarian principles of family reunification and refugee resettlement. Fewer than 10 percent of immigrants in recent years were admitted because of their skills. Less skilled immigrants will clearly continue to be a valuable resource for employers. **Yet, with projections of a rising demand for skilled workers in coming years, the Nation can achieve even greater benefits from immigration by augmenting this traditional emphasis on family reunification with policies designed to increase the number of skilled immigrants. Immigrants with more education or training will likely make the greatest contributions to the U.S. economy**, suggesting that basic skill levels could be one guide to admitting new immigrants under a skill-based criteria. (p. 165)

The IMMACT 90 Committee Report goes on to say:

> The competitive influences of the Asian Pacific Rim, Caribbean Basin, and the European Community are forcing re-evaluation of the U.S. role in the world. Immigration law is not now in synchronization with these global developments. Its current structure inhibits timely admittance of needed highly skilled immigrants. … As noted by the American Council on International Personnel, **"The ability to put the best manager or the most expert technician in the right position within the company at the precise moment that he or she is needed is an absolute requirement to assure that a business stays even or ahead of well-financed and highly efficient overseas competitors."** (Internal citation omitted).

In relation to employment based non-immigrant visas in particular, the IMMACT 90 Committee Report states:

> **The supply of foreign temporary workers has not kept up with the demands of American business in the international marketplace.** Various technological advances have rendered the treaty trader visa ("E-visa") unavailable to several categories of workers. **The intracompany transferee visa ("L-visa") has not been responsive to the need to**

> **rotate executives and managers for assignments in the United States.** The bill addresses these problems by expanding access to the E visa to allow transfer of technology and services. It also broadens the L visa to include affiliated accounting firms and reduces time frames for previous employment with the company.

Finally, when analyzing the specific provisions of the Act, the IMMACT 90 Committee Report was concerned with narrowing or clarifying what constituted qualifying job duties both in relation to H-1B professionals and L-1 specialized knowledge workers (which it described as the one area in the L-1 classification needing greater specificity) but it did NOT seek to narrow the term "employee." Again, it is clear from the report that the opposite was intended:

> (e) Intracompany transferees.--The L visa has provided multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures. This visa has been a valuable asset in furthering relations with other countries but **the Committee believes it must be broadened to accommodate changes in the international arena**.

All of this language from the Committee Report – together with its consistent use of the term "worker" as interchangeable with the term "employee" -- is unequivocal and unambiguous evidence that Congress did not intend to narrow the definition of who could be a qualifying employee for employment-based permanent residence or for H, L and O non-immigrant classification. The fact that the Service did not change its interpretation for 19 years (including 17 years after *Darden* and 6 years after *Clackamas*) further supports the validity of the long-established application of the INA and regulations. The recent AAO decisions and adjudications following improperly depart from the precedent cases, and are contrary to the clear intent of Congress, which was to broaden employment-based immigration in the particular categories in question.

B. The AAO Failed to Properly Apply the Supreme Court Case Law

Assuming that these Supreme Court Cases do somehow -- despite the existence of 8 C.F.R. §103.3(c) and 8 C.F.R. §1003.1(g) and the absence of Congressional intent -- overrule existing precedent or raise a new legal question, the Neufeld Memorandum, the AAO and the Service Centers' application of *Darden* and *Clackamas*, especially to the exclusion of *Yates*, is incorrect.

Darden, *Clackamas* and *Yates*, taken together, stand for the proposition that where the meaning of the term "employee" cannot be determined or gleaned from the statutory scheme or from specific guidance found in the legislative history *or the agency's historical interpretation of the term*, the Court will turn to the common law definition UNLESS that common law definition would thwart Congressional intent or lead to an absurd result. This sets up a two part test: 1) a requirement to search for specific guidance

respecting the meaning of the term "employee" under the INA, and 2) absent such specific guidance, a requirement to analyze whether application of the common law test would thwart Congressional intent or lead to an absurd result. The AAO misapplied *Darden, Clackamas* and *Yates*, because it failed to apply either part of this two part test.

1. The AAO Failed to Look for Evidence of "Specific Guidance" Respecting the Meaning of the Term "Employee"

The AAO and the Neufeld Memorandum fail to consider whether any provision in the INA or any part of its legislative history or agency interpretation gives specific guidance on the meaning of the term "employee" that would obviate the need to resort to the common law. It is quite clear from *Yates* that this analysis has to consider all of the relevant sources of specific guidance as to the meaning of the term "employee" and is not just limited to the four corners of the INA and its regulations.

Had the AAO conducted this intervening analysis it would have found that there is specific guidance, not only as detailed above in relation to the Conference Committee Report on IMMACT 90, but also in relation to earlier and subsequent immigration related legislation, that Congress never intended to generally exclude working-owners from the definition of the term "employee" for purposes of nonimmigrant and immigrant employment-based benefits. It is important in this context to note that this interpretation of the statute has been established by agency practice and precedent decisions for over fifty years and that it continued for 17 years after *Darden*, 6 years after *Clackamas*, and 5 years after *Yates.* There is ample evidence from the statute, regulations and precedent decisions to conclude that Congress intended working owners to be eligible as beneficiaries of employment-based non-immigrant and immigrant petitions even if they controlled the entity.

a. The Language of the INA is "Specific Guidance" in Favor of a Broader Meaning of the Term "Employee"

The language of the INA itself indicates that Congress never intended the rigid narrow meaning of the term "employee" in the context of employment-based immigration that the Service wishes to apply today. In INA §§101, 203, 204 and 214, the sections dealing with nonimmigrant or immigrant petitions, the term "employee" is rarely used and the terms "employee" and "worker" are used interchangeably throughout the INA. Moreover, the term "employee" is never used to define an eligible class of beneficiaries.[6] For example, INA §101 (a)(15)(H)(1)(b) defines an H-1B simply as an alien "who is coming to the U.S. to perform services" in a "specialty occupation." Section 101(a)(15)(L) uses "render services" and Section 101(a)(15)(O) says "continue work in the area of extraordinary ability." In fact, the only definition of the term "employee" contained

[6] The term "employee" is used in these sections in only three senses: First, within the phrase "employees of foreign governments" or a variation of this in defining the rights of such persons (c.f. INA §214(b)); second, in INA §214(f) dealing with inadmissibility of D nonimmigrant crew members during labor disputes; third, in references generally to the employees of a petitioning employer (*c.f.* INA §212(t)).

anywhere in the INA or its implementing regulations is the extremely broad definition in 8 C.F.R §274A and even though it is limited to that part, there is no indication in the legislative history of IRCA that this definition was intended to be inconsistent with the remainder of the INA. Therefore, at the outset, the Service's new definition circumscribing the class of eligible beneficiaries seems overwrought.[7]

The terms employ, employment and employer are used liberally throughout the INA and Sections 204 and 214, and clearly indicate that Congress intended that some kind of employing U.S. entity must serve as the petitioner for these nonimmigrant and immigrant classifications. What is instructive when seeking specific guidance as to whether this would exclude working-owners with control over the entity is that even in that context, the definitions of certain classes of these beneficiaries make it clear that Congress intended to include individuals with control over the petitioning employer in the class of employees who could be sponsored under the INA. For example, the L-1 nonimmigrant visa classification and the Priority Worker immigrant classification specifically include an individual serving as an "executive," which is defined as an employee who:

> Directs the management of the organization or a major component or function of the organization; Establishes the goals and policies of the organization, component, or function; Exercises wide latitude in discretionary decision-making; and Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. 8 C.F.R. §214.2(l)(1)(ii)(C).

The statute and regulations anticipated that high-level workers with significant control over the operations of a petitioning entity are within the class of eligible beneficiaries. As in *Yates*, while the statute is not absolutely clear as to whether working owners are included in the class of eligible beneficiaries, nothing in the statute specifically excludes them. What indications there are suggest that Congress intended to include them. Moreover, there is a long history of agency implementation that consistently supports this interpretation.

b. The Interpretation of the Term "Employee" by Legacy INS and USCIS is "Specific Guidance" in Favor of a Broader Meaning of the Term "Employee"

The question of whether a working owner can be the beneficiary of a nonimmigrant or immigrant petition by a company that he or she owns and/or controls also has a long precedent history. In its recent decisions, the AAO – and the Adjudicators who rely thereon -- ignore some of this history and dismiss the rest. As noted above, this is impermissible since they are legally bound to follow precedent decisions **unless they are**

[7] Although discussed in greater detail elsewhere in this memorandum, this conclusion is bolstered by the fact that none of the various House or Senate Committee reports for any immigration statute from 1952 to the present – other than IRCA – concerned themselves at all with the definition of the term employee and generally referred to the eligible or affected aliens as "workers."

"modified or overruled by later precedent decisions." 8 C.F.R. §103.3(c) and 8 C.F.R. §1003.1(g).

However, even if the precedent decisions can somehow be distinguished – under the *Darden*, *Clackamas* and *Yates* decisions, they must be considered as part of the bundle of evidence that provides the requisite "specific guidance" as to the meaning of the term "employee" for purposes of establishing the class of people who may be beneficiaries of employment-based petitions. The *Yates* decision clearly states that agency interpretation of a statute is highly probative in determining the intent of Congress. *Yates* at 21 (Agency view merits the judiciary's respectful consideration.)

The question of whether the sole owner of a U.S. corporation could be a beneficiary of an immigrant preference petition filed by the corporation first arose just a few years after the original enactment of the INA in 1952. In the 1958 decision *Matter of M*, the Board of Immigration Appeals, affirmed by the Attorney General, held that the statute did not preclude a corporation from petitioning on behalf of its sole owner, noting that this interpretation furthered the purpose of the INA rather than thwarting it.[8] The decision also quoted from a 1954 letter from the Assistant Commissioner to an attorney stating that "…the fact that the beneficiary is the major stockholder of the corporation would not prevent the corporation from filing a petition on your client's behalf." *Matter of M* at 50-51.

The question arose again in 1979 in *Matter of Allan Gee*, where a corporation, wholly-owned by the beneficiary, filed an immigrant petition on behalf of its owner-manager, who was then present in the United States in L-1 nonimmigrant status. While the AAO has attempted to distinguish this case on the ground that it stands only for the narrow proposition that a corporation may file a petition on behalf of its owner, the Acting Regional Commissioner's statement of the issue is instructive:

> The District Director denied the petition and certified his decision to me. It was held that the petitioner, Allan Gee, Inc., is owned in its entirety by the beneficiary and therefore, a bona fide employer-employee relationship between Allan Gee, Inc. and the beneficiary does not exist.

Matter of Allan Gee at 2772. Given that statement, the AAO's reasoning makes no sense and in fact misrepresents the Service's own precedent on the issue. As stated by the Acting Regional Commissioner and quoted above, the very issue at hand in *Matter of Allan Gee* was whether a bona fide employer-employee relationship exists for purposes of eligibility. **The Regional Commissioner discusses and rejects the District Director's reliance on the common law definition of employee, specifically finding that the statute included owner-managers as preference petition beneficiaries, using**

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[8] "…it seems clear that the purpose of 8 USC §1153(a)(1)(A) was to encourage the immigration of such aliens. We believe the District Director was correct in his finding that the appellant possessed the qualifications for first preference mentioned in the statute. Hence, we have here the situation where the purpose of the statute was accomplished rather than a frustration of the purpose…" *Matter of M* at 52.

the legal principle that a corporation is a separate legal entity from its owner(s) to support this conclusion. The Neufeld Memorandum and the AAO's recent decisions improperly ignore this binding precedent, and apply the reasoning explicitly rejected.

Shortly after the decision in *Matter of Allan Gee,* the Service again addressed this question in *Matter of Aphrodite Investments Limited*, this time in the context of an L-1 nonimmigrant visa petition. In its recent decisions, the AAO distinguishes *Matter of Aphrodite* in the same way as *Matter of Allan Gee,* asserting that the Commissioner did not address the question of whether an owner can be an employee for purposes of eligibility as a beneficiary of a nonimmigrant visa petition. However, this is incorrect; the question of whether an owner is an eligible employee is at the heart of *Matter of Aphrodite* just as it was in *Matter of Allan Gee*. The Commissioner in *Matter of Aphrodite* specifically rejected an overly formalistic interpretation of the term "employee" as improperly limiting the purpose of the statute stating: "If we were to adopt the definition of 'employee' we would exclude some of the very people that the statute intends to benefit: executives." *Matter of Aphrodite* at 531.

There are also two other cases that seek to define the terms "employer" and "employee" which are not distinguished in or addressed by the AAO decisions In *Matter of Tong,* 16 I & N Dec. 593 (BIA 1978), the BIA, for purposes of Section 245(a) adjustment eligibility, concluded that self employment met the definition of employment contained in 8 C.F.R. §274a.1(h) because even self employment was "service or labor performed by an employee for an employer within the United States." Therefore it applied the definition of "employment" outside the confines of Part 274a to a different section of the INA. This undercuts the contention found in some of the recent Service adjudications that the definition contained in 8 C.F.R. §274a.1(h) had no bearing on any other part of the INA. In *Matter of Smith,* 12 I & N Dec. 772 (District Director1978), the District Director applied a similar definition to conclude that "(i)n view of the fact that the petitioner has guaranteed the beneficiary full-time permanent employment for 52 weeks a year with a two week paid vacation and other fringe benefits and that the beneficiary will be paid directly by the petitioner who is responsible for all payroll deductions and contributions, it is concluded that the petitioner qualifies as the actual employer of the beneficiary within the meaning and requirements of the Immigration and Nationality Act, as amended." Again, there is no discussion of the control element but rather a focus on the compensation arrangement.

In addition, the AAO fails to account for the fact that its own regulations inherently include working-owners as eligible employment-based petition beneficiaries. In regard to L-1A visas, 8 C.F.R. §214.2(l)(3)(vii) states:

> If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

The retention of this regulation despite the fact that the transfer requirement has since been deleted from the INA shows that the Service sees working owners who control the entity as "employees" for L-1A purposes.

Finally, the AAO in its recent decisions gives great weight to criteria enumerated in the EEOC's New Compliance Manual. The Court in *Clackamas* turned to this source specifically because the EEOC was the agency with the authority to enforce the provision of the statute in question in that case. The EEOC does not have the authority to enforce the employment-related benefits provisions of the INA and therefore reliance on the Manual is misplaced. Instead, the AAO, like the Supreme Court, should be giving proper deference to its own precedent decisions, as the agency charged with implementing and interpreting the employment based benefits provisions of the INA.

An additional resource may be found in the regulations governing the filing of Applications for Permanent Employment Certification. The Department of Labor includes special requirements "…where the employer is a closely-held corporation or partnership in which the alien has an ownership interest." 20 C.F.R. §656.17(i). An Application for Permanent Employment Certification requires that the employer conduct a good faith recruitment effort to determine whether there are qualified U.S. workers available for a specific position. The Department of Labor included these special provisions to address concerns of whether bona fide recruitment is carried out where the beneficiary has influence and control within the organization. These additional requirements clearly indicate that the Department of Labor considers working owners within the general class of eligible beneficiaries of these applications and the subsequent immigrant visa petitions. Otherwise, these additional requirements would not be necessary. This textual analysis is identical to that used by the *Yates* Court in determining that it had no need to turn to common law to discern the intent of Congress in the statute.

These various agency interpretations of the term "employee" are remarkably consistent in that they all include working owners, irrespective of the degree of control they have over the entity, as persons who are included in the class of beneficiaries for employment based immigrant and non-immigrant visas. This is precisely the "specific guidance" that the Supreme Court was talking about in *Darden*, *Clackamas* and *Yates*.

c. The Legislative History of the Term "Employee" in the INA is "Specific Guidance" in Favor of a Broader Meaning of the Term "Employee"

As noted above, the Conference Committee Report for IMMACT 90 (the version of the INA that the AAO purports to use 2 decades later as the basis for its change in interpreting the term "employee") repeatedly voices Congress's desire to expand employment-based immigration, broaden the reach of the L, H and O visa programs and increase employment-based permanent immigration. It uses the words "worker" and "employee" interchangeably and never expresses any intention or even hint of an intention to exclude working owners – no matter how great their control over the entity –

from the class of covered beneficiaries. What is striking is that this reflection of Congressional intent is not changed from that seen in earlier versions of the INA, nor has Congress retreated from that objective in later amendments to the INA despite the urgings of immigration opponents.

The Committee Reports for the 1952 INA make relatively little mention of employment-based immigration, as the focus at that time was quota-based immigration based on national origin and largely focused on family-based immigration and facilitating the entry into the United States of those persons fleeing communism or other totalitarian regimes. The language used to reference employment-based immigration is striking. The Committee report says relative to Section 203 that employment-based visas are to be made available to persons "**whose services** are determined by the Attorney General after consultation with appropriate agencies of the Government, and after investigation of the facts, to be urgently needed in the United States and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States." The word "services" is a much broader term than the common law definition of the term "employee." CONF. REP. 82-2096, Conf. Rep. No. 2096, 82ND Cong., 2ND Sess. 1952, 1952, U.S.C.C.A.N. 1753, 1952 WL 3083 (hereinafter "1952 Committee Report"). In Section (h) of the 1952 Committee Report, the terms used are "temporary workers" and "temporary services" – again concepts broader than the common law definition of the term "employee." Furthermore, this section of the report refers to the act of "importing" an "alien worker" to provide the "services" needed but makes no mention of the term "employ," "employer" or "employee."

Even in relation to protection of the U.S. labor market, the 1952 Committee Report uses the terms "labor" and "workers" although it does state that "employment" of these persons should not affect the working conditions of U.S. workers "similarly employed." This section of the report concludes: "It is the opinion of the committee that this provision will adequately provide for the protection of American labor against an influx of aliens entering the United States for the purpose of performing skilled or unskilled labor where the economy of individual localities is not capable of absorbing them at the time they desire to enter this country." Use of the broad terms "labor" and "workers" in the context of employment rather than use of the more narrow term "employee" suggest that the 1952 Congress wanted to include more persons in the ambit of the 1952 INA for purposes of employment-based petitions than the common law concept of a servant controlled by a master.

The 1965 revisions to the 1952 Act also do not indicate a narrowing of this concept. In fact, the Preamble to the Conference Committee Report specifically indicates that the purpose of the 1965 law is "the abolishment of the national origins quota system for the allocation of immigrant visas and the substitution of a new system of allocation based on a system of preferences which extends priorities in the issuance of immigrant visas to close relatives of U.S. citizens and **aliens lawfully admitted for permanent residence, to aliens who are members of the professions, arts, or sciences, and to skilled or unskilled alien laborers who are needed in the United States**, and to certain refugees. CONF. REP. 89-1101, Conf. Rep. No. 1101, 89TH Cong., 1ST Sess. 1965, 1965,

U.S.C.C.A.N. 3353, 1965 WL 4570 (hereinafter "1965 Conference Report"). The 1965 Committee Report retains the use of the term "labor" and does not introduce the term "employee" or change the concept of who is potentially eligible to be a beneficiary of an employment-based petition in a manner that excludes or even addresses working-owners.

The next piece of immigration legislation that considered employment-based immigration is the 1986 Immigration Control Act or IRCA. The principal purpose of the employment-related provisions of IRCA was to provide for employer sanctions and gain greater employer compliance in relation to the hiring of foreign workers. This piece of legislation -- for the first time -- used the term "employer" extensively. The term was discussed in the House Report to be interpreted as broadly as possible so that anyone who paid someone to work (other than a true independent contractor) was considered an "employer" under IRCA. See generally, 1986 H.R. REP. 99-682(II), H.R. REP. 99-682, H.R. Rep. No. 682(II), 99TH Cong., 2ND Sess. 1986, 1986 U.S.C.C.A.N. 5757, 1986 WL 31951 (hereinafter "1986 House Report").

One key statement in the House report is that **"(i)t is not the intent of this Committee that sanctions would apply in the case of casual hires (i.e., those that do not involve the existence of an employer/employee relationship)."** In this context, it is critical to note that the only time the term "employee" is specifically defined anywhere in the INA or its regulations is in 8 C.F.R. §274a.1, which says "(t)he term employee means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors as defined in paragraph (j) of this section or those engaged in casual domestic employment as stated in paragraph (h) of this section." This definition is a broader definition than the common law master/servant definition and is expressly limited to Part 274 but the above quoted statement from Congress makes it clear that **Congress considered ALL working relationships covered by this definition to be employer/employee relationships.**

Finally, if the AAO is correct and IMMACT 90 somehow changed the landscape without Congress expressly saying so, it is logical to assume that the next time Congress addressed employment-based immigration, which was in the 1998 American Workforce Improvement Act and the 2000 American Competitiveness in the 21st Century Act ("AC21"), it would give at least some indication of that fact in the legislative history. Again, the opposite is true. The 1998 Act and AC21 increased the H-1B cap substantially and were focused on expanding not contracting the number of immigrant workers entering the United States. The Senate, when explaining the purpose of the 1998 Act and AC 21, said:

> In the Information Age, when skilled workers are at a premium, America faces a serious dilemma when employers find that they cannot grow, innovate, and compete in global markets without increased access to skilled personnel. That access, however, was being curbed by a cap on H-1B visas put in place almost a decade earlier, in 1990, when no one understood the scope of the information revolution that was about to hit. … What was true in 1998 remains true today. In fact, in 1998, the error

> Congress made was in underestimating the workforce needs of the United States in the year 2000. Despite the increase in the H-1B ceiling in 1998, a tight labor market, increasing globalization and a burgeoning economy have combined to increase demand for skilled workers even beyond what was forecast at that time. As a result, the 1998 bill has proven to be insufficient to meet the current demand for skilled professionals.

S. REP. 106-260, S. Rep. No. 260, 106TH Cong., 2ND Sess. 2000, 2000 WL 622763.

While the focus of both the 1998 Act and AC21 was H-1B workers, this language again evidences an intent to broaden not reduce or contract employment-based immigration and since the AAO and Service Center Adjudicators are seeking to apply their new definition of the term "employee" to H-1B workers with controlling interests in the petitioning entity as well, the language the Senate uses is relevant. There is no indication anywhere in the 1998 Act, AC21 or the legislative history of either statute that would indicate Congress intended to narrow the class of persons who could be beneficiaries of immigrant and non-immigrant employment petitions to exclude persons who held a controlling or substantial interest in the petitioning employer.

The consistently expansive reading of both who may be a beneficiary and who may be a petitioner in employment-based immigration reflected in the Committee Reports of all employment-related immigration legislation since 1952 provides the "specific guidance" from Congress required under *Darden*, *Clackamas* and *Yates* to show that Congress never intended to exclude working owners of petitioning entities as potential beneficiaries even if these persons controlled the petitioning entity. Given that history, there is no way Congress could have intended the narrow common law definition of a servant controlled by a master to be the definition of who could be an employee under the INA.

2. The AAO Failed to Consider Whether the Common Law Definition of the Term "Employee" Would Thwart Congressional Intent or Lead to an Absurd Result

The second way in which the AAO misapplied *Darden*, *Clackamas* and *Yates* is that it failed to consider whether the common law definition would thwart Congressional intent or lead to an absurd result. Here, the interpretation of the term "employee" that the AAO seeks to implement thwarts Congressional intent AND leads to an absurd result even though either would render application of the common law definition inapposite.

As detailed above, the Congressional intent in creating employment-based immigration has consistently been to increase use of these categories by alien workers so long as they did not unlawfully disadvantage U.S. workers. In a nutshell, the intent of the employment-based provisions of the INA is to attract individuals who will benefit the United States through their business and commercial activities. The AAO's current interpretation of the term "employee" for purposes of employment-based immigration would thwart this Congressional intent by arbitrarily and categorically denying admission

to the United States to an entire class of formerly qualified beneficiaries simply because they are investing their own money and resources to benefit the United States through their business and commercial activities. There is no indication that Congress ever intended this. Instead, Congress clearly intended to attract persons who are willing to financially invest in the United States because that reduces and leverages the amount of money and resources that Americans invest. Congress has continually expanded the L-1 and E non-immigrant categories as well as the employment-based preference categories.

In its decisions, the AAO fails to explain how its reasoning furthers the intent and purpose of the INA and that is because it cannot do so. In addition to narrowing rather than broadening employment based immigration, the AAO interpretation unlawfully discriminates against small businesses which are precisely one of the targets of the 1990 expansion of the L-1 program. Working-owners are much more likely to be found in small business, where lower capitalization requirements enable individuals and small groups of investors to more adequately and effectively pursue a commercial venture. In case there is any doubt as to whether facilitation of small business furthers the economic goals of the INA, President Obama in a recent speech at the Brookings Institution discussed the critical importance of small business to the American economy:

> Over the past 15 years, small businesses have created roughly 65 percent of all new jobs in America. These are companies formed around kitchen tables in family meetings, formed when an entrepreneur takes a chance on a dream, formed when a worker decides it's time she became her own boss. These are also companies that drive innovation, producing 13 times more patents per employee than large companies. And it's worth remembering, every once in a while a small business becomes a big business — and changes the world.[9]

The AAO's interpretation of the term "employee" also leads to easily-envisioned absurd results. To justify its interpretation, the AAO asserts that the BIA precedent decisions stand for the very narrow principle that a corporation may file a petition on behalf of its owner. Taken to its inescapable conclusion, the AAO's reasoning leads to an absurd result. A corporation may file a petition on behalf of its owner, but that petition will now be denied because an owner cannot be an employee. AILA would like the Service to consider the following all too likely examples in this regard:

- A corporation seeks to transfer its CEO to the United States to directly oversee the operations of its U.S. subsidiary. A petition for L-1A status would be approved, as long as the CEO was not a majority shareholder of the corporation. Even if all of the other facts were identical, this one fact under the Service's reasoning is the difference between approval and denial.

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[9] "Remarks by the President on Job Creation and Economic Growth," delivered at The Brookings Institution, Washington, D.C., December 8, 2009. See http://www.whitehouse.gov/the-press-office/remarks-president-job-creation-and-economic-growth.

- A graphic design firm seeks O-1 status for an internationally-awarded graphic designer to serve as President and Design Director. The petition is approvable as long as the beneficiary is not also buying a controlling share of the firm.

- A start-up nanotechnology firm seeks H-1B status for a microbiologist who has conducted extensive research at a major university while pursuing a Ph.D. degree and who has several patents which appear to have promise for commercially-viable uses. The petition is approvable as long as the beneficiary is willing to forego being a shareholder in the newly-formed corporation.

Had the AAO applied the second test required by the Supreme Court in *Darden*, *Clackamas* and *Yates* it would have been compelled to conclude that excluding working owners with control over the petitioning entity from the class of potential beneficiaries for L, H, and O visas and for immigrant petitions based essentially on these non-immigrant categories, would thwart Congressional intent and lead to absurd results.

III. CONCLUSION

The Neufeld Memorandum, the AAO's recent non-precedent decision and the adjudications at the Service Centers that are applying these decisions to current filings seek to overturn over fifty years of consistent precedent and regulatory interpretation to categorically deny eligibility for benefits to an entire class. Moreover, this longstanding line of precedent decisions is entirely consistent with the intent of Congress, which has amended the INA numerous times since the first decision in *Matter of M*, but has never taken action to specifically exclude working owners as beneficiaries of employment-based nonimmigrant and immigrant petitions irrespective of the degree to which the working owner controlled the petitioning entity.

AILA urges USCIS to immediately rescind the Neufeld Memorandum, and issue a new policy memorandum that clearly sets out the agency's official position on this issue, provides a correct interpretation of the *Darden*, *Clackamas* and *Yates* decisions, and upholds the intent of Congress in the INA as well as longstanding agency precedent and policy. AILA believes this memorandum should include all employer-sponsored immigrant and nonimmigrant visa petitions, state that under *Yates* the Service must not resort to the common law definition of employee, that it is the agency's position, based on Congressional intent and longstanding precedent, that working-owners are employees for all such petitions and that any required employer-employee relationship is satisfied where the petitioner is a U.S. legal entity.

AILA InfoNet Doc. No. 10012760. (Posted 01/27/10)

EXHIBIT A

Examples of AAO Decisions and USCIS Service Center Adjudications

Decisions finding employer/employee relationship may be established with sole owner of a corporation

Matter of X, File No. EAC----- (AAO Feb 23, 2006).The AAO found that petitioner, a New York limited liability corporation founded by the beneficiary, qualified as a U.S. employer and could file an H-1B for the founder. The decisions states, "Established tenets of corporate law, as well as cases such as Matter of Aphrodite, state that a corporation has a separate legal identity from its owner. As such, a corporation, even if it is owned and operated by a single person, may hire that same individual and the parties will be in an employer-employee relationship, as is the case in the instant matter."

Matter of [NAME NOT PROVIDED], SRC-98-101-50785, 21 Immig. Rptr. B2-6 (AAU August 9, 1999) [Employer/employee relationship established where sole owner of corporation petitioned for himself as sole employee of business].

Decisions finding no employer/employee relationship

EB-1 Multinational Manager/Executive

Matter of _____, LIN-06-170-52427, July 23, 2009

"Next, the issue of the beneficiary's ownership interest in the U.S. entity brings to light the sixth ground for denial-whether the petitioner established that it has an employer/employee relationship with the beneficiary."

"…the petitioner is a corporation, which the petitioner claims is ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. Regardless of whether the beneficiary directly owns the petitioning entity or whether he derives ownership indirectly through his direct majority ownership of the foreign entity that may ultimately own the petitioner, there is no evidence that anyone other than the beneficiary himself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. He will control the organization; set the rules governing his work; and share in all profits and losses. Given these factors, the AAO cannot conclude that the petitioner and the beneficiary have the requisite employer/employee relationship."

Matter of _____, LIN-06-235-52206, May 1, 2009

"The first issue in this proceeding is whether the petitioner and the beneficiary have the requisite employer/employee relationship to qualify for the immigration benefit sought herein."

"…the petitioner is a corporation, which appears to be ultimately owned and controlled by the beneficiary, who purports to assume a role as the petitioner's principal. There is no evidence that anyone other than the beneficiary herself is in a position to exercise any control over the work to be performed by the beneficiary. As such, it appears the beneficiary is the employer for all practical purposes. She will control the organization; set the rules governing her work; and share in all profits and losses. Based on this initial finding, the AAO cannot approve this petition."

Matter of _____, LIN-06-215-51970, December 1, 2008

"Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be 'employed' by the petitioner, or that he will be an 'employee' of the petitioner, as required by the Act and regulations."

"…the petitioner has not established that the beneficiary will be an 'employee' of the petitioner in the United States. Despite the petitioner's failure to establish its actual ownership (see infra), the beneficiary is claimed to own 100% of the petitioner and is the petitioner's sole employee. The beneficiary also appears to be the 'president' of the petitioner, a Florida corporation. The petitioner did not submit an agreement, employment contract, or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an 'employee' as defined above. It has not been established that the beneficiary will be 'controlled' by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary is the petitioner for all practical purposes. He will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be 'employed' as an 'employee,' and the petition may not be approved for that additional reason."

<u>L-1 nonimmigrant petitions</u>

Matter of _____, EAC-08-059-50859, March 4, 2009

"Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be 'employed' by the petitioner, or that she will be an 'employee' of the petitioner, as required by the Act and regulations."

"…the petitioner has not established that the beneficiary will be an 'employee' of the petitioner in the United States. The beneficiary appears to be the 99.99% owner of the foreign employer, a Mexican business organization, which, in turn, is the 100% owner of the petitioner. While the beneficiary claims to be 'employed' by the petitioner, the beneficiary allegedly draws a portion of her salary from the Mexican business. The beneficiary also appears to be an officer of the petitioner. The petitioner did not submit an agreement, employment contract, or any other document describing the beneficiary's

claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an 'employee' as defined above. It has not been established that the beneficiary will be 'controlled' by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary is the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the beneficiary will be 'employed' as an 'employee,' and the petition may not be approved for that reason."

Matter of _____, WAC-07-193-52752, December 1, 2008

"However, upon review, the petitioner has not submitted sufficient evidence to establish eligibility for the L-1A classification. In this matter, given the petitioner's description of its business organization and the beneficiary's proposed relationship to this business, it appears more likely than not that the beneficiary will not be an 'employee' of the United States operation."

"Consequently, since the beneficiary is a primary owner of the petitioner, the director is directed to review the record, request pertinent additional evidence regarding the petitioner's control over the beneficiary and his prospective employment, and render a new decision after reviewing this evidence."

Matter of _____, EAC-07-032-52837, August 1, 2008

"Beyond the decision of the director, the record is not persuasive in establishing that the beneficiary will be 'employed' in the United States, or has been 'employed' abroad, by qualifying organizations."

"…the record is not persuasive in establishing that the beneficiary has been or will be an 'employee' employed by an 'employer.' As indicated above, the petitioner claims that the beneficiary owns and controls both it and the Canadian entity. The foreign entity further asserts in the letter dated October 16, 2006 that the beneficiary 'has acted as the Owner and President of the Canadian Company, Tom Veert Contracting, Limited, since its establishment 22 years ago' and that '[as] the President, [the beneficiary] has been responsible for management of every facet of the business.' Finally, as indicated in the January 31, 2007 letter, the foreign entity claims that the beneficiary 'sets the employment standards.' In view of the above, it appears that the beneficiary will be, and has been, a proprietor of this business. He is not, and was not, an 'employee' as defined above. It has not been established that the beneficiary will be 'controlled' by the petitioning organization or that the beneficiary's employment could be terminated. To the contrary, the beneficiary is the petitioning organization for all practical purposes. He controls the organization; he is responsible for the management of 'every facet' of the business; he cannot be fired; he reports to no one; he will set the rules governing his work; he sets all employment standards; and he will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that the

beneficiary will be, or has been, 'employed' as an 'employee' by an 'employer.' Accordingly, the petition will not be approved for these additional reasons."

H-1B nonimmigrant petitions

Matter of _____, EAC-07-167-52441, June 4, 2009

"Beyond the decision of the director, the AAO finds that the evidence of record fails to establish that the petitioner and the beneficiary in this proceeding have the required employer-employee relationship to establish that the petitioner is an intending United States employer under section 101 (a)(l 5)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii)."

"…the petitioner has not established that it will be a 'United States employer' having an 'employer-employee relationship' with the beneficiary as an H-1B temporary 'employee.' As explained above, the petitioner purports to be a corporation which is solely owned, controlled, and operated by the beneficiary. The beneficiary owns 100% of the petitioner's issued stock and is the president of the corporation. The petitioner did not submit an employment contract or any other document describing the beneficiary's claimed employment relationship with the petitioner. In view of the above, it appears that the beneficiary will be a proprietor of this business and will not be an 'employee' having an 'employer-employee relationship' with a 'United States employer.' It has not been established that the beneficiary will be 'controlled' by the petitioner or that the beneficiary's employment could be terminated. To the contrary, the beneficiary is the petitioner for all practical purposes. She will control the organization; she cannot be fired; she will report to no one; she will set the rules governing her work; and she will share in all profits and losses. Therefore, based on the tests outlined above, the petitioner has not established that it will be a 'United States employer' having an 'employer- employee relationship' with the beneficiary as an H-1B temporary 'employee.' 8 C.F.R. § 214.2(h)(4)(ii)."

Matter of _____, WAC-07-058-50916, May 4, 2009

"The primary issue in the present matter is whether the petitioner has established that it meets the regulatory definition of an intending United States employer. Section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(ii)."

"Therefore, despite the documentary evidence submitted, it appears that the beneficiary will be a proprietor of this business and will not be an 'employee' having an 'employer-employee relationship' with a 'United States employer.' It has not been established that the beneficiary will be 'controlled' by the petitioner or that the beneficiary's employment could be terminated. As president and CEO, he will control the organization; he cannot be fired; he will report to no one; he will set the rules governing his work; and he will share in all profits and losses. Moreover, there is no evidence in the record to support a finding that the petitioner has the financial ability to pay the beneficiary's proposed salary as contemplated by the employment agreement. Therefore, based on the tests outlined above, the petitioner has not established that it will be a 'United States

employer' having an 'employer-employee relationship' with the beneficiary as an H-1B temporary 'employee.' 8 C.F.R. §214.2(h)(4)(ii)."