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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

[REDACTED]

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FILE:

[REDACTED]

SRC 04 206 52080

Office: TEXAS SERVICE CENTER

Date:

MAR 06 2007

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is a wholesaler of pharmaceutical products. It seeks to employ the beneficiary permanently in the United States as a wholesaler II. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it is a successor-in-interest to the entity that filed the labor certification with DOL and that the petitioner had not established its continuing ability to pay the proffered wage from the priority date. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial, the issues in this case are whether or not the petitioner is a successor-in-interest to the entity that filed the labor certification with DOL and whether or not the petitioner had established its continuing ability to pay the proffered wage from the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The certified Form ETA 750 in this matter was submitted on April 30, 2001 by [REDACTED], Miami, Florida 33176. The petitioner listed on the Form I-140 visa petition, which was submitted on July 23, 2004, is [REDACTED], of [REDACTED], Miami, Florida 33172. The Form I-140 petition was correctly filed with the Texas Service Center, which issued the decision of denial.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup>

In the instant case the record contains (1) an asset purchase agreement dated December 10, 2001, (2) Articles of Incorporation of [REDACTED], filed on October 3, 2000 (3) Corporate Certificate of Ownership of [REDACTED], (4) print-outs from the Florida Department of State, Division of Corporations showing the incorporation of [REDACTED] c. on October 3, 2003 and the voluntary dissolution of All International Company on June 28, 2002, (5) an attestation from [REDACTED], President and Owner of [REDACTED], (6) a copy of a sublease for office space at [REDACTED], Miami, Florida 33172 for [REDACTED], (7) a letter from the President and Owner of [REDACTED] c. confirming the offer of permanent employment to the beneficiary, (8) a copy of All International Company's 2001 Form 1120, U.S. Corporation Income Tax Return, (9) copies of Vertical [REDACTED]'s 2002 through 2004 Forms 1120, (10) an organizational chart for [REDACTED], (11) a copy of a letter, dated December 6, 2005, from [REDACTED] stating that

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[REDACTED] has “entered into a leasing arrangement with Paychex Business Solutions effective 12/29/2003. Employees previously employed by Vertical Source Pharma, Inc. are now employed by and reported under Paychex Business Solutions, specifically: PBS of Central Florida, Inc., 10105 [REDACTED] Street North, St. Petersburg, FL 33716,” and (12) copies of exhibits A through F of an Assets Purchase Agreement between Vertical Source Pharma, Inc., All International Company, and Cori Lima. The record does not contain any other evidence relevant to the relationship of the petitioner to the entity to whom the labor certification was issued or to the ability to pay the proffered wage of \$28,267.20 to the beneficiary from the priority date of April 30, 2001 and continuing to the present.

The December 10, 2001 Asset Purchase Agreement indicates that the petitioner/purchaser, Vertical Source Pharma, Inc., acquired the seller’s, All International Company’s, assets including:

all the right, title and interest of Seller in its business, franchise, rights, claims (including insurance claims), privileges, properties and assets owned, used or held for use by Seller of every nature and description, tangible and intangible, wherever located, and regardless of whether reflected on the books and records of the Seller, including without limitation the goodwill of the Seller, the name “All International Company” and variations thereof, all trademarks, trade names and trade secrets of Seller, prepaid insurance policies, security deposits, Sellers rights to the lease at 141 N.E. 3<sup>rd</sup> Avenue, Suite 303, Miami, Florida 33132, all as same shall exist on the date hereof, subject to such additions and dispositions as shall have occurred in the ordinary course of business since the date hereof; cash on hand and in banks in the amount of \$307,143.42; Inventory valued at \$87,537.62 as set forth on Exhibit “A” attached hereto; Accounts Receivable with an aggregate outstanding balance of \$513,769.00 as set forth on Exhibit “B” attached hereto; and Furniture and Equipment as set forth on Exhibit “C” attached hereto, the said assets are hereinafter sometimes collectively referred to as the “Purchased Assets.”

The December 10, 2001 Asset Purchase Agreement indicates that the petitioner, Vertical Source Pharma, Inc., acquired All International Company liabilities including:

Purchaser shall assume no liabilities of Seller except liabilities of the Seller in the aggregate amount of \$924,519.85, set forth on Exhibit “D” attached hereto.

Seller shall retain responsibility for any obligation or liability

- for federal, state, or local taxes based on or measured by net income, or any interest, penalties, or additions to tax with respect thereto;
- required by this Agreement to be disclosed by Seller to Purchaser and not so disclosed or which arises out of a breach of any representation and warranty made by Seller or Shareholders under this Agreement,
- for any civil or criminal penalties (including interest) imposed upon Seller on account of any fraudulent, criminal, intentional, willful, or negligent act or omission of Seller or any violation of law by Seller, or
- arising out of, based upon, or resulting from any actions, suits, claims or proceedings, whether in law or equity, pending or threatened, based upon any transactions or occurrences or acts or omissions of Seller on or prior to the Closing Date, except as expressly assumed by Purchaser pursuant to Section 1.02(a)(i).

It is noted that [REDACTED] was Vice President and a shareholder of All International Company and is now the Owner and President of [REDACTED]

The director denied the petition on December 22, 2005 based on the finding that the petitioner is not the true successor of All International Company within the meaning of the opinion in *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981) because it had not assumed all of All International Company rights, duties, obligations, and assets.

On appeal, counsel asserts that Vertical Source Pharma, Inc. is the successor-in-interest because of the following reasons:

- a) the company is engaged in the same business of the original company, All International Company;
- b) the company acquired all the rights, duties, obligations\* and assets of All International Company;
- c) the officer (Vice President) of the original company, All International Company, is now the present and current officer of the successor-in-interest or purchaser (President) of the company, Vertical Source Pharma, Inc.
- d) the successor-in-interest or purchaser company, Vertical Source Pharma, Inc., is located in the same geographical location as the original company.

- \* Denotes that Vertical Source Pharma, Inc. continues to fulfill all the regular business operations such as conducting daily business transaction, continuing providing employment for the original company's employees and the occupation of the same geographical location of the original company but under its new company name.

Counsel also claims that although Exhibit "D" only lists all the financial obligations of the old company, this is not indicative that the successor-in-interest will not be assuming all the other non-financial liabilities of All International Company which includes the continuation of employment for all the existing employees of the original employer company. Counsel states that Vertical Source Pharma, Inc. did not lay off any previous employees of All International Company nor did it intend to withdraw the sole bona fide immigrant petition application by All International Company for the alien/beneficiary. Counsel further notes that in any normal strategic business takeover or buyout environment, the buyout of any business by a successor-in-interest or purchaser of any business are not indicative that the successor-in-interest or purchaser has to assume all financial debts of the previous company.

If an entity wishes to rely on a labor certification issued to another entity it must establish that it assumed all of the rights, duties, obligations, and assets of the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). *Dial Repair Shop* states that all of the assets of the petitioning business must have been acquired by the substituted petitioner in order for that substituted petitioner to qualify as a true successor and to rely on the labor certification issued to the original petitioner. In the instant case, we are applying that abstract language to the acquisition of a corporation.

The director's decision found that if the owner of a business is corporate, then every asset, duty, and obligation of that corporation must transfer in order for the new owner of the business to rely on a labor certification awarded to the original petitioner. This office does not agree.

As counsel observes, in any normal strategic business takeover or buyout environment, the buyout of any business by a successor-in-interest or purchaser of any business is not indicative that the successor-in-interest or purchaser has to assume all financial debts of the previous company. In *Jordan v. Ravenswood Aluminum Corp.*, 455 S.E.2d 561, 563 (W. VA. 1995), the court decided that "a corporation that purchases the assets of

another corporation is not liable for the debts of the seller unless: (1) the purchaser expressly or impliedly assumes the liability, (2) the transaction was fraudulent, (3) 'some element of the transaction was not made in good faith,' (4) the purchase effected a consolidation or merger, or (5) 'the successor corporation is a mere continuation or reincarnation of its predecessor.'" It is reasonable to assume that any purchaser of All International Company would exclude the liabilities listed under section 1.2 of the Asset Purchase Agreement (specifically those for tax purposes, breach of representation and warrant, civil or criminal penalties, actions, suits, claims or proceedings, etc.). Therefore, with the purchase of all of the assets, the business liabilities, and the continuation of the immigration related liabilities, the AAO has determined that the petitioner is a successor-in-interest to All International Company.

The second issue in this proceeding is whether the petitioner has established its continuing ability to pay the proffered wage from the priority date of April 30, 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.59 per hour or \$28,267.20 annually.

The 2001 Form 1120 for All International Company reflects a taxable income before net operating loss deduction and special deductions or net income of -\$14,735. Schedule L did not list any net current assets.

The 2002 through 2004 Forms 1120 for [REDACTED] reflect taxable incomes before net operating loss deduction and special deductions or net incomes of \$48,422, \$59,414, and \$229,704, respectively. The 2002 through 2004 Forms 1120 for Vertical Source Pharma, Inc. also reflect net current assets of \$53,693, \$77,704, and \$236,866, respectively.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$28,267.20 based on the previous evidence submitted and because the \$229,559 listed on line 26, Other Deductions, of the Form 1120 for All International Company in 2001 was a discretionary deduction for taxation purposes only, and not an actual expenditure. Counsel further states that "[t]he tax returns only show the income and deductions allocated for tax purposes, but the 'Net Taxable Income' is not a figure to rely on for what a company makes, but is a tax formula for calculating the taxable income to be taxed by the IRS."

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 13, 2002, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not provided any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner for the beneficiary, for any of the pertinent years (2001 through 2004) to demonstrate that the petitioner employed the beneficiary in 2001 through 2004. Therefore, the petitioner has not established that it employed the beneficiary in 2001 or subsequently.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Chi-Feng Chang*, 719 F. Supp. at 537. *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

For a "C" corporation, CIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 16, 2005 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns demonstrate that its net incomes in 2001 (All International Company) through 2004 (.) were -\$14,735, \$48,422, \$59,414, and \$229,704, respectively. The petitioner could have paid the proffered wage of \$28,267.20 in 2002 through 2004 from its net income, but not in 2001.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the

proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 2001 through 2004 were \$0, \$53,694, \$77,270, and \$236,866, respectively. The petitioner could have paid the proffered wage of \$28,267.20 in 2002 through 2004 from its net current assets, but not in 2001.

On appeal, counsel contends that the petitioner has established its ability to pay the proffered wage of \$28,267.20 based on the evidence previously submitted and because the \$229,559 listed on line 26, Other Deductions, of the Form 1120 for All International Company in 2001 was a discretionary deduction for taxation purposes only, and not an actual expenditure. Counsel further states that "[t]he tax returns only show the income and deductions allocated for tax purposes, but the "Net Taxable Income" is not a figure to rely on for what a company makes, but is a tax formula for calculating the taxable income to be taxed by the IRS."

Counsel is mistaken. While the petitioner has shown its ability to pay the proffered wage in 2002 through 2004 ( ), it has not established that All International Company had the ability to pay the proffered wage in 2001. In addition, counsel states that the deductions on line 26 were discretionary, but provides no verifiable evidence to support his contention. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter*

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

of *Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, the petitioner has provided tax returns for 2001 through 2004, with the only one that does not establish the petitioner’s ability to pay the proffered wage of \$28,267.20 being that of All International Company. However, the 2001 tax return of All International Company shows that it possessed gross receipts of \$10,511,652, gross profit of \$640,496, compensation of officers of \$297,813, and wages paid of \$47,014. Since the beneficiary’s wages of \$28,267.20 is only .27% of All International Company’s gross receipts and only 9.5% of its compensation of officers and since, at the time of its buyout, it had been in business more than five years, it is determined that All International Company could have paid the proffered wage of \$28,267.20 in 2001. Therefore, the petitioner has overcome the director’s denial with regard to establishing its ability to pay the proffered wage from the priority date of April 30, 2001 and continuing through 2004.

Beyond the decision of the director, another issue must be determined in this proceeding. That issue is whether or not the beneficiary will be employed as a permanent, full-time employee by the petitioner of record.

In an unsigned letter on Paychex Business Solutions letterhead, dated December 6, 2005, the petitioner states:

This letter is to inform you that Vertical Source Pharma, Inc., Federal ID number [REDACTED] has entered into a leasing agreement with Paychex Business Solutions effective 12/29/2003. Employees previously employed by Vertical Source Pharma, Inc. are now employed by and reported under Paychex Business Solutions, specifically:

[REDACTED]  
Federal ID number [REDACTED]

Counsel did not submit a contract between the petitioner, Vertical Source Pharma, Inc. and Paychex Business Solutions, Paychex Business Solutions and the beneficiary, or Vertical Source Pharma, Inc. and the beneficiary.

The regulation at 20 C.F.R. § 656.3 states in pertinent part:

*Employer* means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an “authorized representative” means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

*Employment* means permanent, full-time work by an employee for an employer other than oneself. . . In the event of an audit, the employer must be prepared to document the permanent and full-time nature of the position by furnishing position descriptions and payroll records for the job opportunity involved in the Application for Permanent Employment Certification.

The regulation at 8 C.F.R. § 204.5(d) states in pertinent part:

*Priority date.* The priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an individual labor certification from the Department of Labor [DOL] shall be the date the request for certification was accepted for processing by any office within the employment service system of the DOL.

Here, the request for labor certification was accepted on April 30, 2001. The labor certification was approved by DOL on November 8, 2002.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

The issue in the present case is whether the petitioner can be considered the proper employer of the beneficiary since it appears that Paychex Business Solutions would pay the beneficiary’s salary and maintain final authority over his hiring and firing.

While it is said that at common law there are four elements which are considered upon the question whether the relationship of master and servant exists – namely, the selection and engagement of the servant, the payment of wages, the power of dismissal, and the power of control of the servant’s conduct; the really essential element of the relationship is the right to order and control another, the servant, in the performance of work by the latter, and the right to direct the manner in which the work shall be done. It is, moreover, essential that the master shall have control and direction not only of the employment to which the contract relates, but also of all of its detail and the method of performing the work. . . . In view of some courts, it is also necessary that this work be performed on the business of the master or for his benefit.

In determining whether the right of control exists, possession of either power to employ or the power to discharge is regarded as very strong evidence of the existence of the master and servant relationship, whereas the payment of wages is the least important factor.

53 Am.Jur.2d, Master and Servant, S.2 as cited in *Matter of Allan Gee, Inc.*, 17 I&N, Dec. 296, Interim Decision (BIA 1979). See also *Matter of Pozzoli*, 14 I&N Dec. 569, Interim Decision (BIA 1974).

In *Matter of Smith*, I&N Dec. 772 (Dist. Dir. 1968), a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, worker's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established when a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third part clients. The commissioner referenced the occupational shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is not demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skills for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

These precedent cases, considered together, establish that an employer that outsources its workers may qualify as those workers' employer within the meaning of 20 C.F.R. § 656.3. To do so, however, it must be the beneficiary's actual employer, retaining hiring and firing authority, responsibility for provision of compensation and benefits, and payment of employee taxes. In the instant case, the petitioner has not submitted any contracts for the parties concerned. Therefore, the AAO cannot determine if the petitioner of record will actually have control of the work of the beneficiary.

After a review of the record, it is concluded that the petitioner has not clearly established that it is the actual employer of the beneficiary.

The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of whether it is the actual employer of the beneficiary. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's December 22, 2005 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.