U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 2 4 2007

WAC 05 050 50335

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 preference visa petition was denied by the Director, Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it was offering full time permanent employment to the beneficiary and that the petitioner would employ the beneficiary after January 1997.[12] The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 August 29, 2005 denial, the single issue in this case is whether or not the petitioner is offering the beneficiary fulltime permanent employment.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on November 30, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all

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[1] This date is wrong. January 2007 is the end date noted on a document submitted to the record describing an in-house project to be worked on by the beneficiary at the petitioner's office in Fremont, California. [redacted] Human Resources Manager, who signed the project description, is located in Princeton Junction, New Jersey.

[2] The record reflects that the instant beneficiary is a substituted beneficiary for [redacted] The record also reflects that a subsequent I-140 petition was filed by the petitioner for the instant beneficiary under the visa petition classification of member of the professions holding an advanced degree or an alien of exceptional ability. This I-140 petition was approved by the Texas Service Center on June 16, 2006.

pertinent evidence in the record, including new evidence properly submitted upon appeal[3]. On appeal, counsel submits a letter dated September 9, 2005, from [redacted] the petitioner's vice president-technical. [redacted] states that the beneficiary was employed with the petitioner from 2001 to the present, and that he is offered a full time permanent position as a software engineer and a salary of $42.99 an hour.

Counsel resubmits an employment offer letter signed by the petitioner and the beneficiary dated November 23, 2004. This document is signed by [redacted], Human Resources Administrator. The letter states that the petitioner offers the beneficiary a permanent fulltime position with petitioner as a software engineer, with an hourly salary, and participation in the petitioner's benefit plan. The letter describes the beneficiary's employment as "at-will" employment. Counsel also submits a copy of the instant I-140 petition and notes that the petition indicates the beneficiary's position was a full time, permanent position. The petition also identifies the petitioner as being established in 1999, to have a gross annual income of $15.3 million dollars, and to currently have 225 employees. The record also contains numerous copies of contracts between the petitioner and other businesses that identify the petitioner's consultants who will work on the respective contracts. With regard to the beneficiary's proposed employment, the petitioner submitted a document prepared by a Human Resources Manager in Princeton Junction, New Jersey, that states the beneficiary would work on an in-house project at the petitioner's office at Fremont, California. The letter states "# of resources" is "six", and identifies the starting and ending date of the employment. Counsel in response to the director's request for further evidence, submitted numerous samples of contracts, or work orders, that identified the petitioner's consultants or employees that would work on the respective projects. Counsel also submitted a list of beneficiaries for three pending I-140 petitions, as well as two other beneficiaries, whose I-140 petitions had been approved. This list is dated August 5, 2005.

On appeal, counsel states that the petitioner already submitted a letter of employment with the petition that offered the beneficiary a permanent full-time position as a software engineer, and a document that detailed the project on which the beneficiary is working on with an expected date of completion of January 2007. Counsel states that this document also clearly states that six resources would be used, and explained that this meant six consultants were needed to work on the project. Counsel also notes that the sample contracts submitted in response to the director's request for further evidence show that the petitioner had different contracts and were not submitted to suggest that the beneficiary was working on these projects.

Based on the evidence in the record, the petitioner appears to be a consulting firm with numerous consultants that it hires out to various companies for specific projects.[4] For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment,

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

[4] The documents submitted to the record indicate that short-term contracts can be for a few months, while companies have contracted the petitioner for one-year contracts, with at least one contract length noted as "open."

> and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Additionally, 8 C.F.R. § 204.5(c) states the following: "*Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act."

In *Matter of Smith*, 12 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, workmen'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 party 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 no 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 skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has been unclear about the placement of the beneficiary. While the petitioner submitted its employment offer to the beneficiary providing at-will employment in a permanent fulltime position, the only specific document in the record as to the beneficiary's employment is the document written by the petitioner's East Coast office, located in Princeton Junction, New Jersey. The petitioner provides no explanation for why such an employment project would not be generated by the petitioner's office located in Fremont, California, or the relationship between the Princeton Junction office and the petitioner.[5] The record is also confused as to when the beneficiary began his employment with the petitioner after the 2001 priority date and the nature of that employment. The petitioner's vice president in his letter stated that the beneficiary began work with the petitioner in 2001, while the beneficiary stated on the Form ETA 750, Part B, that he began his employment with the petitioner in August 2003.[6] *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

The petitioner makes no distinction between the beneficiary's previous employment and whether the petitioner did provide the beneficiary with sufficient consulting jobs that amounted to fulltime permanent employment. The letter detailing a specific in-house project for the beneficiary for the period of January 2005 to January 2007 simply establishes that the petitioner would employ the beneficiary in a two-year project.

Thus, the letter detailing a specific in-house project for the beneficiary for limited duration is given limited weight in the petitioner's attempt to establish it is providing fulltime permanent employment to the beneficiary. Nevertheless, as counsel points out on appeal, the petitioner did submit an employment letter with its initial petition that indicated the petitioner would pay the beneficiary, and that the beneficiary was eligible for the petitioner's benefit plan, that includes medical insurance, short term/long term disability insurance, life insurance and a 401K plan. The petitioner will also pay the beneficiary for ten days of paid vacation on completion of one year of service. It is noted that in the majority of the various contracts and work orders submitted to the record, the petitioner in Fremont or the company in Princeton, New Jersey are clearly identified as providing the services of its employees/consultants. Thus, the petitioner does appear to be the actual employer of the beneficiary. What is less clear, based on the evidence in the record, is whether the petitioner as of the 2001 priority date of the Form ETA 750 could offer the beneficiary sufficient consulting positions to be considered full time permanent employment. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997). Without further clarification, the director's decision shall stand.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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[5] The employment offer letter from [redacted] dated July 2005,and submitted on appeal is written on the Princeton Junction letterhead, while the letter from the petitioner's vice president is on the Freemont office letterhead. The service contracts submitted to the record come from both the Fremont and the Princeton offices, in those documents where the party providing consulting services is identified.

[6] The petitioner submitted W-2 Forms for the beneficiary from the Fremont office that suggests with wages of $19,717, the beneficiary began working for the petitioner in late 2003. The beneficiary's W-2 form for tax year 2004 indicates the petitioner paid the beneficiary $138,501.

ORDER: The appeal is dismissed.