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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007
WAC 04 193 50527

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded for further consideration.

The petitioner is an assisted living facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that based on the record of proceeding, the beneficiary will not be employed as a permanent, full-time employee by the petitioner of record. 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 8, 2006 denial, the only issue in this case is whether or not the beneficiary will be employed as a permanent, full-time employee by the petitioner of record.

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

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.
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> *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 July 3, 2000. The labor certification was approved by DOL on June 1, 2004.

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 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 pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes counsel's brief, a copy of a Human Resource Services Agreement between the petitioner and [redacted], copies of Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary for the years 2000 through 2003, copies of Forms W-2 issued by [redacted] for the beneficiary for the years 2003 and 2004, a copy of the regulation 20 C.F.R. § 656.3, a copy of the regulation 20 C.F.R. § 656.30, and a copy of *Matter of International Contractors, Inc. and Technical Programming Services,* 1989-INA-278, (June 13, 1990), a Board of Alien Labor Certification Appeals (BALCA) case. Other relevant evidence includes a letter, dated September 19, 2005, from [redacted], Senior Account Manager at [redacted] The record does not contain any other evidence relevant to whether or not the beneficiary will be employed as a permanent, full-time employee by the petitioner of record.

The letter from [redacted] of [redacted] Leasing describes the business relationship between [redacted] Leasing and the petitioner. Ms. [redacted] states:

> [redacted] Leasing, a subsidiary of [redacted] provides our clients outsourcing solutions for all Human Resource needs. [redacted] is a recognized leader in the PEO industry (Professional Employer Organization). As such we operate as an extension of [redacted] payroll department, benefits administration, unemployment compensation, risk management, and workers' compensation administration. [redacted] Leasing becomes the employer of record and assumes most personnel-related obligations. Kelly Staff Leasing is responsible for all the payroll quarterly taxes, as we are the employer of record.
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> * * *
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> In addition, this letter will confirm that Ms. [redacted] is on payroll and is employed with [redacted].

The Human Resource Services Agreement signed and dated on January 3, 2003 between the petitioner and [redacted] states that [redacted] Leasing maintains final authority regarding administration of human resource matters, including administration of payroll, [redacted] benefits, and worker's compensation for the leased personnel. During the term of the agreement, [redacted] will timely pay the wages and related payroll taxes of the leased personnel from [redacted] Leasing's own account. Additional services to be provided by [redacted] include 1). determine with client such matters as time, place, type of work,

[1] 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).

skill sets, pay rates, and price of the services for the leased personnel, 2). determine assignments or reassignments of leased personnel, and 3). terminate or reassign leased personnel to other clients when leased personnel are determined unacceptable by client.

The Human Resource Services Agreement between the petitioner and [redacted] further states that the petitioner shall be solely responsible for that portion of the day-to-day supervision and control of the work to be performed by the leased personnel as necessary to achieve the objectives and results determined by the petitioner including attendance at work. In addition, the petitioner shall establish and maintain the general procedures to be followed by the leased personnel regarding the performance of their duties on behalf of the petitioner. Unless, [redacted] and the petitioner otherwise agree, recruiting, interviewing, job training, work evaluation, supervision and discipline of each of the leased personnel is the responsibility of the petitioner. The petitioner shall have a right to have any of the leased personnel removed from its workplace, with or without notice and with or without cause, for any reason not prohibited by law. In addition, the wages payable to any of the leased personnel shall be increased or decreased as the petitioner requires provided that the petitioner complies with all applicable federal, state, and local laws in taking such action. Time cards, bonus and/or commission payments and documentation of services performed by the leased personnel are the responsibility of the petitioner. The petitioner shall appoint an individual or individuals who will verify correctness of all leased personnel's compensation packages, salaries, bonuses, and commission compensation. The petitioner agrees to pay [redacted] fees as agreed upon by [redacted] and the petitioner for services performed by [redacted] as indicated in the attached Fee Schedule. The petitioner shall maintain, at all times, a Performance Assurance Payment with [redacted] in an amount equal to an average regular invoice and administrative charges.

No contract was provided between [redacted] and the beneficiary or between the petitioner and the beneficiary.

On appeal, counsel contends that although the petitioner outsourced its human resources, it continues to employ the same employees and retains control and supervision over the employees. Counsel asserts that the beneficiary continues to be employed on a permanent, full-time basis with the petitioner at the same location as a caregiver. As such, the petitioner has established that the beneficiary will be employed as a permanent, full-time employee by the petitioner of record. Counsel cites *Matter of International Contractors, Inc. and Technical Programming Services* in support of his contention.[2]

The issue in the present case is whether the petitioner can be considered the proper employer of the beneficiary since [redacted] pays the beneficiary's salary and maintains final authority regarding administration of human resource matters, including administration of payroll, [redacted] benefits, and worker's compensation.

> 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

[2] Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). 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).

> 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.
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> 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 ahs 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 contract between the petitioner and [redacted] does not clearly demonstrate who has primary control over the beneficiary. While the petitioner appears to be solely responsible for recruiting, interviewing, job training, work evaluation, supervision and discipline of each of the leased personnel, unless agreed upon by the petitioner and [redacted] Leasing has final authority regarding administration of human resource matters, including administration of payroll, [redacted] benefits, and worker's compensation for the leased personnel.[3,4] Although the petitioner completed and signed the relevant immigration forms, the contract between the petitioner and [redacted] indicates that [redacted] is the beneficiary's actual employer. In addition, without a copy of a contract between the beneficiary and [redacted] or the beneficiary and the petitioner, 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. If the petitioner is successful in establishing that it is the actual employer of the beneficiary, it must also establish that it has the continuing ability to pay the beneficiary the

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[redacted] Leasing's website describes a range of services including payroll administration outsourcing and Human Resources function outsourcing. The website explains staff leasing works according to the following:

- [redacted] signs a service agreement with your company
- [redacted] also signs a limited term labor agreement with each employee who will be leased to your company
- The employee works for [redacted] and is officially seconded to your company
- [redacted] pays the employee each month, on a gross salary basis, incorporating any bonuses or adjustments that you have requested
- [redacted] also pays all employment taxes, pension fund and other contributions
- [redacted] presents you with a comprehensive invoice and report detailing the leased services for a given period.

See the [redacted] website at [redacted], (accessed February 23, 2007).

[4] It is noted that [redacted] Leasing was transferred from [redacted] to [redacted] in 2006. Therefore, new contracts between [redacted] and the petitioner would need to be evaluated as well.

proffered wage from the priority date of July 3, 2000. 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 July 3, 2000. The proffered wage as stated on the Form ETA 750 is $9.49 per hour or $19,739.20 annually.

In the instant case, the petitioner has established its ability to pay the proffered wage as evidenced by the 2001 and 2002 Forms W-2, Wage and Tax Statements, issued by the petitioner for the beneficiary, in 2001 and 2002, but not in 2000 and 2003 through the present.

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 February 8, 2006 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.