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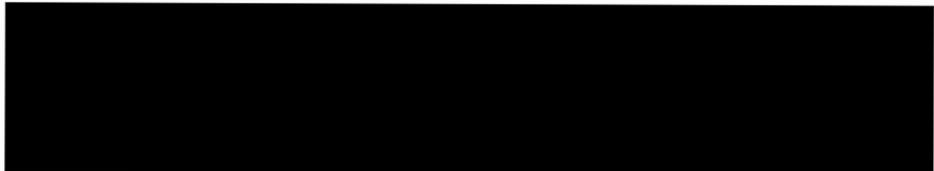


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 05 2007
WAC 05 198 51660

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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:



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 dismissed.

The petitioner is an information technology services business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA-750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's December 21, 2005 decision denying the petition, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence, that it exercised control over the beneficiary thereby qualifying as the beneficiary's employer, or that the beneficiary would be employed in a permanent, full-time position. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 the granting of 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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of 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 who are members of the professions.

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

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 either 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 petition's priority date, which is the date the Form ETA-750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 1, 2001.¹ The proffered wage as stated on the Form ETA-750 is \$58,000 annually.

¹ The instant beneficiary is being substituted for the initial recipient of the certified alien labor certification application. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA-750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service,

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a brief and additional evidence.

Relevant evidence submitted on appeal includes a copy of a subcontracting agreement, dated December 1, 2004, between the petitioner and [REDACTED], naming the beneficiary to work as a consultant for the petitioner's end-client, Wells Fargo Services & Company, from 06/02/05 – 06/30/06. Other relevant evidence in the record includes: the petitioner's job offer to the beneficiary; the beneficiary's earnings statements from the petitioner; the beneficiary's 2004 Form W-2 Wage and Tax Statement issued to the beneficiary from [REDACTED]; a 2004 W-2 and Earnings Summary issued to the beneficiary from the petitioner; Form I-797A approval notices addressed to various employers granting the beneficiary H-1B extensions; a subcontracting agreement, effective 12/01/04, between the petitioner and Compusys, and appendices, naming the beneficiary to work as a consultant for the petitioner's end-client, Wells Fargo Services & Company, from 12/01/04 – 12/31/05; the petitioner's DE-6 quarterly wage reports for the second and third quarters of 2005; the beneficiary's earnings statements issued by the petitioner for the period from 05/31/05 – 09/30/05; the beneficiary's federal income tax returns for 2002, 2003, and 2004; compiled financial statements from the petitioner's accountant; and the petitioner's federal income tax returns for 2001, 2002, 2003, and 2004.

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).

On appeal, counsel states, in part, that the proffered position and the financial commitment to pay the proffered wage are permanent in nature, and that the beneficiary is working on a long-term project at the petitioner's end-client, Wells Fargo, whose contracts are renewable on an annual basis. Counsel states further that the petitioner has clearly demonstrated its ability to pay the proffered wage, as demonstrated by its net available funds "calculated through a combination of its income reported on federal tax returns, its available lines of credit, its bank balances and its statement of assets . . ."

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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

to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 June 28, 2005, the beneficiary claimed to have worked for the petitioner beginning in November 2004 and continuing through the date of the ETA-750B.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA-750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner uses the following four addresses to file I-140 and I-129 petitions: [REDACTED] and [REDACTED].

[REDACTED] Also shown is that the petitioner has filed a total of 259 I-140 immigrant petitions since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004, in addition to having filed 2,537 I-129 nonimmigrant petitions since 1995. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. It is noted, however, that the record does not contain a list of the proffered wage commitments to the beneficiaries of the petitioner's other immigrant and nonimmigrant petitions.

It is also noted that even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA-750 labor certification application by filing a new I-140 petition, supported by a new ETA-750B for the beneficiary. The ETA-750s underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from [REDACTED], Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure*, vol. 4, § 43.04 [REDACTED] 2004)(available at "[REDACTED]". Therefore, the certified ETA-750s underlying any withdrawn petitions retain potential relevance to the petitioner's total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA-750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for the same beneficiary, or for a substituted beneficiary.

The instant I-140 petition states that the petitioner was established in 1993 and currently has "234+" employees. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation provides further: "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 establish the prospective employer's ability to pay the proffered wage." The language "may accept" in the above regulation indicates that CIS is not required to accept such a statement, but rather may exercise its discretion not to accept such a statement. *See* 8 C.F.R. § 204.5(g)(2)

The record contains a copy of a letter, dated June 28, 2005, from the petitioner's president, who states, in part, as follows:

██████████ employs well over the threshold of 100 employees; and

██████████'s annual revenues are approx. in the range of \$15 million to \$20 million over the years 2001-2004.

Please see attached:

Petitioner's Federal Tax Return Copies for 2001, 2002, 2003 . . . and 2004 . . .

This clearly evidences our ability to pay [the beneficiary] the aforementioned salary of \$58,000 per year . . .

Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the June 28, 2005 statement from the petitioner's president. As discussed above, CIS electronic records show that the petitioner has filed a total of 259 I-140 immigrant petitions since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004. In addition, the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all the individuals it is seeking to employ. Information on the Form I-140 reflects that the petitioner has "234+" employees. Given that the number of immigrant and nonimmigrant petitions reflects an increase of more than one thousand percent of the petitioner's workforce, we cannot rely on a letter from the petitioner's president referencing the ability to pay the beneficiary.

As we decline to rely on the letter from the petitioner's president, we will examine the other financial documentation submitted. These documents do not clearly support the president's contention. It is further noted that the June 28, 2005 letter does not state that the petitioner's president is the petitioner's financial officer, as required by the regulation at 8 C.F.R. § 204.5(g)(2).

The record contains a copy of the beneficiary's 2004 Form W-2 Wage and Tax Statement. The beneficiary's W-2 form for 2004 shows compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2004	\$4,200.00	\$58,000.00	\$53,800.00

The above information is insufficient to establish the petitioner's ability to pay the beneficiary's proffered wage in 2004.

As another 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 for a given year, 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 (9th 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now 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 the Service 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 v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, 2003, and 2004. The record before the director closed on October 21, 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 return for 2004 is the most recent return provided by the petitioner.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. An S corporation's total income from its various sources are reported on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. See Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated as an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Line 23 of the Schedule K, for income.

In the instant petition, the petitioner's tax returns indicate income from activities other than from a trade or business or additional relevant deductions. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income or all of its relevant deductions. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income.

In the instant case, the petitioner's tax returns show the following amounts for income on line 23, Schedule K for 2001, 2002, and 2003, and on line 17e, Schedule K for 2004, as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage of the beneficiary only	Surplus or (deficit)
2001	\$194,258.00	0	\$136,258.00
2002	\$30,307.00	\$27,693.00	-\$27,693.00
2003	\$124,604.00	0	\$66,604.00
2004	\$89,909.00	0	\$36,109.00*

* Crediting the petitioner with the compensation actually paid to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the beneficiary's proffered wage in 2002. Further, when considering the record as a whole, the 259 I-140 immigrant petitions filed by the petitioner since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004, and the 2,537 I-129 nonimmigrant petitions filed by the petitioner since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.²

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage of the beneficiary only	Surplus or (deficit)
2002	-\$238,247.00	\$296,247.00	-\$296,247.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002. Again, when considering the record as a whole, the 259 I-140 immigrant petitions filed by the petitioner since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004, and the 2,537 I-129 nonimmigrant petitions filed by the petitioner since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.³

² If this office presumed the wages in the other immigrant petitions only to be similar to the proffered wage in the instant case, the petitioner would have total wage obligations of approximately \$15 million (259 x 58K), which is much more than the petitioner's net income and net current assets.

³ Same as above.

The record also contains a copy of a letter, dated May 6, 2005, from the petitioner's accountant, who states, in part, as follows:

Because [the petitioner] has used the Cash Basis as a method of accounting, this is the reason that the accounts receivable of the company at the end of the Tax Year are not considered in the Tax return. For the purposes of determining the employer's ability to pay the wages, this can be misleading and hence we are providing a detailed explanation and a comparison of the finances of the company when prepared using Accrual Basis.

The ability of the company to pay in future can be best ascertained by *Accrual Basis* because it is the method of recording the earnings and expenses as they occur or are incurred without regard to actual date of collection or payment.

The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to the IRS.

This office, however, is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting, then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business, prepared according to generally accepted accounting principles.

For an S corporation, however, there are other considerations. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [redacted] held 100 percent of the company's stock in 2001, 2002, 2003, and 2004. According to Chander Shaikher's IRS Form 1120S Compensation of Officers, reported on Line 7 of page 1, he elected to pay himself \$199,477.00 in 2001, \$168,259.00 in 2002, \$150,000.00 in 2003, and \$150,000.00 in 2004.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17

I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, CIS would not be examining the personal assets of the petitioner's owner, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of his corporation. It is noted that the officer's compensation for 2002 is \$140,566.00 greater than the proffered wage minus the ordinary income. The record of proceeding, however, does not contain evidence that would demonstrate that the sole officer could or would forego approximately 16 percent of his officer's compensation in 2002 that could be redistributed towards having sufficient funds to pay the proffered wage in that year. Further, as discussed above, when considering the record as a whole, the 2,537 I-129 nonimmigrant petitions and the 259 I-140 immigrant petitions filed by the petitioner since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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, 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.

With respect to the permanent nature of the proffered position, counsel states, in part, the following in his brief:

This Counsel had provided substantial evidence including a complete contract between [the petitioner] and its client Compusys (a first tier vendor to Wells Fargo Bank – the end client where the project exists) and a copy of the contract between Compusys and Wells Fargo.

Note that Counsel has provided now, a currently valid copy of the currently valid and existing and on-going contractual relationship between Compusys (a client company of the Petitioner . . . and Wells Fargo (the end client) where in the project on which [the beneficiary] is working at the end client Wells Fargo (this is one of the various perpetual annual contract extensions on this long term project on which [the beneficiary] is continuing to work as a part of his permanent employment offer at [the petitioner]), the contract being for the period of 6/2/2005 and valid until 6/30/2006 (and this being renewable on an annual basis).

[T]he position offered is a permanent position and not a temporary position, as it is the nature of the Petitioner's business to offer permanent work to its I-140 beneficiaries regardless of the duration of the various consulting projects on which these beneficiaries work at client sites, the location and duration of which can change based on changing business demands and trends. But the job offer and the financial commitment to pay proffered wages, remains permanent in nature.

Fixed-term contracts were considered in *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). In *Smith*, 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 the petitioner was the beneficiary’s actual employer because it was doing the following: 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. *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 with 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 occupation 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.

Noted in the record are the petitioner’s August 18, 2005 job offer to the beneficiary, the beneficiary’s work orders, and the contracts indicating that the petitioner provides employment benefits, has the authority to hire and fire the beneficiary, and controls the beneficiary’s full-time temporary work assignments. Therefore, the petitioner has established that it is the beneficiary’s actual employer. The petitioner, however, has not provided evidence that it has met its past contractual obligations to place its information technology employees at client companies or that it has a recurring demand for temporary assigned workers. As such, the petitioner has not established that the position offered is a permanent full-time position.

The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.