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U.S. Citizenship and Immigration Services

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PUBLIC COPY

FILE: EAC 04 225 51647 Office: VERMONT SERVICE CENTER Date: MAR 30 2007

IN RE: Petitioner:
Beneficiary:

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: SELF-REPRESENTED

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a health care staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 750, Application for Alien Employment Certification accompanied the petition. The Acting 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 denied the petition accordingly.

On appeal, the petitioner submits a brief and additional evidence.

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.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the completed, signed petition, including all initial evidence and the correct fee, was filed with CIS. *See* 8 C.F.R. § 204.5(d). Here, the petition was filed with CIS on July 29, 2004. The proffered wage as stated on the Form ETA 750 is $42,000 per year.

On the petition, the petitioner stated that it was established during 2002 and that it employs seven workers. The petition states that the petitioner's gross annual income is $500,000. In the space reserved on the petition for the petitioner's net annual income the petitioner inserted "N/A." On the Form ETA 750, Part B, the petitioner did not indicate that it had employed the beneficiary. The petition indicates that the petitioner will employ the beneficiary at the petitioner's offices at [redacted] Jersey. The Form ETA 750 indicates that the petitioner will employ the beneficiary in the "New Jersey Area."

In support of the petition, the petitioner submitted the 2002[1] Form 1120S, U.S. Income Tax Return for an S Corporation, of Logistic Solutions Incorporated (LSI). That return shows that LSI declared a loss of $47,210 as its ordinary income during that year. The corresponding Schedule L shows that at the end of that year LSI had $5,155,847 in current assets and $3,485,525 in current liabilities, which yields net current assets of $1,670,322.

The petitioner also submitted a letter, dated July 13, 2004, on the petitioner's letterhead. That letter states that the petitioner has three employees[2] and an estimated gross annual income of $500,000 for 2004. That letter refers to the petitioner variously as The Medical Staffing Incorporated and as The Medical Staffing Healthcare Division of LSI. This office notes that the petitioner is The Medical Staffing LLC.

The Acting Director denied the petition on October 26, 2004. The Acting Director noted that the net current assets of LSI were sufficient to pay 39 times the wage proffered in this case. The Acting Director also noted, however, that the petitioner had filed more than 210 immigrant visa petitions since February 2003, of which more than 39 were approved. The decision refers to a May 4, 2004 memorandum from the Associate Director of Operations of CIS outlining the circumstances under which a petition should be approved, the circumstances pursuant to which a petition should be denied, and under what circumstances the service center should issue a request for evidence. The Acting Director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner provides, (1) LSI's tax returns for the years from 1999 to 2003, (2) LSI's compiled financial statements for various periods,[3] (3) various documents pertinent to a line of credit extended to LSI by a commercial lender, (4) a letter, dated December 10, 2003, from an accountant, (5) copies of the petitioner's formation documents, (6) a copy of the petitioner's lease, (7) the undated personal financial statement of [redacted] (8) monthly bank statements pertinent to accounts of LSI and the petitioner, (9) copies of various contracts that are described further below, (10) a letter, dated August 20, 2004, from Philadelphia Bangalore Consulting, Incorporated (PBC), (11) an undated letter from PBC addressed To Whom It May Concern, (12) two letters of recommendation from the petitioner's clients, (13) Web content pertinent to some of the petitioner's clients indicating that they are attempting to hire additional nurses, (14) certificates showing that the petitioner is a member of the New Jersey Hospital Association, and (15) web content from the site of the New Jersey Hospital Association.

The petitioner argues that if the record did not demonstrate that the petitioner was able to pay the proffered wage then the service center should have requested additional evidence. The petitioner states that the contracts, "and the revenue they guarantee for the petitioner, will ensure that it has sufficient income to pay

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[1] Because the priority date of the petition is July 29, 2004 financial information pertinent to prior years would ordinarily not be considered directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Because no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2004 were available when the petition was submitted, however, this office will review data from previous years.

[2] On the Form I-140, filed 16 days after the date of this letter, the petitioner reported seven employees.

[3] Those consolidated financial statements include segregated balance sheets and income statements for the petitioner.

the beneficiary's [sic] their salaries." The petitioner also states that LSI wholly owns the petitioner, and that during 2003 LSI had gross revenue of $17,759,443 and a salary and wage expense of $10,685.541.

The petitioner notes that the May 4, 2004 memorandum referenced in the decision of denial states, "CIS adjudicators should make a positive ability to pay determination [if] the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage." The petitioner asserts that, therefore, the petition in the instant case should be approved.

In the alternative the petitioner asserts that, if the initial evidence was insufficient to demonstrate the petitioner's ability to pay the proffered wage, then the initial evidence was incomplete and a request for evidence should have been issued.

The petitioner further argues that LSI's gross revenues and its annual salary and wage expense show that the service center should have exercised favorable discretion and found that the magnitude of the petitioner's operations shows the ability to pay the proffered wage.

The additional tax returns submitted show financial data of LSI. The compiled financial statements provided show financial data for LSI and its affiliates. Only the compiled balance sheets submitted show segregated financial data for the petitioner, The Medical Staffing LLC. No copies of annual reports, federal tax returns, or audited financial statements for the petitioner are in the record.

The December 10, 2003 accountant's letter states that the petitioner is a single member limited liability company owned by LSI. That letter continues that for tax purposes the petitioner is a nonentity whose income is reported on the corporate income tax return of LSI.

The personal financial statement of [redacted] indicates that it was prepared for the commercial lender who issued LSI a line of credit and states that, among their other assets, they own LSI.

One of the contracts provided is an agreement by a subsidiary of the New Jersey Hospital Association to act as a liaison between healthcare organizations and the petitioner. The relevance of that document to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is unclear. That document will not be discussed further.

Four of the contracts provided are between PBC and Fresenius Medical Care, Park Pleasant Nursing Home, St. Mary Medical Center, and Nazereth Hospital. No evidence in the record suggests that any of the parties to those contracts are related to the petitioner. The relevancy of those contracts to any issue before this office is unclear and they will not be further addressed.

Another contract is between the petitioner and Bergen Medical Center (BMC) of Paramus, New Jersey. That contract indicates that the petitioner will refer nurses or other health care professionals to BMC and that BMC will either make them employees; utilize their services as contract workers and pay the petitioner for their services; or utilize them as contract workers for a trial period and then employ them. That contract does not stipulate any number of nurses that BMC is obliged to employ pursuant to that agreement. The contract specifies that it may be terminated with 30 days notice.

The third contract is between the petitioner and PBC. Pursuant to the terms of that agreement PBC will refer registered nurses or other healthcare professionals to the petitioner for placement and receive one-half of the gross margin paid to the petitioner for that placement. The relevance of that document to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is unclear.

Other contracts are between the petitioner and Countryside Care Center of Delhi, New York; Hamilton Park Health Care Center, Ltd. of Piscataway, New Jersey; Excellence Rehab Physical Therapy, PC, of Bronx, New York; Bartnet Hospital of Patterson, New Jersey; Premier Therapy Services, Incorporated, of New Hope, Pennsylvania; United Methodist Homes of Endwell, New York; VTA Management Services of Brooklyn, New York; Health Care Services of NY, NJ, LLC; and Kensington Hospital of Philadelphia, Pennsylvania. Pursuant to those agreements the clients would pay set hourly fees to the petitioner for nurses placed with them,[4] although the agreements do not specify any minimum number of nurses they will employ pursuant to that arrangement. Each contract specifies that it may be terminated with 30 days notice.

Another contract is between the petitioner and Rehab Resources of Piscataway New Jersey. That contract calls for the petitioner to provide an unspecified number of nurses to Rehab Resources, but does not specify whether those nurses would become employees of the petitioner or of Rehab Resources.

One of the contracts is between the petitioner and [redacted]. It licenses the petitioner to use the business name [redacted]' in India and other countries that might be subsequently designated and to sublicense other companies to use that business name. Another four contracts in the record are for sublicensure by the petitioner of the business name [redacted]to companies operating in India and Bangladesh. The petitioner also provided documents showing tha[redacted]ffers preparatory classes for nursing licensure tests. The relevance of those documents to the petitioner's continuing ability to pay the proffered wage beginning on the priority date is unknown and those documents will not be considered further.

The August 20, 2004 letter from PBC is addressed to the petitioner and indicates that PBC then had 25 nursing positions available at four Pennsylvania health care facilities and would refer any registered nurses the petitioner had available to those positions. The undated letter from PBC also indicates that it then had contracts to place 25 nurses at the four Pennsylvania medical facilities and would be happy to place nurses "from the inventory of [the petitioner]" in those positions.[5]

The May 4, 2004 memorandum relied upon by the petitioner does not support a finding that the petition should have been approved. The memorandum does state that the petition should be approved if the petitioner's net current assets exceed the proffered wage.[6] That memorandum did not consider the circumstances of the instant case, in which the petitioner has filed multiple petitions. The petitioner must

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[4] In some cases the client would not be the end user of the nurses' services, but would place them with an end-user.

[5] This letter and the previously described contract between the petitioner and PBC show that the petitioner and PBC utilize the same pool of nurses, as needed, rather than that PBC can be counted upon to employ any particular number of the petitioner's nurses.

[6] As is discussed further below, the net current assets shown on the tax returns submitted are not necessarily those of the petitioner.

show the ability to pay the wages proffered to each of the beneficiaries of pending petitions, not merely the wage of the instant beneficiary.

Citing that same memorandum the petitioner urges that a request for evidence should have been issued in the event that the evidence initially submitted was insufficient to justify approval. The memorandum does indicate that a request for evidence should be issued if the initial evidence is incomplete. That the evidence is insufficient to justify approval, however, does not necessarily indicate that it is incomplete. In any event, the failure of the service center to issue a request for evidence when appropriate would not require remand. This office will consider all of the initial evidence and all of the evidence submitted on appeal. The evidence submitted on appeal is presumably the same evidence the petitioner would have submitted in response to a request for evidence. Considering that evidence will cure any arguable error in failing to issue a request for evidence.

Finally, the petitioner argues, citing LSI's revenue and expenses, that the magnitude of the petitioner's operations is such that the service center should have found that the petitioner has the ability to pay the proffered wage, notwithstanding that the returns may not show that ability.

If the evidence demonstrated that the petitioner, itself, was a large operation, with large revenues and a large number of employees, then this office might find that it had the ability to pay the proffered wage of a single new employee, or even several new employees. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In the instant case, however, the petitioner has not demonstrated that the petitioner itself has large revenues. Further, the petitioner has petitioned for more than 100 new workers. This office finds that the evidence in the instant case does not demonstrate that the petition should be approved based on the magnitude of the petitioner's operations.

The petitioner's credit line is of no relevance. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The petitioner can temporarily use the credit line in the event of an interruption in payments from its clients, but that does not obviate the petitioner's obligation to demonstrate the ability to pay the proffered wage itself on a permanent basis. A line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. The credit available to the petitioner is not, therefore, part of the calculation of the funds available to pay the proffered wage during the course of, for instance, a calendar year.

The bank statements submitted are similarly of no relevance. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an

account on a given date, and cannot show the sustainable ability to pay a proffered wage.[7] Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

The unaudited financial statements submitted cannot be used to demonstrate the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The financial statements submitted were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner cites various financial statistics from the tax return of LSI and asserts that they show the petitioner's ability to pay the proffered wage. In the decision of denial the Acting Director appears to have considered those figures to be relevant to the petitioner's ability to pay the proffered wage. This office disagrees.

The petitioner is a limited liability company (LLC). An LLC is taxed as a partnership and generally reports income and expenses on a Form 1065, U.S. Return of Partnership Income. In this case the petitioner reports its income and expenses unsegregated from its owner's income and expenses on its owner's consolidated corporate return. The petitioner's accountant states that the petitioner is therefore a "nonentity." As an LLC, however, the petitioner is a legal entity separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958).

Further still, the General Provisions of the petitioner's Limited Liability Operating Agreement states, at GP4.3(a) that " . . . the Members shall not [generally] be personally liable to any third party for any debt, obligation or liability of the Company." The sole member of the petitioner is LSI. Thus, not only is LSI protected from liability for the petitioner's debts, obligations, and liabilities by operation of law, but it also made clear in drafting the operating agreement that it fully intended to be insulated from them.

The debts and obligations of the petitioner are not the debts and obligations of the owners or anyone else,[8] notwithstanding that the petitioner reports its income and expenses on its owner's consolidated tax return. Without additional evidence and authority in support of the accountant's assertion that the petitioner is not a separate entity, this office will treat LSI and the petitioner as separate entities.

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[7] A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

[8] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return or its audited financial statements, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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. Texas 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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The proffered wage is $42,000 per year. The priority date is July 29, 2004.

In the instant case the petitioner provided no copies of annual reports, federal tax returns, or audited financial statements of its own. The petitioner urges, however, that the contracts provided "and the revenue they guarantee for the petitioner, will ensure that it has sufficient income to pay the beneficiary's [sic] their salaries."

The contracts provided, however, do not demonstrate that any of the companies with whom the petitioner contracts are obliged to employ any of the petitioner's nurses. Further, they may unilaterally elect to cancel their contracts with the petitioner with 30 days notice. This office finds that the contracts provided do not, contrary to the petitioner's assertion, guarantee it any revenue at all.

The petitioner provided no copies of annual reports, federal tax returns, audited financial statements, or any other reliable evidence of its ability to pay additional wages. Therefore the petitioner has failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and the petition was correctly denied on that basis.

The record in this matter raises additional issues that were not addressed in the decision of denial.

The regulations at 20 C.F.R. §§ 656.22(b)(2) and 656.20(g)(3) indicate that notice of the job offered must be posted at the location of intended employment unless the position is represented by collective bargaining. The record in this case contains no indication that collective bargaining represents the petitioner's employees.

The notice of the proffered position states that it was posted from June 14, 2004 to July 2, 2004, but does not state where it was posted.

Further, the Form ETA 750 in this matter states that the beneficiary would be employed in the "New Jersey Area" and the Form I-140 states that the beneficiary would be employed at the petitioner's offices at [redacted] The balance of the record indicates, however, that the location at which the beneficiary would be employed, and even the state in which the beneficiary would be employed, has not yet been determined.[9]

The petitioner is obliged to demonstrate that it posted the notice of the proffered position in accordance with the regulations and that the Form ETA 750, if approved, would be valid for employment of the alien at the site of her intended employment.

Section 122(b) of IMMACT 90 states, in pertinent part,

> The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that:
>
> (1) no certification may be made unless the applicant for certification has, ***at the time of filing the application, provided notice of the filing*** (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations.

[Emphasis added.]

Because those issues formed no part of the basis of the decision of denial, this office declines to base this decision, even in part, on those grounds. If the petitioner seeks to overcome this decision on motion, however, it should include a discussion of those issues.

That the location at which the petitioner would employ the beneficiary is unknown complicates the determination of whether the petitioner proposes to employ her at the predominant wage for nurses in the area of intended employment as required by 20 C.F.R. §656.40. This, again, raises the question of whether the labor certification, if approved, would be valid at the location at which the petitioner would subsequently employ the beneficiary. Again, this office declines to base this decision, in whole or in part, on this ground. If the petitioner seeks to overcome this decision on motion, however, it should include a discussion of this issue.

Further still, some of the contracts between the petitioner and end-users indicate that the end-users may themselves hire nurses referred by the petitioner and pay a referral fee. The regulation at 20 C.F.R. § 656.3 states:

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[9] The evidence does not indicate that any nurses work at the petitioner's offices. Further, only two of the petitioner's contracts are with health care providers in Piscataway and not all of the petitioner's contracts are with health care providers in New Jersey.

> *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.

Petitions for alien workers to be contracted to end-users 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 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.

These precedent cases, considered together, establish that an agency that refers 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, rather than referring potential employees to other employers for a fee. Some of the contracts in the instant case indicate that workers referred pursuant to those contracts would continue on the petitioner's payroll. Other contracts make equally clear that workers referred pursuant to those contracts would become employees of the end-user, not the petitioner. Workers whom the petitioner anticipates referring, rather than employing, are not eligible for the instant visa category.

Further, the record does not make clear whether the petitioner proposes to pay the beneficiary full-time regardless of whether it is able to utilize the beneficiary's services full-time, or anticipates paying only for those hours during which it is able to place the beneficiary.

The petitioner is not permitted, under the instant visa category, to maintain a pool of workers whose pay is conditional upon their placement with a health care provider. By filing a petition pursuant to the instant visa category the petitioner is stating that it will employ the beneficiary full-time, and the petitioner must guarantee the beneficiary full-time pay even if that full-time employment is unavailable.

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

ORDER: The appeal is dismissed.