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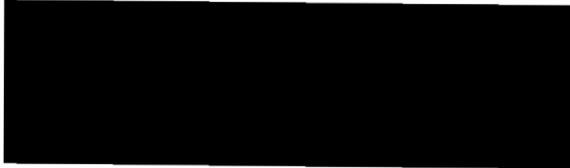
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 15 2007
WAC 06 050 50424

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

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

ON BEHALF OF PETITIONER: 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.

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a medical staffing service. It seeks to employ the beneficiary permanently in the United States as a registered nurse. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification accompanied the petition. The director determined that the record showed the petitioner did not intend to employ the beneficiary permanently and on a full-time basis and that the petition may not be approved pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)

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

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

The Form I-140 and the Form ETA 9089 both state that the petitioner would employ the beneficiary at the Chapman Medical Center, 2601 East Chapman Avenue, in Orange, California.

The record contains an employment contract between the petitioner and the beneficiary. That contract specifies that the petitioner is the beneficiary's employer and will pay her \$26.87 per hour and issue her a paycheck weekly. The contract details the beneficiary's entitlement to paid vacation time, sick leave, family leave, and participation in medical and dental health insurance and a 401K Investment and Savings Program.

The record also contains an Agreement for Supplemental Staffing Agencies executed by the petitioner's CEO on June 9, 2005 and by the CEO of Integrated Healthcare Holdings, Incorporated. (IHHI) That agreement states that, "Upon request by [hospitals owned by IHHI], [the petitioner] shall use its best efforts to assign temporary, supplemental personnel . . . [to IHHI's hospitals]."

Based upon that clause the director found that the petitioner is not offering the beneficiary permanent employment as required by section 203(b)(3)(A)(i) of the Act, and denied the petition.

On appeal counsel noted that IHHI operates the Chapman Medical Center, where the beneficiary would be employed. Counsel asserted, however, that the petitioner, and not IHHI, will be the beneficiary's employer, is offering her full-time employment and benefits, and will be responsible for paying her wages. That the beneficiary's assignment to IHHI is temporary, counsel implies, does not alter the fact that the position the petitioner is offering to the beneficiary is permanent.

This office observes that only the potential employer may file a Form I-140 visa petition for an alien worker. If IHHI, rather than the petitioner, were the beneficiary's intended employer, then the petition would necessarily be denied.

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.

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 since the petitioner was providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance, it was the actual employer of the beneficiary. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

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

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in

addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

The petitioner has established that it is the beneficiary's actual employer. Its employment agreement with the beneficiary unequivocally states that it is the beneficiary's employer. The petitioner provides employment benefits, has the authority to hire and fire the beneficiary, and at all times controls the beneficiary's full-time temporary work assignments. The petitioner indicated on Form I-140 that the position is a full-time, permanent position for a registered nurse. Thus, the petitioner has established that it is the actual employer for the beneficiary.

The nature of the petitioner's business is to provide registered nurses, and possibly other workers, to other companies on a contract basis. Such placements are typically, perhaps even necessarily, terminable at will by the business at which the contract workers actually perform their jobs and are, in that sense, temporary, as-needed, positions. CIS routinely approves petitions filed by companies operating the same type of business under the same circumstances. The petitioner, Westways Staffing Services itself, is offering the beneficiary full-time permanent employment. If CIS were to demand that the initial placement with an end user also be permanent, then staffing agencies would be unlikely to obtain approval for any petitions.

This office finds that the proffered position is not temporary within the meaning of section 203(b)(3)(A)(i) of the Act. The petitioner has overcome the sole basis for the decision of denial, and the record does not suggest any other issues that preclude approval of the instant petition. The appeal will be sustained. The petition will be approved.

This office notes, however, that the nature of the petitioner's business does raise an issue. As was noted above, staffing services typically provide contract workers to other companies on an as-needed basis. The record does not make clear whether the petitioner proposes to pay the beneficiary for full-time employment 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 obtain alien workers so that it may maintain a pool of workers whose pay is conditional upon their placement with an end-user. 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 a full-time wage and pay it even if full-time employment is unavailable. As the record does not indicate that the petitioner contemplates any other arrangement, however, this is not a basis for denying the instant petition.

The burden of proof in these proceedings rests solely on the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.