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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
Washington, DC 20529-2090



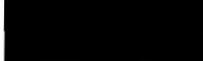
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 03 2009

WAC 04 209 50613

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the Immigrant Petition for Alien Worker (I-140). The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director issued a new decision and denied the petition again and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner, [REDACTED] operates a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.

The director determined that the petitioner had not established that it was the actual employer of the beneficiary or that it demonstrated its intent to directly employ the beneficiary on a full-time, permanent basis. The director denied the petition on November 17, 2007.

The AAO remanded the case back to the director to obtain additional evidence relating to the petitioner's continuing ability to pay the proffered wage to the beneficiary, as well as the wages of all sponsored beneficiaries. The AAO also remanded the case in order for the director to obtain additional information related to the relationship of the petitioner and [REDACTED] with whom the petitioner had contracted certain services, so as to determine who would be considered as the beneficiary's actual employer.

On remand, the director issued a request for evidence, dated December 7, 2006, to the petitioner. It requested evidence of its ability to pay the beneficiary's proffered wage from March 26, 2001 to the present, as well as to submit the petitioner's 2004 and 2005 federal tax returns; evidence that the petitioner could pay the proffered wage(s) for the 50 sponsored individuals that the petitioner had filed for since 2001; to submit evidence of the employment status of all beneficiaries from their priority date to the present. The director also requested copies of the beneficiary's Wage and Tax Statements (W-2s) for 2004 and 2005; the beneficiary's federal tax returns for the years 2001 through 2005; all records of the beneficiary's employment from the priority date to the present; copies of the petitioner's state quarterly wage reports; and to submit the employment contract between the petitioner and the beneficiary; any employment agreements between the petitioner and [REDACTED] from 2001 to the present; and to provide contracts with [REDACTED] the outline the business relationship between [REDACTED] and [REDACTED]. Based upon the response provided by the petitioner, the director denied the petition on July 25, 2008 and certified it to this office for review

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de*

*novus* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).<sup>1</sup>

Section 203(b)(3)(A)(iii) of 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.

It is noted that only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). *See* 8 C.F.R. § 204.5(c).

The regulation at 20 C.F.R. § 656.3 states:

*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.

*Employment* means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

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 either 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 [United States Citizenship and Immigration Services (USCIS)].

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<sup>1</sup> 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.

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on March 26, 2001. The proffered wage as stated on Part A of the ETA 750 is \$1,625.87 per month, which amounts to \$19,510.44 per year.

On Part B of the ETA 750, signed by the beneficiary on February 14, 2001, the beneficiary does not claim to have worked for the petitioner as of the date of signing. A letter, dated January 9, 2006, from [REDACTED] the petitioner's administrator, states that the beneficiary began employment with the petitioner on November 22, 2004. Accompanying pay stubs, dated from December 6, 2004 to January 5, 2006, indicate that they were generated by [REDACTED] and written on the Union Bank of California, in San Francisco, California, by [REDACTED]

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on July 20, 2004, the petitioner states that it was established in 1984, employs 136 workers and has a gross annual income of 6.8 million dollars.

In his initial denial, the director referred to a letter, dated January 19, 2006, from [REDACTED] which stated that the petitioner had outsourced its payroll services and insurance compliance to [REDACTED]

This letter referred to another letter, dated January 5, 2006, from [REDACTED] the human resources manager of [REDACTED]

[REDACTED] letter states that [REDACTED] is a federally recognized tribal enterprise that provides outsourced employment services to employers, including payroll services, workers' compensation coverage, loss control and other functions. [REDACTED] claimed that [REDACTED] pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. [REDACTED] further stated that the petitioner's payroll taxes are withheld and paid under [REDACTED] Federal Employer Tax ID number, thus relieving the petitioner of that task and liability.<sup>2</sup>

In his initial decision, the director also referred to a contract between the petitioner and [REDACTED] that established that the actual employer in this case was [REDACTED] not the petitioner, as [REDACTED] has had the ability to hire and to control the beneficiary's employment. The director indicated that the contract between [REDACTED] and [REDACTED] reflects that [REDACTED] would be considered the "legal employer" of the beneficiary and that the hiring and firing of the beneficiary would be the responsibility of [REDACTED]. Therefore, the director concluded that [REDACTED] would be the beneficiary's actual employer, rather than the petitioner.

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<sup>2</sup> According to its website, [REDACTED] was established during April 2003. *See* [REDACTED] (accessed April 2, 2007.)

On appeal, counsel asserted that the petitioner has been the underlying bona fide employer with the ability to hire and fire and to discipline employees, which would include the beneficiary. Counsel maintained that the petitioner has the right to control the details of the work of its employees, rather than [REDACTED]. Counsel also asserted that the issue is moot because the contract between the petitioner and [REDACTED] was terminated. In support of these assertions, counsel submitted a letter signed by [REDACTED], dated May 1, 2006. The letter indicates that the petitioner is giving a 30-day notice of termination of the staffing contract with [REDACTED]. Also submitted was an employment agreement, dated May 2006, (no day designated) which is more than five years after the priority date, between the petitioner and the beneficiary whereby the beneficiary agreed to pay a penalty provision of \$10,000 in case of breach and pretermination of his employment without the petitioner's consent.<sup>3</sup> Also contained in the record is a declaration by [REDACTED], dated May 25, 2006. [REDACTED] states that the contract between petitioner and [REDACTED] has been terminated.<sup>4</sup> She further claims that [REDACTED] had merely acted as the petitioner's alter-ego, following the petitioner's instructions. She states that the petitioner selected and hired the prospective workers and that [REDACTED] was just an agent with no power to supervise and control employees.

On appeal, the AAO found that a remand was necessary in order to determine whether the petitioner or [REDACTED] could be considered the beneficiary's intended actual employer because the contract between these entities, referred to by the director was not contained in the record.

The AAO remanded the case in order for the director to obtain a copy of the actual contract between [REDACTED] and [REDACTED], as well as obtain additional evidence of the petitioner's ability to pay all of its sponsored beneficiaries.

The AAO also noted that while the letter from [REDACTED] referred to the business arrangement between [REDACTED] and the petitioner, her letter is not a contract and would be given only limited evidentiary weight. Similarly, [REDACTED] declaration offered on appeal is not sufficient for purposes of meeting the burden of proof in demonstrating the specific terms of a written contract that the parties were operating under during the relevant period. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO further noted that its review of the petitioner's federal tax returns indicated that it had sufficient net income of \$891,017 in 2001; \$658,814 in 2002; and \$748,205 for 2003 to pay the

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<sup>3</sup>It is noted that this agreement, dated May 6, 2006, was required to be included in the labor certification or in its attachment by regulation. See 8 C.F.R. § 656.21. The priority date established by the Form ETA 750 as March 26, 2001 shows that it was not part of the labor certification proceedings.

<sup>4</sup> A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

proffered wage of the beneficiary, but that such a determination must be predicated on a conclusion that the petitioner would be considered as the actual intended U.S. employer of the beneficiary. Additionally, before the petitioner's ability to pay the proffered wage could be determined, the petitioner must establish whether it had been able to pay the combined proffered wages of all beneficiaries of the multiple petitions that it has filed during the relevant period, which were pending since each respective priority date was established. The AAO noted that in response to the director's request for evidence, the petitioner did not submit any documentation with regard to how many previously approved beneficiaries were working for the petitioner and their wages.

As noted above, on remand, the director issued a request for evidence, dated December 7, 2006, instructing the petitioner to provide evidence of its ability to pay the proffered wage to the instant beneficiary as well as evidence that it could pay the proffered wage(s) to other sponsored beneficiaries. The director additionally requested copies of any employment agreements between the petitioner and [REDACTED]

Counsel's response, included a copy of the petitioner's contract with [REDACTED] which appears to be undated, but there is a facsimile date of November 10, 2003, appearing on the signature page, containing the signatures of the representatives of the petitioner and [REDACTED]. A copy of a disclosure statement containing the signature of [REDACTED] on behalf of the petitioner and listing N [REDACTED] administrative services and declaration that it is to be the "legal employer," is also included in the response.

In response to the director's request for the employment status of all sponsored beneficiaries from their respective priority dates to the present and corresponding proof of the ability to pay the individual proffered wages of each of the sponsored beneficiaries from their respective priority dates to the present, the petitioner responded with a list of 45 individuals with each respective status designated as 21 "approved," 8 "last known pending," 2 "pending," 2 "denied," and 12 "last known denied."<sup>5</sup> The petitioner also provided copies of its state quarterly wage reports for the last three quarters of 2006, not the last four quarters as requested by the director.

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<sup>5</sup> The petitioner did not indicate when each sponsored individual left the petitioner's employ. The petitioner would need to show that it could pay the proffered wage for each respective beneficiary until such beneficiary left the petitioner's employment. Additionally, a review of USCIS electronic records demonstrates that the petitioner continues to file additional petitions. The petitioner must demonstrate that it can pay for the newly filed workers as well. The petitioner did not provide any evidence that such sponsored workers had been terminated or evidence that sponsored workers had resigned. USCIS may reject a fact stated in a petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Following the petitioner's response, the director issued a decision on November 17, 2007. He determined that, based on the documentation submitted, [REDACTED], and not the petitioner would be the beneficiary's actual employer. Further, the director noted that while state quarterly wage reports submitted, listed that the petitioner employed the beneficiary since the second quarter of 2006, counsel had provided a letter, dated February 26, 2007, indicating that the beneficiary had not started employment with the petitioner. Accordingly, the director provided that certified, sealed Forms DE-6 wage reports from the California Employment Development Department would be required to resolve the inconsistencies. The director additionally concluded that the petitioner did not employ the beneficiary as a full-time permanent employee prior to the director's April 10, 2006 decision, but only hired the beneficiary directly, after the denial, based on second party employment practices, of working for [REDACTED] and not for the petitioner.

Relevant to the petitioner's ability to pay for all petitioned I-140 beneficiaries and the bona fides of all immigrant petitions filed, the AAO requested, on February 7, 2008, that the petitioner provide information showing the number of its employees for each of the 2000 through 2007 years and to provide for each petition filed since March 2001 to the present; (a) the beneficiaries' name(s); (b) position; (c) priority date of the labor certification; (d) proffered wage listed on the labor certification; (e) proof of employee compensation paid to date; (f) whether any of the sponsored beneficiaries have adjusted status to legal permanent resident, and the date of adjustment; (g) whether any of the beneficiaries were ever employed with the petitioner; and (h) the length of time that each beneficiary was employed with the petitioner, including start and end date of employment for each beneficiary.

The petitioner was also asked to provide specific information including documentation relating to its operations; the beneficiary's earnings and federal tax returns for 2006 and 2007; certified copies of quarterly wage reports filed with the state for 2004, 2005, and 2006, in a sealed envelope obtained directly from the California Employment Development Department; and acknowledgment from [REDACTED] that it terminated the agreement with the petitioner pursuant to the petitioner's May 2006 request. The RFE further sought clarification of the beneficiary's claimed employment from January 1998 to July 2000 in Saudi Arabia as stated on Part B of the ETA 750 which was inconsistent with claims of employment in the United States from May 1999 to June 2000 as stated on the biographic questionnaire (Form G-325) filed with his adjustment of status application, as well as his stated claim of entry to the United States on December 10, 1998.

A central issue in this matter is whether [REDACTED] was the actual intended employer of the beneficiary, acting as a third party staffing agency for the petitioner. The copy of the contract between the petitioner and [REDACTED] submitted in response to the director's request for evidence on remand, does not identify a commencement date within the document or with the signatures, but indicates a facsimile date of November 10, 2003. The contract provided, in part, the following:

[REDACTED] agrees to provide, and Customer hereby agrees to subscribe for, the services of personnel employed by [REDACTED] (hereinafter referred to

as “employees”) and other ancillary services provided by [REDACTED] including, but not limited to personnel placement, upon the following terms and conditions:

1. [REDACTED] will recruit, screen and hire employees for assignment at Customer’s place of business . . .
2. [REDACTED]s will have sole responsibility for screening, hiring, and terminating its employees;
3. [REDACTED]s will ensure that an Employment Eligibility Verification form (I-9) is completed for each employee assigned to Customer’s place of business;
4. . . . [REDACTED] will maintain all personnel files and payroll records for its employees.
5. [REDACTED] retains the right to determine and set the level of compensation and fringe benefits of its employees. Customer has no authority to alter, change or increase the compensation and/or benefits. . .
6. [REDACTED]s will withhold, pay, and report all taxes and issue employee W-2 forms at the end of each year with respect to each of its employees provided to Customer, as required by law;
7. [REDACTED]s will maintain Occupational Injury Indemnity and Medical Benefits coverage for its employees . . .
8. [REDACTED]s agrees to maintain unemployment, general liability, and fidelity insurance with respect to each of its employees provided to Customer;
9. [REDACTED] will administer all unemployment claims with respect to each of its employees assigned to Customer’s workplace;
10. [REDACTED] will provide Customer with an itemized invoice for each [REDACTED] employee assigned to Customer’s workplace for each pay period.

#### Customer’s Responsibilities

1. Customer will provide [REDACTED] with a job description specifying the job duties and scope . . .
2. Customer will promptly notify [REDACTED] in the event there is any material change in the terms and conditions of an employee’s temporary assignment or the job duties required by the Customer . . .
3. Customer will review, approve and sign all time cards of [REDACTED] employees on assignment to Customer. Customer’s signature on timecards authorizes [REDACTED] to pay the employee and bill Customer for all hours indicated on such timecards.
4. Customer will notify [REDACTED] of any unusual wage and hour practices of Customer . . .;
5. Customer will exercise good judgment and management relating to the day-to-day supervision of [REDACTED] employees. . .
6. Customer will maintain its premises and work areas in compliance with all applicable health and safety laws and regulations . . .customer will further comply . . .with the directives of [REDACTED] safety and risk management program . . . [REDACTED] shall have the right to inspect Customer’s premises at any

- time to ensure a safe workplace is being provided to [REDACTED] employees . . .;
7. Customer will notify the CEO of [REDACTED] or its Human Resources Director, immediately in the event of a discrimination or sexual harassment complaint involving a [REDACTED] employee . . .
  8. Customer will notify [REDACTED] promptly if Customer should decide it no longer wishes to accept the services of any particular [REDACTED] employee. [REDACTED] will be responsible for removing its employee from the Customer's workplace if so requested by Customer.

As noted above, the declaration, dated May 25, 2006, by the petitioner through its administrator, [REDACTED], asserts that [REDACTED] was an alter-ego of the petitioner, and at all times during the contract, [REDACTED] never had the power and authority of supervision and control of the employees working at our facility.” This declaration was accompanied by a copy of a May 1, 2006, letter from [REDACTED], to [REDACTED] giving a 30-day notice of termination of the staffing contract.

These representations directly conflict with the stated terms of the contract which provide that [REDACTED] had the authority to screen, hire and terminate its employees. The petitioner did not submit any amendments, revisions or other contractual provisions to demonstrate that a different agreement with [REDACTED] existed. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It may be determined that from at least November 2003 until May 2006, (based on [REDACTED]'s letter to [REDACTED] terminating the contract), the employees working at the petitioner's business were [REDACTED]'s employees, over whom [REDACTED] had significant control such as directly paying the salaries, withholding taxes, providing W-2s, and paying the equivalent of worker's compensation insurance and unemployment insurance. It also had the authority to remove its employees from the petitioner's place of business should the petitioner fail to cure misconduct at its worksite such as discrimination or harassment of [REDACTED] employees, as well as the authority to place its employees only in temporary assignments with the petitioner.

On appeal, the petitioner asserts that the director's denial was based on his determination that the petitioner had failed to show that the petitioner was the beneficiary's actual intended employer and that the petitioner would employ the beneficiary as a full-time worker.

Counsel relies on *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000) in support of his contention that the petitioner was the beneficiary's actual employer. That court affirmed a USCIS decision that a medical contract service agency was not considered the employer, but rather that the hospital was the nurses' true employer since the nurses provided services to the hospital and not the medical services company.

*Defensor* related to the USCIS' denial of several H-1B petitions for nurses, as the petitioner could not demonstrate that the positions were specialty occupations. The court concluded that

the hospital was the “true employer” since “at root level the hospitals “hire, pay, fire, supervise, or otherwise control the work” of the nurses.” In the present matter, based on the agreement that the petitioner signed with [REDACTED] had the power to hire, fire, pay, and determine whether an employee can be dismissed at the petitioner’s objection. As noted above, the terms of the agreement indicate that [REDACTED] was the actual employer of the beneficiary.

Further, counsel provides that “the factors used to determine if an employer-employee relationship exists are several: (1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; (7) establishment of work boundaries.” *Fox v. Contract Beverage Packers, Inc.*, 398 N.E. 2d 709 (Ind. App. 2 Dist. 1980) *citing Gibbs v. Miller*, 152 Ind. App. 326, 283, N.E. 2d 592 (1972). Counsel asserts that in that case, the only element lacking in the employment relationship was that Contract Beverage Packers did not remunerate Fox (the employee) directly, but rather paid him indirectly through Manpower. Counsel summarizes the court’s determination that the fact that Contract Beverage Packers did not directly pay Fox did not defeat the existence of an employer-employee relationship. *Fox v. Contract Beverage Packers, Inc.*, 398 N.E. 2d at 709.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished 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). Counsel provides a cite to an Indiana Appellate court, which is not binding on USCIS.

Counsel additionally relies on *Yellow Cab. Co. v. Magruder*, 49 F. Supp. 605 (D.Md. 1943) *citing Treasury Regulations* 106 § 1426(a). Counsel quotes the text of the case:

Every individual is an employee if the relationship between him and the person for whom he performs a service, is the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the service, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct the manner in which the services are performed; it is sufficient that he has the right to do so.

This case cited by counsel is related to U.S. Treasury Regulations in order to determine whether Yellow Cab could recover federal insurance taxes paid, and, therefore, not entirely applicable to the matter at hand. Further, in contrast to the broad precedential authority of decisions rendered by a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due

consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

In this case, counsel asserts that the petitioner, [REDACTED] is the actual employer. He states that [REDACTED] and not [REDACTED] exercises control in that [REDACTED] interviews and hires the employees; provides instructions how work is to be performed; provides the number of hours the employee will work; provides the location for work, tools, and equipment to be used; arranges for additional employee training; provides the employee with facility rules to which the employee must adhere; terminates the employee if necessary; and can demand that an employee submit reports when required.

Further, counsel contends that [REDACTED] does not have the license to operate a skilled nursing facility, and, therefore, would be capable of exercising the foregoing functions. Additionally, counsel states that all the individuals working in the skilled nursing facility must be duly licensed, and that [REDACTED] without the proper licensing, would be unable to supervise the beneficiary.

We note that the agreement, as set forth, allow [REDACTED] to hire, fire, pay, determine compensation, and [REDACTED] merely confirms how many hours the individual has worked. Further the agreement provides for [REDACTED] on-site inspection.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

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 to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

As indicated above, in this case, the evidence indicates that during a period of time from at least November 2003 to May 2006, the contract between the petitioner and [REDACTED] indicated that the petitioner's intent to be the beneficiary's actual employer offering permanent full-time employment did not exist. [REDACTED] acting as a staffing agency was the actual employer. Thus, the petitioner was unable to sustain a bona fide job offer as the intended employer offering a full-time permanent job. Only the actual U.S. employer that intends to employ the beneficiary may file a petition to classify the beneficiary under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). See 8 C.F.R. § 204.5(c). The petitioner is not eligible to file a visa preference petition on behalf of the beneficiary. The job offer did not revive simply because the petitioner sought to terminate its contract with [REDACTED] in May 2006. As noted above, 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. See *Matter of Great Wall*, 16 &N Dec. 142 (Acting Reg. Comm. 1977).

With respect to the petitioner's ability to pay the beneficiary's proffered wage of \$1,625.87 per month, annualized to \$19,510.44 per year, it is noted that a review of the petitioner's federal tax returns indicated that it had sufficient net income of \$891,017 in 2001; \$658,814 in 2002; and \$748,205 for 2003 to pay the proffered wage of the beneficiary, but such a determination must be predicated on a conclusion that the petitioner would be considered as the actual intended U.S. employer of the beneficiary. Based on the foregoing, this determination may not be made.

Additionally, even if the petitioner's ability to pay the proffered wage could be determined, the petitioner must also establish whether it had been able to pay the combined proffered wages of all beneficiaries of the multiple petitions that it has filed during the relevant period. It would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). Based on the petitioner's response to the AAO's request for evidence asking for the name, position, labor certification priority date, proffered wage, proof of employee compensation paid to date, adjustment of status of immigrant beneficiaries, employment with the petitioner and length of time of such employment from each petition filed from March 2001 to the present, it does not appear that the petitioner's information is consistent with USCIS records.

In response to this question, the petitioner provided a chart indicating that it has petitioned 71 beneficiaries from March 2001 to the present, calculated as the date of the AAO's request on February 7, 2008. In contrast, USCIS records indicate that the petitioner sponsored over 140 applicants during this period of time. Further, out of the 71 applicants actually listed by the petitioner, only 12 are listed as current or past employees. These widely disparate numbers preclude an accurate estimate of the petitioner's ability to pay multiple beneficiaries that were sponsored during this period of time, although it is noted that the petitioner paid the beneficiary \$22,391.96 in 2007 according to the W-2 provided. According to a 2006 W-2, the petitioner paid the beneficiary \$12,283.73 in 2006. [REDACTED] paid him \$10,633.32 in compensation. It must be noted that during the period of time that he was employed under the agreement between the petitioner and [REDACTED] compensation paid by [REDACTED] may not be imputed to the petitioner. It is additionally noted that none of the federal tax returns were certified IRS copies

as requested, and the copies of the petitioner's state wage reports for 2004, 2005 and 2006 were not certified or submitted in a sealed envelope as requested. The petitioner has not demonstrated that it has had the continuing ability to pay the proffered wage of the beneficiary or its other sponsored beneficiaries beginning as of the respective priority date(s).

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. In that case, an appeal was sustained where unusual business circumstances prevailed in the year of filing and the petitioner's expectations for the resumption of successful business operations were justified, in part, based on its outstanding reputation.

In this case, we do not find *Sonogawa* applicable where as set forth above, the petitioner failed to sustain a bona fide job offer during the period from November 2003 to May 2006 when [REDACTED] assumed the position as the actual employer. Additionally, the petitioner has not established that it had the continuing ability to pay multiple beneficiaries that it has sponsored. Further, although the petitioner has reported substantial gross and net income on its tax returns, we find no unusual or unique business circumstances or reputational factors have been shown to exist in this case that parallel those described in *Sonogawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year within a framework of profitable years for the petitioner.

Finally, the petitioner provided two documents which relate to the beneficiary's employment in Saudi Arabia and with the [REDACTED]. The Saudi document indicates that the beneficiary's employment with the Social Insurance Hospital contract start date was June 20, 1990 and that the contract end date was June 19, 1998. His last working date was May 2, 1998. The employment document related to [REDACTED] merely indicates that his employment ended on June 26, 2000. As to the claim of employment in Saudi Arabia, the dates as stated on the employment document are consistent with the beneficiary's date of entry to the United States, but they are inconsistent with the dates claimed on the ETA 750. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even where the director failed to identify such basis for denial in his decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(which notes that the AAO reviews decisions on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision is affirmed. The petition will remain denied.