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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 03 222 54850

Date: **AUG 18 2006**

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a skilled nursing 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, accompanied the petition. The director determined that the petitioner had not established that it was the true employer of the beneficiary or that the petitioner had a fulltime position available for the beneficiary. The director denied the petition accordingly.

On appeal, counsel states that the petitioner is the direct employer of the beneficiary and that no third party is now involved in the employment of the beneficiary. Counsel submits further documentation.

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

The regulation at 8 C.F.R. § 204.5(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker.* If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 26, 2001. The proffered wage as stated on the Form ETA 750 is a monthly salary of \$1,625.87, or an annual salary of \$19,510.44. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1984, to have 136 employees, and a gross annual income of \$6.8 million. In support of the petition, the petitioner submitted IRS Form 1120S, the

petitioner's corporate income tax return for tax years 2000, 2001, and 2002. These documents named [REDACTED] Hospital as the business submitting the tax returns, and indicated the petitioner had ordinary income of \$605,044, \$891,017, and \$658,814 in the respective tax years.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 4, 2004, the director requested additional evidence pertinent to that ability. The director noted that the petitioner had submitted multiple I-140 petitions, most of which were pending. The director stated that the petitioner had to establish that it had the ability to pay the proffered wages of all the beneficiaries, including the beneficiary on the instant petition. The director requested a detailed list naming all beneficiaries with approved and/or pending I-140 petitions.

The director also requested the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage as of March 26, 2001, the priority date of the Form ETA 750, and to the present. The director specifically requested that the petitioner submit its 2003 federal income tax return.

In addition, the director requested a list of the petitioner's care facilities, and a clarification as to whether the beneficiary was currently employed with the petitioner. The director also requested evidence that the beneficiary possessed the requisite four years of high school education and the requisite work experience stipulated in the Form ETA 750. With regard to work experience, the director noted that the petitioner needed to provide letters, contracts, and pay statements to verify that the beneficiary worked for the listed employer, and that evidence of prior experience should be submitted in letterform on the previous and/or current employer's letterhead showing name, title and phone number of the person verifying the information. The director also noted that the verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

In response, the petitioner submitted its 2003 IRS Form 1120S that indicated ordinary income of \$748,205. The petitioner also stated that it only operated one facility, the [REDACTED] Hospital. The petitioner stated that the beneficiary does not currently work with the petitioner and submitted a document entitled Offer of Employment Certification signed by the petitioner that confirmed the petitioner was offering a permanent and full-time position as nursing assistant to the beneficiary.

The petitioner also submitted a list that indicated the petitioner had filed 46 I-140 petitions from November 2002 to June 2004, and that Citizenship and Immigration Services (CIS) had approved 22 of the petitions. The petitioner also submitted documentation as to the beneficiary's graduation from [REDACTED] the Philippines, in 1957, as well as two letters of work verification for two years and one month of experience as a nursing assistant, prior to the March 2001 priority date.

On December 21, 2005, the director issued a Notice of Intent to Deny (NOID) the instant petition. The director noted that the petitioner had submitted over 50 I-140 petitions from 2002 to the present, and that 22 petitions had been approved. The director asked the petitioner to submit evidence of its ability to pay the beneficiary and all other pending applications as of the priority date to the present. The director also asked the petitioner to submit evidence to explain why the petitioner had not employed any of the pending applicants or

approved applicants since the third quarter of 2004, and requested an explanation of why the petitioner had not employed anyone since the end of the fourth quarter of 2004. The director stated that although the petition indicated that the beneficiary would be employed in a permanent, full-time position, the documentation submitted with the petition indicated that the beneficiary would not be employed in a permanent, full-time position.

The director stated that the Employment Development Department (EDD) did not show any record of the petitioner's previously approved I-140 beneficiaries working for the petitioner, although CIS records indicated that these applicants had current and approved CIS Employment Authorization Documents (EADs). The director stated that this lack of employment records would lead a reasonable person to believe that no job exists for pending or previously approved beneficiaries.

The director then stated that the beneficiary had a current and approved EAD; however the EDD documents did not show that the beneficiary has worked for the petitioner. The director requested the petitioner to submit evidence to confirm that the employment of the beneficiary is still valid and that a permanent full time job exists for the beneficiaries of approved and pending petitions. The director also noted that the beneficiary lives in Phoenix, Arizona since 2001, while the proffered position is in San Jose, California. The director requested that the petitioner submit documentation to explain why the beneficiary was willing to move 710 miles to work for the petitioner earning \$9.37 an hour.

In response, [REDACTED] the petitioner's president, submitted a letter dated January 19, 2006. In her letter [REDACTED] that the petitioner had submitted its income tax returns for tax year 2001 to 2003 to support the petitioner's ability to pay the prevailing wages for all the approved I-140 petitions and pending applications from the priority date to the present. [REDACTED] noted that the director stated that the EDD had no record of the beneficiary ever working for the petitioner. [REDACTED] stated that the petitioner had outsourced its payroll services, payroll taxes filing and reporting and insurance compliance to Mainstay Business Solutions (Mainstay). [REDACTED] a letter dated January 5, 2006 from [REDACTED] Human Resources Manager, Mainstay, Irvine, California. [REDACTED] stated that a copy of Mainstay's quarterly report for the petitioner for the previous quarters was submitted to the record.¹ The petitioner also submitted DE-6 Forms to the record submitted by Aquinas Corporation for the first three quarters of 2001, for all four quarters of 2002, and all four quarters of 2003. [REDACTED] also submitted an EDD magnetic media-submittal sheet, Form DE-166, in which Mainstay indicated it paid \$36,328,839.48 in wages for the third quarter of 2005.

[REDACTED] stated that the beneficiary was not working for the petitioner but that a full time permanent position exists and is still valid. [REDACTED] also submitted a letter entitled Offer of Employment Certification dated January 19, 2006 that stated the petitioner offered the beneficiary a permanent full-time position as nursing assistant, and repeated the job duties already listed in the petitioner's prior offer of employment certification.

¹ The record contains one EDD Form DE-166 document from Mainstay that indicated it had reported wages of \$36,328,839.48 for the third quarter of tax year 2005. The remaining DE-6 forms indicated that Aquinas Corporation submitted DE-6 Forms for the last three quarters of 2001, for all four quarters of 2002, and all four quarters of 2003.

In her letter, ██████████ stated that the petitioner has an employment relationship with ██████████ and that Mainstay is a federally recognized tribal enterprise that specializes in providing outsourced employment services to employers looking to outsource their non-revenue generating functions to a service provider. ██████████ stated that the petitioner has contracted with Mainstay to handle payroll, workers' compensation, loss control, and a host of other employment-related services. ██████████ stated that Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. Ms. ██████████ then stated the payroll taxes are withheld and paid under Mainstay's Federal Employer Tax ID number, thus relieving the petitioner of that task and liability.

On April 15, 2006, the director denied the petition. In his decision, the director stated that ██████████ stated that the petitioner employed the beneficiary, but that employment related matters such as payroll, worker's compensation insurance, health insurance and retirement was done through Mainstay, a temporary staffing agency. The director stated that while the petitioner contends the beneficiary will be performing services as a nursing assistant, the employer and employee management would be through Mainstay. The director stated that all independent cooperative evidence indicated that the petitioner in the instant petition is not San Tomas Convalescent Hospital. The director stated that Mainstay, the originating employer, is a temporary staffing agency, and that direct employment and the intent to hire and control the beneficiary's employment is with Mainstay, not with the petitioner. The director also noted that Mainstay also had the ability to contract the beneficiary out to other locations other than the petitioner.

The director then stated that the instant I-140 petition is a misrepresentation of the beneficiary's true employer, and noted that the beneficiary still resides in Phoenix, Arizona. The director noted that the petitioner did submit a letter stating that the job offer with San Tomas is still valid; however CIS could find no evidence that the petitioner was directly employing anyone from the 4th quarter of 2004 to the present.

The director also questioned the beneficiary's intent to relocate over 700 miles for a job that pays \$9.37 an hour in a demographic area where the cost of living far exceeded that of Phoenix, Arizona. The director questioned the legitimacy of the job offer and noted that no evidence was submitted in response to the CIS request for further evidence with regard to the beneficiary's intent to relocate contained in the director's NOID.

The director then stated that the petitioner submitted a contract of an employment agreement into evidence.² The director noted that the contract between San Tomas Convalescent Hospital and Mainstay stated that Mainstay is considered the "legal employer" of the beneficiary and that all hiring and firing of the beneficiary is the responsibility of the staffing agency. The director concluded, that based on this document, Mainstay is the beneficiary's employer, rather than the petitioner. The director then stated that second party employment is a misrepresentation of the true employer and a misrepresentation of a material fact of the visa approval for the beneficiary.

² The contract between the petitioner and Mainstay Business Solutions (Mainstay) to which the director refers in his decision is not found in the record.

The director cites section 212(a)(6)(c)(i) of the Act with regard to the inadmissibility of any alien who by fraud or willfully misrepresenting a material fact seeks to procure a visa, or other documentation, or admission into the United States. The director also cited *Matter of Estime*, 19 I&N Dec. 450 (BIA 1986), with regard to revocation of approved visa petitions and the “good and sufficient cause” standard of proof in the proper issuance of a notice of intent to revoke the approval of a visa petition, and *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) with regard to revocation proceedings.³ The director further stated that the documentation indicates that the beneficiary would not be employed in a permanent, full-time position. The director concluded by stating that good and sufficient cause exists in the instant petition to deny the beneficiary the benefit sought.

On appeal, newly hired counsel states that CIS has mischaracterized the employment situation by stating that San Tomas Convalescent Hospital is not the employer and that San Tomas Convalescent Hospital has no intention of hiring the beneficiary. Counsel also states that the economic demographics behind the beneficiary’s relocation has no bearing on the beneficiary’s actual intent and gives no weight to the value derived by the beneficiary from relocating to another geographic area to obtain legal residency.

Although counsel on the Form I-290B states that he will be sending a brief and evidence to the AAO within 30 days, the AAO has received no additional documentation with regard to the instant petition.⁴ Therefore, the AAO will examine the petition based on the record as presently constituted.

As previously stated, although the director referred to a contract between Mainstay and the petitioner, the record does not contain this document and the actual business relationship between the petitioner and Mainstay and the effective dates of any such relationship. Another letter referenced by the director in his decision that the director stated made very clear that the petitioner had no intent of controlling employment or hiring the beneficiary directly, is also not found in the record. Although the letter from [REDACTED] to the business arrangement between the two businesses, her letter is only given limited evidentiary weight. Of more probative weight would be the actual contract between the two businesses.

The petitioner refers to Mainstay as a company to which the petitioner outsourced some employee benefits and services, while the director, in his decision, described Mainstay as a temporary staffing agency. Although the director stated that public records as a source of his information on Mainstay, he did not identify any such public documents. Based on its Internet website, Mainstay Business Solutions is a duly formed and organized tribal body of the Blue Lake Rancheria Tribe of California (Blue Lake), a federally-recognized Indian tribe. The business was established in April 2003 and appears to provide outsourced employment services to small and medium-sized businesses in California and Hawaii.⁵ The company website describes a range of services including “employee administration, including new hire processing, W4s and I-9s, payroll processing and

³ It is not clear why the director cited precedent decisions with regard to revocation proceedings. The instant petition has never been approved. Thus, the revocation of the instant petition is moot.

⁴ The AAO also sent a fax to counsel on August 10, 2006 to determine whether counsel had submitted a brief that the AAO had not received, with no response from counsel.

⁵ In describing its business emphasis, the company states it works to lower the total cost of employment for businesses in a number of industries, and the client list includes restaurants, nursing and residential care facilities, construction companies, janitorial service providers, and various businesses in light industrial, manufacturing, warehousing, and similar professions.

delivery, recruitment, testing/screening/reference and credit checks, in addition to expertise in workers' compensation and loss control." See <http://www.mainstaybusiness.com/services.htm>.

In addition, the company draws attention to its ability to use federal workmen's compensation rates as a means of lowering the costs of its actual and potential clients, based on its status as a tribal body. Thus, Mainstay's website, while providing more information on the company's recruitment, and new hire processing activities, does not identify the company exclusively as a temporary staffing agency. The website does state the company has 15,000 employees under management and has processed \$750 million in payroll for some 129,000 employees over the past three years.

In addition the fact that the petitioner, as Aquinas Corporation doing business as San Tomas Convalescent Hospital, submitted DE-6 Forms in tax years 2001, 2002, and 2003 supports the petitioner being the actual employer of the beneficiary as of the 2001 priority date year and as of the June 2003 filing of the instant I-140 petition. Based on the 2003 claimed date of establishment of Mainstay, Mainstay could not possibly been the actual employer of the beneficiary as of the 2001 priority date year. The gap of documentation with regard to the petitioner's DE-6 Forms as of tax year 2004 and 2005 is not explained by either the petitioner nor counsel, nor does the EDD document from Mainstay provide any documentation as to the actual employment of the petitioner's work force; however, the director's assumption that the lack of such documentation means that the petitioner did not employ any employees in 2004 appears also unsubstantiated.

However, the petitioner bears the burden of proof in establishing its eligibility for the visa petition, and thus far, based on the record, the preponderance of the evidence does not show that the petitioner who filed the instant I-140 petition remained the employer of the beneficiary during tax years 2004 and 2005, or rather turned over the recruitment and hiring of employees, and according to the director's statements, control of the beneficiary, to Mainstay.

Thus, the issue of whether the petitioner or Mainstay is the beneficiary's actual employer, during the years 2004 and 2005 is not established by the director, counsel's comments, or the record. As previously stated, the record also does not contain any contract of employment between the petitioner and Mainstay that establishes the actual relationship between the two business entities and/or how to terminate any relationship between the two entities.

As stated previously, the petitioner's documentation as to wages paid during the years 2001, 2002, and 2003 support its being the prospective employer of the beneficiary as of the priority date and as of the actual filing of the petition in 2003. Furthermore, the record contains no documentation to suggest that Mainstay in any way is a successor in interest to the petitioner. Without more persuasive documentation, the AAO cannot evaluate the director's findings or counsel's comments with regard to the beneficiary's actual prospective employer during the 2004 or 2005 period of time. Thus, the AAO will withdraw the part of the director's decision that discusses the relationship between the petitioner and Mainstay, and remand the decision to the director for the creation of a complete record of proceedings to include the contract between the petitioner and Mainstay.

The AAO views the more important issue to be examined in these proceedings as whether the petitioner has the ability to pay the proffered wage to the multiple beneficiaries for whom it has submitted I-140 petitions.

While the petitioner's federal income tax returns indicate substantial net income and net current assets, the director correctly noted that the petitioner, based on its multiple I-140 petitions for multiple beneficiaries from the priority year 2001 to the present, had to establish its ability to pay the proffered wage, not only of the beneficiary, but of all the beneficiaries petitioned during the same period of time.

The AAO notes the comments of the director with regard to why the beneficiary would relocate 700 miles for a job that pays \$9.75 an hour. The AAO views the questioning of the petitioner's intentions based on her geographic location as an inappropriate factor to consider. The AAO will not address this issue further. Furthermore, in his decision, the director refers to *Matter of Estime*, which is a case involving the criteria and standard of proof upon which a petition may be revoked. However, in the instant petition, the petition has been denied, not approved, and the issue of revocation is moot.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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, both the beneficiary on the Form ETA 750 and the petitioner in materials submitted to the record stated that the beneficiary had not worked for the petitioner. Thus, the petitioner cannot establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Although the petitioner submitted its tax return for 2000, since the priority date was established in tax year 2001, the petitioner's tax return for 2000 is not dispositive in these proceedings. Therefore, only the petitioner's 2001, 2002, and 2003 federal income tax returns are considered with regard to its net income.

The evidence indicates that the petitioner is structured as an S corporation. For an S corporation, CIS considers net income to be the figure shown on line 21, ordinary income, of the IRS Form 1120S. The petitioner's tax return for 2001, 2002, and 2003 shows the following amounts of ordinary income: \$891,017, \$658,814, and \$748, 205. These figures are sufficient to pay the proffered wage of \$19,510.44. However, as correctly noted by the director, the petitioner has to establish its ability to pay the proffered wage for all beneficiaries, when there are multiple petitions.

In the instant petition, the director requested a detailed list of all beneficiaries with approved and/or pending I-140 petitions. The petitioner provided a list of 46 beneficiaries for whom the petitioner had filed I-140 petitions from 2002 to 2004. According to the petitioner, CIS had approved 22 of these petitions. In his notice of intent to deny the petition, the director stated that the EDD forms⁶ showed no record of the petitioner's previously approved I-140 beneficiaries' work with the petitioner. The director also noted that CIS records indicated that these applicants had current and approved EAD cards for employment authorization. The director requested evidence to explain why the petitioner had not employed any of the pending applicants or approved applicants since the third quarter of 2004, and also why the petitioner apparently had not employed anyone since the end of the 4th quarter of 2004 to the present time. On appeal, neither the petitioner nor Mainstay provided any of the requested information with regard to how many previously approved beneficiaries were working with the petitioner, and their wages.

The petitioner would have to provide a listing of petitions filed as of March 26, 2001, the actual status of these petitions, and the proffered wages for these beneficiaries, prior to any examination by the AAO of whether the petitioner has sufficient net income to pay the wages of all multiple beneficiaries. Without this specific information, the AAO cannot determine whether the petitioner in fact has sufficient net income to pay the proffered wages of all multiple beneficiaries.

On appeal, counsel also does not provide any further evidentiary documentation as to the petitioner's multiple I-140 petitions and beneficiaries. Based on the lack of documentation, the petitioner has not established that it has the ability to pay the wages of all beneficiaries petitioned either since the 2001 priority date to the present, or since the 2003 filing of the instant I-140 petition, based on its net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner submitted the following information for tax years 2001, 2002 and 2003:

⁶ As stated previously, the record is not clear to which EDD forms the director refers.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	2001	2002	2003
Ordinary Income	\$ 891,017	\$ 658,814	\$ 748,205
Current Assets	\$ 473,922	\$ 1,407,168	\$ 1,356,135
Current Liabilities	\$ 371,008	\$ 464,952	\$ 311,644
Net current assets	\$ 102,914	\$ 942,216	\$ 1,045,491

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary. Based on the petitioner's net current assets, the petitioner has sufficient funds to pay the proffered wage of \$19,510.44 in all three years in question based on its net income and/or net current assets. Nevertheless, as previously stated, the petitioner has to establish that it has the ability to pay the proffered wages of all beneficiaries of multiple I-140 petitions filed as of the 2001 priority date stipulated by the Form ETA 750. The record does reflect a list submitted by the petitioner of 46 beneficiaries identified on I-140 petitions filed from 2002 to 2004. However, neither the petitioner nor counsel submitted any further evidentiary documentation to establish the actual employment of these beneficiaries and their actual wages. Without more evidence submitted to the record with regard to the actual employment of the previous beneficiaries and their wages, the AAO cannot determine whether the petitioner has the ability to pay the wages of all beneficiaries the multiple petitions filed by the petitioner, based on the petitioner's net income or net current assets.

The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date.

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

ORDER: The appeal is remanded.