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U.S. Citizenship
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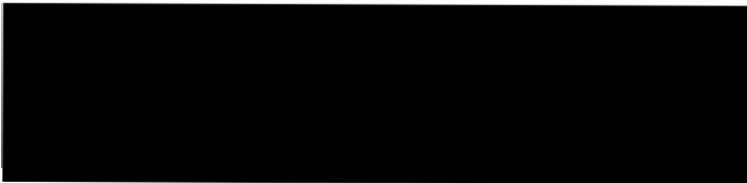
IN RE:

Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be remanded.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

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 unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 26, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$1,938.34 per month (\$23,260.08 per year). The Form ETA 750 states that the position requires three months of experience.

On appeal, counsel submits a legal brief and additional evidence.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns 2000, 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director requested additional evidence to support the petitioner's employment offer to the beneficiary. In response counsel submitted a letter from [REDACTED] administrator, stating that the petitioner will employ the beneficiary.

The director issued a notice of intent to deny processing the petition on December 21, 2005. In the notice the director observed that the petitioner had multiple pending petitions. The director requested evidence of the petitioner's ability to pay for all petitions. The director also stated that the petitioner has not employed any of the then pending applicants (i.e. beneficiaries) or approved applicants since the 3rd quarter of 2004.² Further, the director requested an explanation of why the petitioner has not employed "anyone" since the end of the 4th quarter of 2004. In summary, the director questioned, *inter alia*, whether or not the beneficiary² (including those beneficiaries with other approved or pending petitions including those beneficiaries in possession of CIS Form I-765 Employment Authorization Documents enabling them to work in the United States) would receive a permanent, full-time employment position?

In response, the petitioner submitted an explanatory letter, and, the petitioner submitted U.S. federal tax returns that stated that the petitioner reported taxable incomes of \$891,017.00, \$658,814.00, and, \$748,205.00 for tax years 2001, 2002, and 2003 respectively.

Also submitted was a Mainstay Business Solutions ("Mainstay"), 2 Executive Circle, Suite 100, Irvine California letter dated January 5, 2006, that stated the petitioner is "... in an employment relationship with Mainstay Business Solutions." According to the letter, Mainstay Business Solutions "...pays the employees of ...[the petitioner] and bills the same for the gross wages, employer taxes and related insurance. The payroll taxes are withheld and paid under Mainstay's Federal Employer Tax ID Number"

Also submitted were California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees that were accepted by the State of California were submitted with a submittal sheet listing Mainstay Business Solutions as the employer.

Also submitted was a job offer letter dated January 19, 2006, from [REDACTED] administrator, that the petitioner will employ the beneficiary as a certified nursing assistant at a salary of \$1,938.34 per month.

The director denied the petition on April 25, 2006, finding, *inter alia*, that the evidence submitted did not establish that it was the true employer of the beneficiary, and, that the petitioner did not establish by the evidence presented that it had a fulltime position available for the beneficiary at the time of filing the Alien

² According to the CIS Form G-325A dated February 18, 2004, submitted by the beneficiary (and employment verification letters in the record), she had been employed as a care giver, and as a nurse assistant by the [REDACTED] Residential Care Facility, Northridge, California, by Mr. [REDACTED] Thousand Oaks, California, and by [REDACTED] Professional Services, (SFO), California from March 1999 to January 2000, January 2000 to November, 2001, and November, 2001 to present time (i.e. February 18, 2004) respectively. According to the beneficiary's W-2 Wage and Tax statement, in the record of proceeding, for 2000, the beneficiary wages from [REDACTED] were \$43,884.30. The proffered wage is \$23,260.08 per year.

Employment Application, that is the priority date. The director stated that the I-140 employment-based petition is to provide the petitioner the ability to directly employ individuals outside the United States in positions determined to have shortages of qualified workers or in positions that are hard to fill. The director stated that Mainstay was a temporary staffing agency and that the direct employment and the intent to hire and control the beneficiary's employment was with Mainstay, not with the petitioner, although according to a Form G-325A in the record of proceeding, the beneficiary was employed from March 1995 through August 1, 2003 with employers other than Mainstay or the petitioner.

The director then stated that second party employment is a misrepresentation of the beneficiary's true employer and therefore a misrepresentation of a material fact of the beneficiary's visa approval. The director reiterated that the evidence submitted into the record established that Mainstay was the beneficiary's true employer in the instant petition.

The director then cited section 212(a)(6)(c)(i) of the Act concerning fraud and misrepresentation of material facts and the effect of such acts on the admissibility of beneficiaries. The director also cited *Matter of Estime*, 19 I&N Dec. 450 (BIA 1986, with regard to standard of proof required for issuing a notice of revocation, and *Matter of Ho*, 19 I&N Dec. 582(BIA 1988).

On appeal, counsel asserts " ... [the] petitioner is a bona-fide employer who has been the underlying employer, with the ability to hire & fire and discipline employees; that should include the beneficiary." Counsel then provides notice that " ... Mainstay [Business Solutions] has been terminated and Petitioner now directly hires employees including the beneficiary"

Counsel has submitted the following documents to accompany the appeal statement: an explanatory letter dated May 22, 2006 from counsel; a copy of the notice of decision dated April 27, 2006, in this matter; a statements from ██████████, Administrator dated May 1, and May 22, 2006; a letter dated May 1, 2006 sent by the petitioner to Mainstay Business Solutions; a statement by the beneficiary; and, an employment agreement between the petitioner and the beneficiary.

On June 21, 2006, counsel submitted a brief in this matter together with a copy of the letter mentioned above from the petitioner to Mainstay Business Solutions dated May 1, 2006 and a copy of the notice of decision. Counsel contends that according to a statement given by ██████████ dated May 11, 2006, Mainstay Business Solutions is an employment agency without the ability to select, hire, supervise and terminate the employment of the employee beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Counsel also contends, in various arguments, that it is the ability to control the details of the work that is evidence of an employer/employee relationship. Counsel asserts that "... [CIS] has not detailed the ability to control the details of the employer's work." We do not agreed that the scope of employment responsibilities between the petitioner and Mainstay Business solutions is relevant to the issue of whether or not petitioner has established that had not established that it was the true employer of the beneficiary or that the petitioner had a fulltime position available for the beneficiary. Since Mainstay is not a party to the labor certification or the petition such an agreement could not prove an employment between the petitioner and the beneficiary. As stated in this discussion, Mainstay's website stated that Mainstay was established in 2003. Based on this year of establishment, Mainstay could not possibly been the actual employer of the beneficiary as of the 2001 priority date year. Counsel has provided no explanation for how it dealt with the beneficiary from the priority date to 2003. The petitioner failed to provide an employment agreement between the petitioner and the

beneficiary required by the U.S. Department of Labor's (USDOL) regulation at 20 C.F.R. § 656.21, *et seq.* as is discussed more completely within this discussion.

Further, it is the petitioner's burden to establish by evidence that it is permanent full-time employer who will employ the beneficiary according to the terms of the labor certification. The burden of proof in these proceedings rests solely with the petitioner not CIS. Section 291 of the Act, 8 U.S.C. § 1361.

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

In the present case, the "employment relationship" between Mainstay Business Solutions and the petitioner was not, according to the record of proceeding, disclosed during the labor certification process.

Although the advisory opinions of other Government agencies are given considerable weight, CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

Since the beneficiary has not worked with the petitioner according to the letter statement, from Julita A. Javier, administrator in the record of proceeding, it is not clear why counsel's is making master/servant, agency or scope of control contentions in this particular fact situation upon appeal.³ However such assertion begs the admission that counsel has made in her appeal statement mentioned above. Counsel has characterized the petitioner as "the underlying employer" in the relationship between Mainstay Business

³ To recount the evidence submitted by the petitioner, and not at issue in this matter, Mainstay Business Solutions, 2 Executive Circle, Suite 100, Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with Mainstay Business Solutions." According to the letter, Mainstay Business Solutions "...pays the employees of ...[the petitioner] and bills the same for the gross wages, employer taxes and related insurance. The payroll taxes are withheld and paid under Mainstay's Federal Employer Tax ID Number." Counsel also stated that Mainstay Business Solutions does not the required licensing to exercise supervision in a nursing home and for that reason, "this alone negates the control test" that the petitioner has raised in counsel's brief. It is reasonable that Mainstay could employ the beneficiary to work in the petitioner's facility without requiring a nursing residence, operating license, since the petitioner would provide the license.

Solutions and petitioner.⁴ Based upon what the petitioner has disclosed to date, we find at the time the Alien Employment Application was accepted Mainstay Business Solutions was intended to be the employer of record.

To recount the evidence submitted by the petitioner, and not at issue in this matter, Mainstay Business Solutions, 2 Executive Circle, Suite 100, Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with Mainstay Business Solutions." According to the letter, Mainstay Business Solutions "...pays the employees of ...[the petitioner] and bills the same for the gross wages, employer taxes and related insurance. The payroll taxes are withheld and paid under Mainstay's Federal Employer Tax ID Number" Further, on appeal, counsel stated and presented evidence that the petitioner has entered into an employment agreement with the beneficiary, dated May 2006, and that the agreement or relationship with Mainstay Business has been terminated as of May 1, 2006, approximately five years after the priority date.

By the preponderance of the evidence submitted in this case, the petitioner had not established that the petitioner had a fulltime position available for the beneficiary. At the time of filing the Alien Employment Application (ETA 750A/B), by the evidence submitted as mentioned above, Mainstay Business Solutions was the *alter ego* of the petitioner in the employment relationship with the beneficiary. During the pendency of the appeal process, the petitioner terminated its contractual relationship with Mainstay Business Solutions on May 1, 2006. The fact that the petitioner has altered its scheme at this stage in the petition review process to eliminate Mainstay's role in the beneficiary's employment cannot change the fact that when the ETA 750 was filed and then accepted, the petitioner by a review of the evidence submitted did not employ the beneficiary at any time.

The second issue in this case is the ability of the petitioner to pay the proffered wage for all beneficiaries for which petitions it has filed are pending. CIS electronic database records show that the petitioner filed I-140 petitions on behalf of approximately 67 other beneficiaries since 1996, with approximately one-half of that number approved. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. Approximately 30 petitions are still in process, either pending or denied (denied petitions may be appealed, re-filled, or the labor certifications reused for other beneficiaries).⁵

⁴ In the present case, the "employment relationship" as characterized by counsel, between Mainstay Business Solutions and the petitioner was not, according to the record of proceeding, disclosed during the labor certification process. The U.S. Department of Labor's (USDOL) regulation at 20 C.F.R. § 656.21, *et seq.*, regarding Applications for Alien Employment (Form ETA 750 A/B) required in pertinent part that that the petitioner (employer/applicant therein) submit in the form or on its attachments " Two copies of the employment contract, each signed and dated by both the employer and the alien (not their agent) ...", that a duplicate contract be furnished to the alien, and, any other "agreement or conditions not specified" "...on the *Application for Alien Employment Certification* form." It is common industry practice to make the employment contract contingent upon the receipt of a right to work document within the United States.

⁵ There is a statement dated May 22, 2006, by Julita Javier, in the record of proceeding, that stated that there are 22 I-140 petitions pending and "At \$19,5510.44 [sic] annually, that would translate to a total of \$429,229.69 annually." Ms. Javier stated that the tax returns submitted prove that the petitioner has the ability to pay the wages proffered. No wage data was submitted to substantiate this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof

When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries⁶ of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition. The director issued a notice of intent to deny on December 21, 2005. In the notice the director observed that the petitioner had multiple pending petitions. The director requested evidence of the petitioner's ability to pay for all petitions. The petitioner has not submitted the requested information, that is employment information (i.e. start dates current status and wage information). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

No evidence was submitted by the petitioner of the proffered wages of each of the pending beneficiaries mentioned above. The AAO cannot by the evidence submitted determine whether or not the petitioner has the ability to pay the proffered wages of all beneficiaries. The petitioner failed to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been or may be pending.

No information was submitted why the petitioner did not employ the beneficiary from the date the beneficiary received her Employment Authorization Document through the auspices of the petitioner, or why the petitioner did not similarly employ other beneficiaries for whom it filed employment based petitions.

No agreement was submitted in the record of proceeding between Mainstay Business Solutions and the beneficiary.

No employment contract by both the employer and the alien (not its or their agent⁷) as of the priority date, February 21, 2001, was submitted in this case.

No agreement was submitted in the record of proceeding between Mainstay Business Solutions and the petitioner other than a termination letter. As previously stated, although the director referred to a contract between Mainstay and the petitioner, the record of proceeding at the time of the director's decision does not contain this document that might outline the actual business relationship between the petitioner and Mainstay and the effective dates of any such relationship.

Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence including but not limited to a document (s) that would outline the business relationship between the petitioner and Mainstay with the effective dates of any such relationship and any other documents necessary to make an additional determination.

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.

in these proceedings. *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)).

⁶ There is an approximation statement stated in a "Declaration" made by Ms. [REDACTED] dated May 22, 2006, found in the record of proceeding that a salary of \$19,5510.44 [sic] for 22 outstanding I-140 petitions equates to \$429,229.69, but there is no substantiation for this approximation.

⁷ See 8 C.F.R. § 656.21, *et seq.*

ORDER: The appeal is remanded to the director.