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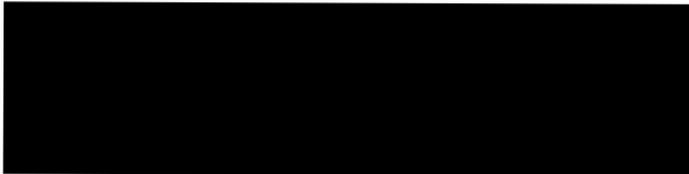


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **NOV 07 2006**
WAC 04 254 50234

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

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. The proffered wage as stated on the Form ETA 750 is \$1,712.50 per month (\$20,550.00 per year).¹ The Form ETA 750 states that the position requires one year of experience.

¹ In this instance, according to documentation attached to the labor certification dated April 10, 2002, the U. S. Department of Labor required that the employer, the petitioner herein, to pay the wage amount per month of \$1,712.50 or \$9.88 per hour. There is an employment agreement dated May 2006 between the petitioner and the beneficiary that stated an hourly rate lower than the proffered wage rate of \$9.37 per hour. If this matter is pursued, an amendment to that agreement must be submitted conforming that section of the agreement (i.e. Section 3.1) to the labor certification. Further, 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

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

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 2001, 2002 and 2003; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 director also stated " ... the petitioner has not employed any of ... [the then pending] applicants [i.e. beneficiaries] or approved applicants since the 3rd quarter of 2004." 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 questions, *inter alia*, whether or not the beneficiary (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) will receive a permanent, full-time employment position?

In response to the request for evidence, the petitioner submitted copies of the following documents: an explanatory letter; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for years 2001, 2002, and 2003; the beneficiary's pay stubs; and, an employment certificate.

The petitioner stated in the letter dated January 19, 2006, from [redacted] administrator, that the petitioner out-sources its "payroll services, payroll taxes and reporting and insurance compliance" with Mainstay Business Solutions.

The U.S. federal tax returns submitted 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.

The director denied the petition on May 3, 2006, finding that the evidence submitted did not establish that it was the true employer of the beneficiary or that the petitioner had a fulltime position available for the beneficiary.

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 statement from [redacted] Administrator dated May 22, 2006;² a letter dated May 1, 2006 sent by the

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."

² The statement concerns another nursing assistant, [redacted]

petitioner to Mainstay Business Solutions; and, an employment agreement between the petitioner and

On June 21, 2006, counsel submitted a brief in this matter together 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 fire 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, "... the Service has not detailed the ability to control the details of the employer's work." We do not agree that the scope of employment responsibilities between the petitioner and Mainstay Business Solutions⁴ is relevant to the issue of whether or not petitioner has established that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition.⁵ We find, that Mainstay Business Solutions as it is not the petitioner nor employer/applicant of the labor certification, has no standing in this matter.

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

³ Although another later submittal included the signed employment agreement between the petitioner and the beneficiary dated May 2006.

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.

⁵ The U.S. Department of Labor's (USDOL) regulation at 8 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/applicants 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.

consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

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.

Counsel's introduction of master/servant, agency or scope of control arguments⁶ begs the admission that counsel has made in her appeal statement mentioned above, and, such contentions are not relevant under the applicable regulations.⁷ She has characterized the petitioner as "the underlying employer" in the relationship between Mainstay Business Solutions and petitioner. Based upon what the petitioner has disclosed to date, we find at the time the Alien Employment Application was accepted Mainstay Business Solutions was the employer of record.

However, there is a letter in the record of proceedings from the beneficiary stating that between November 2000 to June 2003 she was employed during that time as a live-in caregiver by [REDACTED] since deceased, at her address at [REDACTED], Beverley Hills California.

Further, there is a letter in the record of proceedings from the [REDACTED] stating that between August 2, 2003 to "the present time" (i.e. the date of the letter which is June 21, 2004) the beneficiary was employed with her during that time as a caregiver. Ms. [REDACTED] address is given as [REDACTED] Pasadena, California.

Based upon what the petitioner has disclosed to date and counsel's assertions that are admissions against the petitioner's interest in this matter, we find that, but for the employment with [REDACTED] and [REDACTED] stated above, Mainstay Business Solutions was the employer of record, and extending counsel's assertion to its logical conclusion.

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

⁶ Counsel stated that Mainstay Business Solutions does not have 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's operating license, since the petitioner would provide the license. It is a common industry practice for medical staffing agencies to provide personnel to medical facilities. In fact, according to the evidence submitted, Mainstay made 20 wage payments between the dates February 15, 2005 to December 31, 2005 referencing the petitioner (although where the beneficiary worked and what job the beneficiary did for the wages paid was not disclosed). There is, however, no evidence submitted that the beneficiary was employed by the petitioner until 2006 as will be discussed herein.

⁷ 8 C.F.R. § 656.21, *et seq.*

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 Solutions has been terminated as of May 1, 2006, approximately five years after the priority date.

There is no evidence of an employment agreement or relationship between the petitioner and beneficiary before May of 2006 not involving Mainstay Business Solutions as the overlying employer, or, the two other employers, [REDACTED] and [REDACTED]. Since the priority date is March 26, 2001, the above letters submitted in evidence established that for the time interval November 2000 to at least June 21, 2004, the beneficiary was not employed by either the petitioner, or Mainstay Business Solutions.

Further, in the statement dated May 30, 2006, [REDACTED] administrator, stated that the beneficiary *will* be employed by the petitioner. There is no evidence of wage payments from the petitioner to the beneficiary, or evidence that if, in fact, the beneficiary ever worked for the petitioner after the priority date. According to the CIS Form G-325A in the record of proceeding the beneficiary was employed by [REDACTED] Palos Verdes, California, and, by [REDACTED] and [REDACTED], since March 2000 until at least August 30, 2004.

Wage payments evidence was submitted to show that the Mainstay Business Solutions employed the beneficiary from February 4, 2005 to December 31, 2005. In contravention to the lack of an employment agreement required under the regulations, and the fact that the beneficiary looked to Mainstay Business Solutions for its wage payments for ten months in 2005,⁸ there is a letter from the petitioner stating that Mainstay Business Solutions was the *alter ego* of the petitioner (and by implication it was the employer). What the term *alter ego* means in the context of the regulation at 8 C.F.R. § 656.21, *et seq.* was not explained by the petitioner.

No evidence was submitted concerning any written employment agreement between Mainstay Business Solutions and the beneficiary in the present case.⁹

No evidence was submitted concerning any employment agreement between the petitioner and the beneficiary prior to 2006. As already noted, such an agreement is required to be included in the labor certification or in its attachments by regulation. *See* 8 C.F.R. § 656.21, *et seq.*

By the preponderance of the evidence submitted in this case, and as found in the record of proceeding, 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.

⁸ In response to the notice to deny the petition are approximately 20 pay statements issued to the beneficiary by Mainstay Business Solutions between the dates February 15, 2005 to December 31, 2005, that stated an hourly rate of \$12.00 per hour with total end-of year earnings of (to December 15, 2005) of \$20,220.72. For the last pay of the year, the beneficiary received \$1,292.10. According to the petitioner’s statement in the record of proceeding, Mainstay Business Solutions is the employer of record under Mainstay’s federal employer identification number (FEIN).

⁹ 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.

Further, 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).¹⁰

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 beneficiaries 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. 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).

The petitioner had not established that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition of the visa petition. The petitioner also failed 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. 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 it supported.

The director has referenced in his decision an agreement detailing Mainstay's responsibilities relative to the beneficiary, but it is not in the record of proceeding. The only information that the petitioner disclosed in this case was that the agreement was terminated on May 1, 2006.

No agreement was submitted between Mainstay Business Solutions and the petitioner (other than a termination letter) or the beneficiary.

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.

¹⁰ Denied petitions can be appealed, refilled, or the labor certifications in them re-used in other similar petitions for other beneficiaries.

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 agent¹¹) as of the priority date, March 26, 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 that might outline the business relationship between the petitioner and Mainstay including the effective dates of any such relationship, 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.

ORDER: The appeal is remanded to the director

¹¹ See 8 C.F.R. § 656.21, *et seq.*