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U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

SEP 05 2006

WAC 03 195 53131

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.

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.

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] 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 July 2, 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. The director also noted that the petitioner could submit a statement from a financial officer if the petitioner had one hundred or more employees, but also noted that the submission of such a document did not preclude Citizenship and Immigration Services (CIS) from requesting additional evidence of its ability to pay the proffered wage.

The director also requested clarification as to whether the beneficiary was currently employed with the petitioner; copies of the petitioner's current valid business licenses for city, country, state and federal government; clarification of the beneficiary's current address; and 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 one year of work experience had to be earned before the priority date of March 26, 2001.

In response, the petitioner submitted its 2003 IRS Form 1120S that indicated ordinary income of \$748,205. The petitioner also submitted a city of San Jose Business Tax Certificate with expiration date of December 31, 2004; a state of California Department of Health Services license with expiration of February 27, 2005; a fictitious business name statement for the petitioner that indicated [REDACTED] was doing business as [REDACTED] a brochure for [REDACTED] a W-2 Wage and Tax statement for tax year 2003; and California EDD Form DE-6 Quarterly Wage and Withholding Reports for the first quarter of tax year 2003. The W-2 statement for 2003 indicated that A [REDACTED] had paid \$3,118,962.91 in wages and salaries in tax year 2003, and the Form DE-6 indicated the [REDACTED] had paid \$914,451.76 in wages during the first quarter of tax year 2003. The petitioner also submitted a list of 48 beneficiaries of I-140 petitions submitted between 2002 and 2004, of which 25 petitions were still pending with CIS. According to this document, CIS had approved 22 petitions of the 48 identified petitions and beneficiaries.

With regard to the beneficiary's qualifications and proffered position, the petitioner submitted a letter entitled Offer of Employment Certification. This letter indicated that a permanent fulltime position was available for the beneficiary as of September 14, 2004. The petitioner also submitted correspondence received by the beneficiary with regard to her actual address in Hawthorne, California, dated January 23, 2004. The petitioner

submitted a letter from [REDACTED], Initao, Philippines that stated the beneficiary graduated from high school on March 30, 1963. Finally the petitioner submitted two letters of work verification; one from the beneficiary's former employer dated July 23, 2004, documenting ten years of nursing assistance, and the second letter dated August 16, 2004, from the beneficiary's actual employer describing her current job duties.

On December 29, 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 petitioner 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) record¹ did not show any 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 jobs exist for pending or previously approved beneficiaries. The director then stated that the beneficiary had a current and approved EAD; however, the submitted 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 offer for 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 lived in Laguna Woods, California. The director requested that the petitioner submit documentation to explain why the beneficiary was willing to move 300 miles to work for the petitioner earning \$9.37 an hour. The director requested that the petitioner provide evidence of the beneficiary's current employment.

In response, [REDACTED] the petitioner's president, submitted a letter dated January 25, 2006. In her letter Mrs. [REDACTED] stated that the petitioner had submitted its income tax returns for tax years 2001 to 2003 to support the petitioner's ability to pay the prevailing wages for all the approved I-140 petitions and pending application from the priority date to the present. Mrs. [REDACTED] also stated that the petitioner had outsourced with Mainstay Business Solutions (Mainstay) to handle the petitioner's payroll services, payroll taxes filing and reporting, and insurance compliance. Mrs. [REDACTED] submitted a letter dated January 5, 2006 from [REDACTED] Human Resources Manager, Mainstay, Irvine, California. Mrs. [REDACTED] also stated that the petitioner had submitted a printout from Mainstay's website that explains its role.² The petitioner also submitted DE 6

¹ It is not clear whether the director referred to the EDD records submitted by the [REDACTED] prior to tax year 2004, namely Forms DE-6, or to the DE-166 submitted by Mainstay for the third quarter of 2005. None of these documents provides any names of employees, but rather total wages and numbers of employees.

² No such document is found in the materials submitted in response to the director's NOID. The record does contain a two-page computer printout for what appears to be state wages for the first quarter of 2001 in the

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. Mrs. [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.

Mrs. [REDACTED] stated that the beneficiary was not working for the petitioner but that a full time permanent position exists and is still valid. Mrs. [REDACTED] also submitted a letter entitled Offer of Employment Certification dated January 25, 2006 that stated the petitioner is offering the beneficiary a permanent full-time position as nursing assistant. Mrs. [REDACTED] also submitted a letter dated January 25, 2006, from [REDACTED] who stated the beneficiary has been taking care of his mother, [REDACTED] since September 2005 until the present time.

In her letter, Ms. [REDACTED] stated that the petitioner has an employment relationship with Mainstay 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. Ms. [REDACTED] stated that the petitioner has contracted with Mainstay to handle payroll, workers' compensation, loss control, and a host of other employment-related services. Ms. [REDACTED] stated that the Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. Ms. [REDACTED] 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 Mrs. [REDACTED] in her letter received January 31, 2006 stated the petitioner employed the beneficiary.³ The director also stated that, according to public records,⁴ Mainstay is a staffing agency. The director stated that Mainstay would handle matters such as payroll, worker's compensation, insurance, health insurance, and retirement. The director stated that the petitioner's assertions that the beneficiary would be working as a nursing assistant conflicted with the record with relation to employee/employer status. The director states that the "disclosure"⁵ submitted into evidence clearly showed that Mainstay Business Solutions controlled the beneficiary and although the beneficiary's end employer is said to be the petitioner, and the petitioner stated that they were able to fire the beneficiary, Mainstay still has the control and ability to reassign the beneficiary to another location or to other end users.

The director again stated that Mainstay Business Solutions is a temporary staffing agency and that direct employment and the intent to hire and control the beneficiary's employment and new hire reporting is with the staffing agency, and not with the petitioner. The director noted a letter submitted into evidence by the petitioner on October 1, 2004,⁶ and states this letter makes it clear that the petitioner has no intent to control employment or hire the beneficiary directly. The director further stated that although the petitioner stated the

amount of \$763,252.66. The provenance of this document is unknown.

³ As stated previously, Mrs. [REDACTED] the petitioner's president, did not state the petitioner was employing the beneficiary, but rather that the fulltime position was still available and valid.

⁴ The director did not identify the public records from which he had obtained information with regard to Mainstay.

⁵ The record is not clear as to which disclosure the director refers.

⁶ This letter is not found in the record.

beneficiary worked at the petitioner's location,⁷ the I-140 petition is a misrepresentation of the beneficiary's true employer, or acting agent. The director also noted that CIS could find no evidence of the petitioner directly employing anyone from the 4th quarter of 2004 to the present.

The director then stated that the petitioner submitted a contract of an employment agreement between itself and Mainstay Business Solutions.⁸ The director noted that the contract stated that Mainstay Business Solutions is considered the "legal employer" of the beneficiary, and that any hiring and firing of the beneficiary is the responsibility of the staffing agency. The director stated that the evidence submitted into record established that the true employer of the beneficiary is Mainstay Business Solutions. The director then further stated that the documentation indicates that the beneficiary would not be employed in a permanent, full-time position.

The director also noted that CIS had requested documentation to support the beneficiary's intent to leave an existing job and move over 300 miles for a job that pays approximately \$9.37 an hour. The director stated that the beneficiary who is now almost 60 has at no time lived near or in the San Jose area and that she has lived in the Los Angeles area since 1996. The director stated that no convincing evidence was submitted the beneficiary's intent to pursuing the San Jose position, or the petitioner's intent in offering the employment. The director then cited Section 212(a)(6)(c)(i) of the Act concerning fraud and misrepresentation and the effect of such acts on the admissibility of aliens. The director also cited *Matter of Estime*, 19 I&N Dec. 450 (BIA 1986, with regard to revocation of approved visa petitions).

On appeal, newly hired counsel states the issues addressed in the director's intent to deny the instant petition include the petitioner's ability to pay the proffered wage; the intent to employ the beneficiary due to previously approved I-140 petitions; and the intent of the beneficiary in seeking employment with the petitioner. Counsel notes that the petitioner has expanded with another facility in Bakersfield, California, and the need for nursing assistants, including the beneficiary, has become imperative. Counsel states that the petitioner is the bona fide employer of the beneficiary with ability to hire, fire and discipline employees, including the beneficiary. Counsel states that Mainstay is an employment agency that acted as the petitioner's "alter ego", and then asserts that the relationship between the petitioner and Mainstay has been terminated.

Counsel submits a copy of a fax from Mrs. [REDACTED], the petitioner's president, dated May 1, 2006 and addressed to [REDACTED], Mainstay Business Solutions. Mrs. [REDACTED] states in the letter that the petitioner is giving Mainstay the required 30 days notice for termination of the staffing contract. Mrs. [REDACTED] stated that the petitioner was pleased with Mainstay's service but that the petitioner was going back to a standard "Workers Compensation Insurance of Payroll." Mrs. [REDACTED] also stated the petitioner has had several problems with [CIS] and it wished to comply with the [CIS] rules and regulations. Counsel also submits a document entitled "Employment Agreement With Liquidate Damages in Case of Breach by Petitioned Employee". Both the beneficiary and the petitioner's president signed this document. The document basically outlines the rights

⁷ The petitioner in its response to the director's NOID clearly stated that the beneficiary is not working with the petitioner, and also provided evidence as to the beneficiary's current employment.

⁸ The contract between the petitioner and Mainstay Business Solutions (Mainstay) to which the director refers in his decision is not found in the record.

and duties of the beneficiary and the rights and responsibilities of the petitioner, including termination of the employment contract and a penalty provision of \$10,000 if the contract is breached.

Counsel resubmits a brochure about the petitioner, and also submits declarations by both Mrs. [REDACTED] the petitioner's president, and the beneficiary. In her declaration, Mrs. [REDACTED] states that the petitioner **will be the employer of the beneficiary with full and unrestricted power to hire and fire, with the power to control and supervise her.** Mrs. [REDACTED] also stated that the petitioner had hired an agency, Mainstay, to be an interim employment agency; however, during this time, Mainstay was just acting at the petitioner's "alter ego", following the petitioner's instructions and direction with regard to the persons working for the petitioner. Mrs. [REDACTED] then stated that at all times when Mainstay had a contract with the petitioner, the petitioner directly did the interviews and selection of people working for the petitioner, and the petitioner directly accepted and hired all employees. She also states that Mainstay never acted on its own to move or transfer a person working for the petitioner nor could Mainstay hire a person that the petitioner did not want to hire. In a second declaration, Mrs. [REDACTED] stated that there were twenty-two I-140 petitions that were approved at an annual salary of \$19,5510.44 for each beneficiary, and that the total sum of salaries would be \$429,229.60.⁹ Mrs. [REDACTED] stated that the petitioner presented its income tax return to support its claims of financial ability to pay these wages. Mrs. [REDACTED] states that with regard to the employment of all the approved applicants, the **petitioner has no control, over the applicants because of the great demand for their services, and based on the indefinite wait for the immigrant petition approval.** Mrs. [REDACTED] states that the petitioner has continued to **offer and will hire any of the beneficiaries at the petitioner's facilities.** Mrs. [REDACTED] states that it is extremely difficult to find workers with the loyalty, dedication and patience to care for the elderly and that the petitioner has to compete with in-house nursing assistants for private patients.

Mrs. [REDACTED] states that the offer to the beneficiary still stands; however, there was a misunderstanding on the beneficiary's part as to when she could legally work with the petitioner. Mrs. [REDACTED] states that in response to the director's question about why the beneficiary would want to move to San Jose for a job with a \$9.37 hourly wage, the offer of permanent residency status for the beneficiary in the United States is the greater **incentive to accept the proffered position.** Mrs. [REDACTED] states that the petitioner offers to petition for its workers, as an additional incentive for any such move and transfer to other areas, and to motivate a longer employment with the petitioner.

In her declaration, the beneficiary states that the petitioner's salary rate is not the most important employment issue for her, but rather the offer to legalize the beneficiary's stay in the United States is the most important incentive for seeking employment with the petitioner.

On appeal, in a cover letter submitted with the I-290B, counsel states that the proffered position is bona fide and the need for such a position is continuing especially with the expansion of the petitioner into Bakersfield, California.. Counsel states that the petitioner cannot find nurse's aides easily in the local labor market because most people, particularly the younger work force, prefer active, mentally challenging work in offices and in marketing. Counsel asserts that most people in the active labor force shun care provider work, and that the work for nurses' assistants is uniquely challenging and not easily appreciated until they are unavailable.

⁹ The petitioner's president submitted no further evidentiary documentation to support this assertion.

In his accompanying brief, counsel states that the main reason behind the director's denial is that CIS thinks that the petitioner is not the petitioner, but rather thinks that Mainstay, which counsel describes as the petitioner's employment agency, is the real petitioner. Counsel states that absent the selection, control, utilization and funds of the petitioner, Mainstay cannot and will not employ the beneficiary. Counsel asserts that Mainstay is not operating nor is it in the business of running a nursing home. Counsel states that even if Mainstay had the liberty to transfer the beneficiary to another job, counsel asserts that there is no evidence in the record that Mainstay, an employment agency and not engaged in the residential care of the elderly, has another client with the same line of business as the petitioner to which a transfer could be made. Counsel further asserts that a person or organization need not actually exercise control over the detail of the work to be an employer of an employee, the employee need only have the ability to control the details of the work. Counsel also asserts that a person and organization need not have absolute control to be an employer, and that the distinction between control and lack of control is one of degree. Counsel cites to various California appeals court decision involving employment issues in making his comments. Counsel further notes that Mainstay does not have a license to work, or exercise supervision in a nursing home, there is not evidence that such an alternate employer would accept the beneficiary, and finally, there is no evidence Mainstay had ever supervised and controlled the work of the beneficiary. Counsel finally states that with the termination of Mainstay's employment services by the petitioner, the issue of who is the direct employer of the beneficiary is moot.

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 Ms. [REDACTED] refers 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.

Both the petitioner, counsel and the director refer to Mainstay as a temporary staffing agency. The petitioner and counsel refer to Mainstay as the petitioner's "alter ego". Although the director cited public records as a source of his information on Mainstay being a temporary staffing agency, 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.¹⁰ The company website describes a range of services including "employee administration, including new hire processing, W4s and I-9s, payroll processing and 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 activities, does not identify the company exclusively as a temporary staffing agency. The website does state the company has 15,000

¹⁰ 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.

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 [REDACTED] 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 have 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 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 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. With more persuasive documentation, the AAO can not 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 300 miles for a job that pays \$9.75 an hour. The director also drew attention to the beneficiary's age in questioning her intentions to work with the petitioner. The AAO views the questioning of the beneficiary's intentions based on her age and geographic location as inappropriate factors 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 48 beneficiaries for whom the petitioner had filed I-140 petitions from 2002 to 2004. Of these beneficiaries, 33 petitions were filed in tax year 2003. In his notice of intent to deny the petition, the director stated that the EDD forms¹¹ showed no record of the petitioner's

¹¹ As stated previously, the record is not clear to which EDD forms the director refers.

previously approved I-140 beneficiaries' work with the petitioner. The director also noted that CIS records indicate 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.

In response the petitioner did not submit any evidentiary documentation with regard the previously approved beneficiaries, or employees pending I-140 approvals. The petitioner did, however, provide a list of 48 pending or approved I-140 petitions filed between the years 2002 and 2004, and also identified the beneficiaries of these petitions. The petitioner identified 22 of these petitions as approved by CIS. The petitioner also stated that Mainstay Business Solutions handled the petitioner's payroll services, payroll taxes filing and reporting and insurance compliance. However, 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, Mrs. [REDACTED] stated that there were twenty-two I-140 petitions that were approved at an annual salary of \$19,5510.44 for each beneficiary, and that the total sum of salaries would be \$429,229.60.¹² However, Mrs. [REDACTED] submitted no further evidentiary documentation to further substantiate her assertion. The assertions of counsel, and by extension, the petitioner, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. Thus, the petitioner cannot establish its ability to pay the proffered wages of all beneficiaries petitioned for by the petitioner, 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.

¹² The petitioner's president submitted no further evidentiary documentation to support this assertion.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹³ 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:

	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 48 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. On appeal, the petitioner's president stated in her declaration that there were 22 I-140 petitions approved and the wages for the beneficiaries in these petitions would total \$429,229.69. However, the petitioner's president presented no further evidentiary documentation such as pay slips, or employment records to further substantiate the actual employment and wages of these 22 approved petitions and beneficiaries. The assertions of counsel, and by extension, the petitioner, do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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.

¹³ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.



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ORDER: The appeal is remanded to the director.