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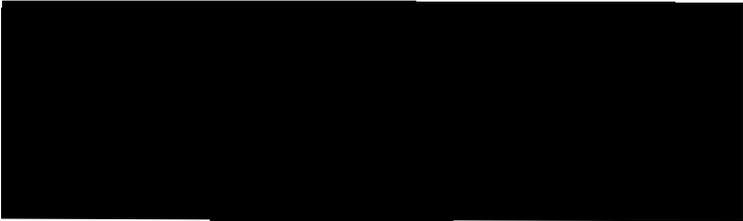
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3000  
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 05 2006  
WAC 04 209 50613

IN RE: Petitioner: [redacted]  
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

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

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 21, 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 as of the date he signed the ETA 750.

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 2001, 2002, and 2003. These documents named [REDACTED] as the business submitting the tax returns, and indicated the petitioner had ordinary income of \$891,017, \$658,814, and \$748,205 in the respective tax years.

The petitioner also submitted a city of San Jose Business Tax Certificate with an expiration date of December 31, 2004; a state of California Department of Health Services license with an expiration date of February 27, 2005; a fictitious business name statement for the petitioner that indicated [REDACTED] was doing business as [REDACTED]; a brochure for [REDACTED] W-2 Wage and Tax statements for tax years 2001, 2002, and 2003; and California EDD Form DE-6 Quarterly Wage and Withholding Reports for the first quarter of tax year 2003. The W-2 statements indicated that [REDACTED] had paid \$3,319,320.49 in wages and salaries in tax year 2001, \$3,649,725.23 in wages and salaries in tax year 2002, and \$3,118,962.91 in wages and salaries in tax year 2003. 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 DE-6 quarterly reports submitted by [REDACTED] for the second quarter of 2001 to the first quarter of 2003.

On December 21, 2005, the director issued a Notice of Intent to Deny (NOID) the instant petition. The director noted that the petitioner had submitted over 50 I-140 petitions from 2002 to the present, and that 22 petitions had been approved. The director asked the petitioner to submit evidence of its ability to pay the beneficiary and the beneficiaries of 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 petition had not employed any of the pending applicants or approved applicants since the third quarter of 2004, and requested an explanation of why the petitioner had not employed anyone since the end of the fourth quarter of 2004. The director stated that although the petition indicated that the beneficiary would be employed in a permanent, full-time position, the documentation submitted with the petition indicated that the beneficiary would not be employed in a permanent, full-time position.

The director stated that the Employment Development Department (EDD)<sup>1</sup> 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 had worked for the petitioner. The director requested the petitioner to submit evidence to confirm that the employment of the beneficiary is still valid and that a permanent full time job exists for the beneficiaries of approved and pending petitions. The director also noted that the beneficiary lived in Los Angeles, California. The director requested that the petitioner submit documentation to explain why the beneficiary was willing to

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<sup>1</sup> 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, to the DE-166 submitted by Mainstay for the third quarter of 2005, or to actual EDD records reviewed by the director. The first two documents do not provide any names of employees, but rather total wages and numbers of employees.

move 300 miles to work for the petitioner and earn an hourly wage of \$9.37. 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 19, 2006. In her letter, Mrs. [REDACTED] stated that the petitioner was submitting its corporate tax returns for tax years 2001, 2002, and 2003 to establish its ability to pay the proffered wage for all approved and pending I-140 petitions since the priority date and to the present. In her letter Mrs. [REDACTED] 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.

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. Whitfield 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. Ms. [REDACTED] referred to a Form DE-166 filed through Mainstay. This document is found in the record and indicates that Mainstay, with a contact person located in Folsom, California, filed a media file for total wages of \$36,328,839.48, for 12,267 employees for the 3<sup>rd</sup> quarter of 2005. This document is signed by [REDACTED]

Mrs. [REDACTED] also stated that the beneficiary works for the petitioner and submitted copies of the beneficiary's pay stubs generated by Mainstay, as well as an employment certification letter. The pay stubs are dated from December 6, 2004 to January 5, 2006. Each paycheck appears to be signed by [REDACTED]. Based on these documents, the beneficiary earned \$12 an hour through the 2004 year. The paychecks are written on the Union Bank of California, in San Francisco, California by Mainstay Business Solutions. The petitioner is identified on the checks with an address initially in Roseville, California, and then in Folsom, California. The petitioner's employment certification letter claims that the beneficiary began his employment with the petitioner on November 22, 2004, is a certified nursing assistant, and works full time for an hourly wage of \$12.

On April 15, 2006, the director denied the petition. In his decision, the director stated that the petitioner filed the I-140 employment based petition under section 203(b)(3)(A)(ii) of the Act.<sup>2</sup> The director then stated that Mrs. [REDACTED] in her letter stated the petitioner employed the beneficiary and that employment related matters such as payroll, worker's compensation, insurance, health insurance, and retirement, were handled through a staffing agency, Mainstay. The director also stated that the petitioner's assertions that the beneficiary would be working as a registered nurse<sup>3</sup> conflicted with the record with relation to employee/employer status. The

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<sup>2</sup> Section 203(b)(3)(A)(ii) relates to qualified immigrants who hold baccalaureate degrees and are members of the professions. The petitioner filed the instant petition under section 203(b)(3)(A)(iii), other unskilled workers.

<sup>3</sup> The petition is for a nursing assistant. The director's references to a registered nurse in his decision are

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.

The director then stated that the petitioner submitted a contract of an employment agreement<sup>4</sup> into evidence and that the contract stated that Mainstay is considered the "legal employer" of the beneficiary. The director stated that Mainstay had the responsibility to hire, to fire, and to reassign the beneficiary. The director stated that no evidence was submitted to the record to establish that the petitioner had sole control over the beneficiary, and that no exclusivity contracts between Mainstay and the petitioner were submitted to the record. Therefore, the director asserted that Mainstay was the beneficiary's employer, not the petitioner. The director then stated that second party employment is a misrepresentation of the beneficiary's true employer and 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, newly hired counsel in a letter dated May 25, 2006, stated that the issue identified in the director's intent to deny the instant petition was the non-existence of a direct employer-employee relationship between the petitioner and the beneficiary. Counsel states that Mainstay was hired as the petitioner's "alter ego," following instructions and directions with regard to the petitioner's employees. Counsel asserts that Mainstay was never involved in the interview, selection process of the petitioner's employees, nor could it override decisions made by the petitioner. Counsel notes that the petitioner has expanded with another facility in Bakersfield, California with 89 beds, and the need for nursing assistants, including the beneficiary, has become imperative.

Counsel then submits an affidavit form Mrs. [REDACTED] in which she describes the relationship between the petitioner and Mainstay. Mrs. [REDACTED] states that the petitioner is the beneficiary's employer with full and unrestricted power to hire, fire, control and supervise him. Mrs. [REDACTED] also submits a letter dated May 1, 2006 addressed to [REDACTED] Mainstay Business Solutions that stated the petitioner is giving Mainstay the required 30 days notice to terminate the staffing contract. Mrs. [REDACTED] also stated that this termination was being done to cut problems with the CIS and the petitioner's desire to comply with the CIS rules and regulations.

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viewed as a simple error.

<sup>4</sup> The contract between the petitioner and Mainstay Business Solutions (Mainstay) to which the director refers in his decision is not found in the record.

Counsel states that the petitioner has indicated that they cannot find nurse's aides easily in the local labor market because most people prefer active, mentally challenging work in offices and in marketing. Counsel also states that because of the quick turnover in nursing assistants, it is imperative to make "adequate preparation and reserve in the likely eventuality that local workers, especially those not petitioned by the petitioner, will terminate their services," and that the care of the elderly and the handicapped cannot be compromised and must be provided for on an uninterrupted basis. 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 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. Finally, counsel submits a sworn affidavit from the beneficiary with regard to how he entered the United States.

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 him. Mrs. [REDACTED] also stated that the petitioner had hired an agency, Mainstay, to be an interim employment agency; however, during this time, Mainstay was only acting at the petitioner's "alter ego," following the petitioner's instructions and direction with regard to the petitioner's employees. 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 subsequent brief dated June 21, 2006, counsel again states that the main reason behind the director's denial of the petition is that CIS 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 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 decisions 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 that might outline the actual business relationship between the petitioner and Mainstay and the effective dates of any such relationship. Although the letter from Ms. [REDACTED] submitted in response to the director's NOID, 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, and the petitioner's "alter ego", among other terms. Although the director cited public records as a source of his information on Mainstay, he did not identify any such public documents. Based on its Internet website, Mainstay Business Solutions is a duly formed and organized tribal body of the Blue Lake Rancheria Tribe of California (Blue Lake), a federally-recognized Indian tribe. The business was established in April 2003 and appears to provide outsourced employment services to small and medium-sized businesses in California and Hawaii.<sup>5</sup> 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 employees under management and has processed \$750 million in payroll for some 129,000 employees over the past three years.

In addition the fact that the petitioner, as Aquinas Corporation doing business as San Tomas Convalescent Hospital, submitted DE-6 Forms in tax years 2001, 2002, and 2003 supports the petitioner being the actual employer of the beneficiary as of the 2001 priority date year and as of the June 2003 filing of the instant I-140 petition. Mainstay's website states 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. 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. Nevertheless, the director's inference that the lack of such documentation means that the petitioner did not employ any employees in 2004 also appears to be unsubstantiated.

However, the petitioner bears the burden of proof in establishing its eligibility for the visa petition, and thus far, based on the record, the preponderance of the evidence does not show that the petitioner who filed the instant I-140 petition remained the employer of the beneficiary during tax years 2004 and 2005, or rather turned over the recruitment and hiring of employees, and according to the director's statements, control of the beneficiary, to Mainstay. Thus, the issue of who is the actual employer, the petitioner or Mainstay, during the years 2004 and 2005 is not established by either the director or counsel's comments or the record. While the record contains copies of the beneficiary's paychecks ostensibly generated by Mainstay, these documents also do not establish the business relationship between the petitioner and Mainstay. It is also noted that the

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<sup>5</sup> 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.

petitioner's fax to Mainstay in May 2006 to terminate the petitioner's business relationship with Mainstay is given little evidentiary weight. The record contains no further documentation as to the actual dissolution of any business relationship based on the petitioner's fax, or formal receipt of the petitioner's request for termination by Mainstay. As stated previously, 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 Form DE-6 documentation as to wages paid during the years 2001, 2002, and 2003 support its being the prospective employer of the beneficiary as of the priority date and as of the actual filing of the petition in 2003. Furthermore, the record contains no documentation to suggest that Mainstay in any way is a successor in interest to the petitioner. Without more persuasive documentation, the AAO cannot evaluate the director's findings or counsel's comments with regard to the beneficiary's actual prospective employer during the 2004 or 2005 period of time. Thus, the AAO will withdraw the part of the director's decision that discusses the relationship between the petitioner and Mainstay, and remand the decision to the director for 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 AAO views the questioning of the beneficiary's intentions based on his geographic location as an inappropriate factor to consider. The AAO will not address this issue further. Furthermore, in his decision, the director refers to *Matter of Estime*, which is a precedent 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, the beneficiary on the Form ETA 750 stated that he had not worked for the petitioner. In response to the director's NOID, the petitioner submitted the beneficiary's paychecks made out to him by Mainstay for the period December 2004 to January 2006. While this documentation remains problematic, due to the questions of whether the petitioner in tax year 2005 was the beneficiary's actual employer, the rate of pay, namely, \$12 an hour is higher than the hourly rate of the proffered wage, namely \$9.38.<sup>6</sup> If the documentation and identity of the beneficiary's actual employer was clarified, the petitioner could establish that it paid the beneficiary a salary higher than the proffered wage in 2005. However, the petitioner has to

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<sup>6</sup> This figure is calculated by dividing the proffered annual wage of \$19,510.44 by 2080 hours.

establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 2001 priority date. The petitioner has submitted no evidence with regard to any wages paid to the beneficiary from March 2001 to December 2004. 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.

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, in the director's NOID, he stated that the petitioner had submitted over 50 I-140 applications from 2002 to the present, and that 22 of these petitions had been approved. The director further stated that the EDD form<sup>7</sup> showed no record of the petitioner's 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 4<sup>th</sup> quarter of 2004.

In response the petitioner did not submit any evidentiary documentation with regard to the previously approved beneficiaries, or I-140 petitions pending approval. 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

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<sup>7</sup> As stated previously, the record is not clear to which EED forms the director refers.

specific information, the AAO cannot determine whether the petitioner in fact has sufficient net income to pay the proffered wages of all multiple beneficiaries.

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

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> 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

As stated previously, the petitioner did provide documentation with regard to the payment of the beneficiary from December 2004 to January 2005. However, due to the continuing lack of clarification as to who was the beneficiary's actual employer during this period of time, the petitioner has not demonstrated that it paid the full proffered wage to the beneficiary during this period of time. Therefore the petitioner has to establish its ability to pay the proffered wage during 2005. In addition, the record does not contain the petitioner's tax

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<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

returns from tax year 2004 or 2005, if available, and thus, the AAO cannot evaluate whether the petitioner has the ability to pay the difference between the beneficiary's actual wages and the proffered wage, as well as pay the proffered salaries of all other beneficiaries of approved or pending I-140 petitions.

With regard to tax years 2001 to 2003, 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.

Neither the petitioner nor counsel submitted any further evidentiary documentation to establish the actual employment of any approved beneficiaries and their actual wages. The petitioner has not established that it paid the beneficiary the proffered wage during this period of time. 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, as of the priority date to the present.

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

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

**ORDER:** The appeal is remanded to the director.