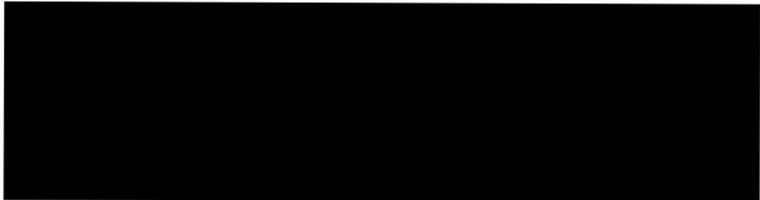




U.S. Citizenship
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Services

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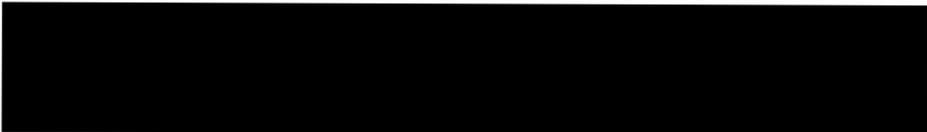
Date: APR 09 2007

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 director, California Service Center, initially denied the preference visa petition on April 28, 2006. The matter came to the Administrative Appeals Office (AAO) on appeal. The AAO withdrew the director's decision and remanded the petition to the director for further analysis. After issuing a request for evidence and allowing the petitioner an opportunity to respond, the director denied the petition again on February 9, 2007. He certified his decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a skilled nursing convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nurse's assistant or nurse's aide, orderly and/or attendant.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the DOL accompanied the petition. In his February 9, 2007 denial, the director determined that the petitioner had not established that it was the actual employer of the beneficiary or that the petitioner had demonstrated an ability to pay the beneficiary the proffered wage from the priority date onwards. Therefore, the director denied the petition.

The regulation at 20 C.F.R. § 656.3² states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again

¹ The petitioner described the beneficiary's position as a nurse's assistant position. The U.S. Department of Labor (DOL) classified the position as a nurse's aide, orderly and attendant.

² The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). *See* 8 C.F.R. § 204.5(c).

Section 203(b)(3)(A)(iii) of 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(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 DOL. *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.

If the instant petition were the only petition filed by the petitioner, it would only be required to produce evidence of its ability to pay the proffered wage to its single beneficiary. However, where, as in this case, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously or approved during the relevant period of analysis, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (which indicates that the petitioner must establish its ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2).

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 the Form 1120S, U.S. Income Tax Return for an S Corporation, for 2000, 2001, and 2002. These documents named [REDACTED] as the business submitting the tax returns, and indicated that the petitioner had net income or ordinary income of \$605,044 in 2000, \$891,017 in 2001, and \$658,814 in 2002.

The director determined that the evidence submitted was not sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Thus, on May 4, 2004, he requested additional evidence regarding the petitioner's ability to pay the wage. The director emphasized that the petitioner had submitted the Form I-140, Immigrant Petition for Alien Worker, on multiple occasions and that most of these petitions were still pending. The director stated that the petitioner had to establish that it had the ability to pay the proffered wages of all the beneficiaries for which it had petitioned and which were pending during the relevant period of analysis, not just the wage of the beneficiary on the instant petition. The director requested a detailed list naming all beneficiaries for whom it had petitioned and for whom the petition was approved or pending.

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

Beyond this, the director requested a list of the petitioner's care facilities, and a clarification as to whether the beneficiary was currently employed by the petitioner. The director also requested evidence that the beneficiary possessed the requisite four years of high school education and the requisite work experience stipulated on the Form ETA 750.

In response, the petitioner submitted its Form 1120S for 2003 which indicated net income or ordinary income of \$748,205. The petitioner also stated that it operated only one facility, the [REDACTED]. The petitioner stated that the beneficiary did not work for the petitioner. It also submitted a document entitled Offer of Employment Certification signed by the petitioner's administrator which indicated that the petitioner was offering a permanent, full-time position as nursing assistant to the beneficiary.

The petitioner also submitted a list which indicated that the petitioner had filed 46 visa preference petitions from November 2002 to June 2004, and that Citizenship and Immigration Services (CIS) had approved 22 of the petitions. The petitioner also submitted documentation regarding the beneficiary's graduation from Lourdes College in Cagayan de Oro City, the Philippines, in 1957, as well as two letters of work verification for two years and one month of experience as a nursing assistant, prior to the March 2001 priority date.

On December 21, 2005, the director issued a Notice of Intent to Deny (NOID) the instant petition. The director stated that the petitioner had submitted over 50 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 instant beneficiary and all other beneficiaries on its pending petitions as of the March 26, 2001 priority date to the present. The director indicated that evidence in the record suggested that the petitioner had not employed any of its beneficiaries on the pending petitions or the approved petitions since the third quarter of 2004 and that the petitioner had not employed anyone since the end of the fourth quarter of 2004. The director stated that the Employment Development Department (EDD) did not show any record of the beneficiaries of the petitioner's previously approved petitions working for the petitioner, even though CIS records indicated that these beneficiaries had current and approved CIS Employment Authorization Documents (EADs). The director asked the petitioner to explain why it had not employed any of its beneficiaries since the third quarter of 2004, and to explain why it had not employed anyone since the fourth quarter of 2004. The director indicated that the lack of records of employment of its beneficiaries could lead a reasonable person to conclude that no jobs exist for the instant beneficiary or for the beneficiaries of the petitioner's pending or previously approved petitions.

The director requested that the petitioner submit evidence to confirm that permanent, full time jobs exist for the instant beneficiary and the beneficiaries of its approved and pending petitions.

In response, the petitioner's administrator, submitted a letter dated January 19, 2006. In her letter, stated that the petitioner had submitted its income tax returns for 2001 through 2003 to demonstrate the petitioner's ability to pay the wages for all the approved Form I-140 petitions and pending petitions from the priority date to the present. stated that the petitioner had outsourced its payroll services, payroll taxes filing and reporting and insurance compliance to Mainstay Business Solutions (Mainstay), indicating that Mainstay had paid the petitioner's employees, rather than the petitioner paying its employees itself. also stated that a copy of Mainstay's quarterly report relating to the petitioner's employees for the previous quarters was submitted into the record. In addition, a letter dated January 5, 2006 from [REDACTED], Human Resources Manager, Mainstay, Irvine, California was submitted into the record.

This office notes that the quarterly reports submitted into the record were those of [REDACTED] Quarterly Wage and Withholding Reports, DE-6 Forms, for the first three quarters of 2001, for all four quarters of 2002, and all four quarters of 2003. The Mainstay Quarterly Wage and Withholding Information, Form DE-166, an EDD magnetic media-submittal sheet, was also submitted but only for the third quarter of 2005. This form indicates that Mainstay paid \$36,328,839.48 in wages during the third quarter of 2005, but it does not contain information which indicates that Mainstay had paid any of the petitioner's employees.

also submitted a letter entitled Offer of Employment Certification dated January 19, 2006 which stated that the petitioner was offering the beneficiary a permanent, full-time position as nursing assistant.

In her letter, 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. stated that the petitioner has contracted with Mainstay to handle payroll, workers' compensation, loss control, and a host of other employment-related services. stated that Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. Ms. Whitfield also stated that the petitioner's 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 this decision, the director concluded that the actual employer in this case was Mainstay, not the petitioner and that all independent evidence in the record supported a finding that [REDACTED] was not in a position to petition for the beneficiary.³ The director indicated that the record reflects that Mainstay is a temporary staffing agency, and that Mainstay would be the beneficiary's direct employer as it has the ability to hire and to control the beneficiary's employment. In addition, the director noted that Mainstay also had the ability to contract the beneficiary out to clients other than the petitioner. The director stated that the petitioner had submitted into the record a contract of an employment agreement.⁴ The director indicated that the contract between

³ Literally, the director stated that [REDACTED] was not the petitioner in this case. However, whether [REDACTED] is the stated petitioner in this case is not in dispute. The director proceeds to explain that San Tomas Convalescent Hospital is not the actual employer of the beneficiary and as such may not petition for her. Thus, it appears that the director intended to state that San Tomas Convalescent Hospital is not qualified to petition for the beneficiary, rather than that San Tomas Convalescent Hospital is not the petitioner.

⁴ The contract between the petitioner and Mainstay Business Solutions (Mainstay) to which the director refers

Mainstay and [REDACTED] indicates that Mainstay would be considered the "legal employer" of the beneficiary and that the hiring and firing of the beneficiary would be the responsibility of Mainstay. Therefore, the director concluded that Mainstay would be the beneficiary's actual employer, rather than the petitioner.

The director also noted that the petitioner did submit a letter stating that the job offer from [REDACTED] is still valid. However, the director could find no evidence in the record that the petitioner was directly employing anyone from the fourth quarter of 2004 to the present.

On appeal, newly hired counsel indicated that [REDACTED] would be the beneficiary's actual employer and that [REDACTED] did intend to hire the beneficiary and provide permanent, full time employment. Counsel also indicated that whether or not the proffered wage is relatively low is not relevant to the beneficiary's actual intent to relocate to another geographic area in order to obtain legal residency, contrary to the director's assertions. In his brief, counsel claimed that Mainstay did not have the power to hire and fire the beneficiary or to move the beneficiary to some employment site other than the petitioning business and that Mainstay would not be the beneficiary's actual employer. Counsel also indicated that evidence in the record does demonstrate that a valid job offer continues to exist for the beneficiary.

As previously stated, the director referred to a contract between Mainstay and the petitioner which, according to the director, the petitioner submitted into the record prior to the issuance of the director's April 28, 2006 decision. However, the AAO emphasized, when it remanded that decision to the director, that the record did not contain this document and that the record, at the time of the appeal, was silent regarding the actual business relationship between the petitioner and Mainstay and the effective dates of any such relationship. Also a letter referenced by the director in his April 28, 2006 decision which, according to the director, made clear that the petitioner had no intention of controlling the employment of the beneficiary or hiring the beneficiary directly was also not found in the record. This office also pointed out in its remand that while the letter from [REDACTED] refers to the business arrangement between Mainstay and the petitioner, her letter is not a contract and shall only be given very limited evidentiary weight. Without access to the actual contract between the petitioner and Mainstay it was not possible for the AAO to determine which entity would be the instant beneficiary's actual employer.

Subsequent to the remand issued by the AAO, the director issued a request for evidence dated September 15, 2006. The director requested a copy of the petitioner's contract agreement with Mainstay. Regarding proof of the petitioner's ability to pay the proffered wage and the validity of the job offer presented to the instant beneficiary, the director also requested: a list of all preference visa petitions which the petitioner had filed as of the priority date and following; the status of each petition; the proffered wage of each beneficiary on each of its petitions; documentation of all wages actually paid to the petitioner's beneficiaries since the priority date; a list of all its petitions that have been approved; as well as a list of all beneficiaries who have in the past or who currently work for the petitioner.

In response, the petitioner submitted a disclosure statement issued by Mainstay regarding its responsibilities to the petitioner and the employees at its site. The statement specifies that Mainstay would require the petitioner to continue to carry out its responsibility to hire, to fire and to assign its employees' wages. Mainstay would handle payroll, administrative services, and as the "legal employer", if applicable, would manage employee benefits. The statement emphasizes that Mainstay, as a tribally owned staffing company, is a sovereign entity. Thus, not all state and federal laws regarding employment apply to Mainstay functions. In

in this decision is not found in the record.

particular, the statement indicates that Mainstay's occupational injury indemnity and medical benefits tend to be guided by tribal council determinations, as opposed to those guidelines developed by state and federal agencies and judges. The statement points out that, for employees under Mainstay's administration, there is no allowance for attorneys' fees to be covered by the employer, should an employee sue the employer. Mainstay administrative services include: occupational injury indemnity and medical benefit coverage and claim administration; federal and state withholding calculations; deposit of federal, state and local tax liabilities; payroll check preparation; unemployment claims management; etc. This document is not dated.⁵

The petitioner also submitted a copy of a different Mainstay disclosure statement which, according to the document, each of the petitioner's employees must sign at the time of hire. The statement indicates that Mainstay administers many employment functions for the petitioner. In particular, this statement places an employee on notice that should any job-related injuries occur, any resulting benefits or compensation to the employee will be determined based on Mainstay's tribally determined policies and procedures; also any disputes as to the employee's benefits will be settled by a sovereign Tribal Council and federal and state courts have no jurisdiction over the council's rulings. This statement adds that there is no allowance for the employer to cover attorneys' fees under this plan. The statement also explains that the arrangement between the petitioner and Mainstay, a tribally owned staffing company, benefits the employee who is legitimately injured at work and the employer who needs to manage a budget while providing benefits for its employees. The statement specifies that under its agreement with Mainstay, the petitioner's employees waive any right to sue the petitioner for work-related injuries, even where the petitioner is negligent. Finally, the statement points out that the employee must accept the sovereign tribal status of Mainstay and the terms laid out in its disclosure statement in order to obtain employment from the petitioner.

These documents appear to indicate that the petitioner is the actual employer of the employees at its worksite and that it has enlisted Mainstay's services only to keep costs down where its employees' job-related injuries are concerned and to carry out certain administrative services on behalf of the petitioner's employees. However, Mainstay's standard customer agreement, another document submitted into the record in response to the director's September 15, 2006 request for evidence, adds information which clearly supports the finding that Mainstay is the actual employer of the employees at the petitioner's worksite.

The copy of Mainstay's standard customer agreement is undated and unsigned, but given that on December 7, 2007 the petitioner sent it by facsimile machine as a continuation of the fax which included the two disclosure documents referenced above, this is apparently a copy of a binding agreement between the petitioner and Mainstay. Moreover, the record indicates that the petitioner abided by and honored the terms of this agreement. Specifically, on May 1, 2006, the petitioner, in accordance with the terms of this agreement at page 6, section F(2), gave Mainstay the "required 30 days notice of termination" of its staffing contract with

⁵ This office notes that there are two copies of the signature page for this disclosure statement in the record. The first copy bears only the signature of [REDACTED] the petitioner's president and administrator. No Mainstay representative had yet signed this page at the time [REDACTED] signed it. There is no evidence on this copy of the signature page that it was sent by facsimile machine other than when the petitioner faxed it to an unknown party on the recent date of December 7, 2006. The second copy of this same signature page includes the signature of [REDACTED] and the illegible signature of the president of Mainstay. Markings on this page indicate that the petitioner sent the document by facsimile machine to an unnamed party on November 10, 2003. Thus, the record is not clear, but, during 2003, the petitioner may have faxed this page to Mainstay for signature, after the petitioner's president had signed it. As such, the petitioner and Mainstay may have entered into this agreement during 2003. This office notes that, according to its website, Mainstay was established during April 2003. See <http://www.mainstaybusiness.com/index.cfm?navid=7> (accessed April 2, 2007.)

Mainstay. This May 1, 2006 letter from _____ the petitioner's president, indicates that the petitioner would be terminating the contract with Mainstay because of problems that the contract has caused between the petitioner and CIS and that the petitioner wishes to comply with CIS regulations. Thus, a preponderance of the evidence indicates that the petitioner submitted this document in response to the director's request for evidence because it represents a binding agreement between the petitioner and Mainstay.

This agreement on page 1, section A(2), indicates that Mainstay will have sole responsibility for hiring and terminating the employees who work at the petitioner's place of business. Page 1, section A(5) of this standard customer agreement indicates that the petitioner has no right to set the level of compensation for employees at its site, only Mainstay has this right. Page 2, section B(1) of the agreement indicates that the petitioner may only offer Mainstay employees assigned to its place of business assignments that are temporary. Page 3, section B(7) indicates that should the petitioner fail to remedy certain forms of misconduct toward one of Mainstay's employees assigned to the petitioner's place of business, Mainstay has the right to withdraw this employee from the petitioner's worksite. Page 4, section C(4) of the agreement indicates that the petitioner may not request that its employees work outside the state without Mainstay's express written consent.

In sum, from some unspecified date after Mainstay was established in 2003 until 30 days subsequent to the petitioner's May 1, 2006 notice of termination letter, Mainstay apparently had the authority to hire and terminate employees at the petitioner's place of business. The standard customer agreement clearly states that employees at the petitioning business' worksite are Mainstay's employees. The record indicates for a certain time during the relevant period of analysis these employees were under Mainstay's control in other crucial ways. For instance, Mainstay had the authority to remove these employees from the petitioner's place of business should the petitioner fail to remedy issues of misconduct at its worksite which were of concern to Mainstay, and Mainstay presumably had the authority then to place such employees at worksites away from the petitioning business. Also, the petitioner was not permitted to offer permanent assignments to any Mainstay employee working at the petitioner's place of business. It could only place the employee in temporary assignments. Thus, this office finds that Mainstay would have been the beneficiary's actual employer for some portion of the relevant period of analysis from the priority date onwards in that Mainstay would have done more than merely refer the beneficiary to the petitioner for a fee; in that it would have directly paid the beneficiary's salary; in that it would have had the authority to place the beneficiary at a worksite other than the petitioner's place of business; etc. See *Matter of Ord* at 286; *Matter of Artee* at 366; and *Matter of Smith* at 773.

Only the actual U.S. employer that intends to employ the beneficiary may file a petition to classify the beneficiary under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). See 8 C.F.R. § 204.5(c). The petitioner failed to establish that during the entirety of the period from the priority date onwards that it would have been the beneficiary's actual employer in control of the proffered position had the beneficiary accepted the position. Consequently, the petitioner is not eligible to file a visa preference petition on behalf of the beneficiary.

Further, the petitioner failed to establish that it has ability to pay the proffered wages of all its beneficiaries relevant to this analysis, including the instant beneficiary, for whom it has submitted visa preference petitions.

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 record does not establish that the petitioner employed and paid the beneficiary the full proffered wage or any portion thereof from the priority date onwards. Further, the director specifically requested that the petitioner provide evidence of any wages it paid to any beneficiaries on its multiple petitions pending or approved during the relevant period of analysis. The petitioner did not provide any evidence of having ever paid wages to any of its beneficiaries.

If the petitioner does not establish that it employed and paid the instant beneficiary, as well as any other of its beneficiaries relevant to this analysis, an amount at least equal to the proffered wage from the priority date onwards, 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 not sufficient. Also, showing that the petitioner paid wages in excess of the proffered wage is not sufficient. 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 petitioner submitted its tax return for 2000. However, the priority date in this case falls after tax year 2000. Thus, the petitioner's tax return for 2000 is not directly relevant in these proceedings. Consequently, only information on the petitioner's 2001, 2002, and 2003 federal income tax returns will be analyzed.

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 Form 1120S. The petitioner's tax returns show the following amounts of net income or ordinary income: \$891,017 for 2001, \$658,814 for 2002, and \$748,205 for 2003. These figures are sufficient to pay the proffered wage of the instant beneficiary or \$19,510.44. However, the petitioner must establish its ability to pay the proffered wage for all beneficiaries of its petitions, pending or approved from the priority date onwards.

The petitioner submitted into the record documentation which indicates that it has over 40 petitions which are either pending or were approved since the priority date. The director specifically requested that the petitioner provide a list of the proffered wage for each of the beneficiaries on these petitions. In its remand of the director's initial decision, this office also emphasized that such a list was necessary before CIS could determine whether the petitioner had the ability to pay the relevant proffered wages. The petitioner failed to provide information related to the proffered wages of its beneficiaries. It also failed to explain why it did not do so. Thus, not only has the petitioner failed to show an ability to pay its beneficiaries' combined proffered wages from its net income, it has failed to even document for the record what amount it must pay to cover these wages.

The petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay the 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, the combined total of its proffered wages 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.⁶ 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 or the total of its combined proffered wages, the petitioner is expected to be able to pay the proffered wage or the total of its combined proffered wages 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	\$ 1,273,922	\$ 1,407,168	\$ 1,356,135
Current Liabilities	\$ 371,008	\$ 464,952	\$ 311,644
Net current assets	\$ 902,914	\$ 942,216	\$ 1,044,491

The petitioner has not demonstrated that it paid the full proffered wage or any portion of the wage to the instant beneficiary or to any other of its beneficiaries relevant to this analysis from the priority date onwards. Based on the petitioner's net current assets, the petitioner does have sufficient funds to pay the proffered wage of the instant beneficiary or \$19,510.44 in 2001, 2002 and 2003. However, before this office may determine whether the petitioner has demonstrated an ability to pay in the instant case, the petitioner must establish whether it is able to pay the combined proffered wages of all beneficiaries of the multiple petitions that it has filed which were approved or which have been pending during the period since the priority date onwards.

The record includes a list submitted by the petitioner which identifies over 40 beneficiaries of petitions apparently filed by the petitioner during the relevant period of analysis. However, the petitioner failed to provide evidence regarding the respective proffered wages of each of its beneficiaries who are relevant to this analysis. Without such evidence, the AAO is not able to determine whether the petitioner has the ability to pay the wages of all beneficiaries of the multiple petitions filed by the petitioner, based on the petitioner's net current assets.

Thus, the petitioner has not shown the ability to pay the proffered wage from the priority date onwards based on its actual payment of the wage to the beneficiary, its net income or its net current assets.

Beyond the decision of the director, the record indicates another basis on which the instant petition must be denied. In the request for evidence dated September 15, 2006, the director specifically requested that the petitioner submit a list that includes the proffered wages for all beneficiaries on its petitions filed since the March 26, 2001 priority date. The petitioner failed to submit such evidence and failed to provide a reasonable

⁶ 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.

explanation as to why it did not. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even where the director failed to identify such basis for denial in his decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(which notes that the AAO reviews decisions on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

This office also notes that in the denial dated February 9, 2007, the director concluded that the petitioner had misrepresented which entity was the actual employer in control of the proffered position. The director indicated that this amounted to a misrepresentation of a fact which is material to the adjudication of this petition. The director did not go on to explicitly conclude that the petitioner had engaged in fraud or willful misrepresentation of a material fact. Nonetheless, to clarify this point in the denial, this office would underscore that there is not evidence in the record that the petitioner or the beneficiary engaged in fraud or the *willful* misrepresentation of a material fact in the filing of this petition or in the filing of the corresponding labor certification.

ORDER: The director's decision of February 9, 2007 is affirmed. The petition remains denied.