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U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **SEP 20 2007**

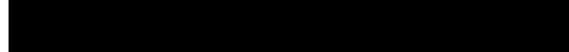
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IN RE:

Petitioner:

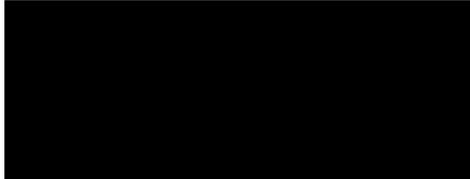


Beneficiary:



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, denied the Immigrant Petition for Alien Worker (I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the DOL accompanied the petition. 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 beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petition merits approval.

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 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 \$1,938.34 per month, which amounts to \$23,260 per year. On the Form ETA 750B, signed by the beneficiary on March 10, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the I-140, which was filed on June 29, 2004, the petitioner states that it was established in 1984, has a gross annual income of 7 million dollars and currently employs 136 workers. The named employer on the ETA 750 is the "[REDACTED] Hospital." The petitioner of the I-140 is also the same employer.

If a petitioner, such as is the case here, seeks to sponsor multiple beneficiaries which have been pending simultaneously or approved during a given period, the petitioner must show that it has had sufficient financial resources pay all the wages beginning at the respective priority date 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). See also 8 C.F.R. § 204.5(g)(2).

In support of its ability to pay the proffered salary of \$23,260 per year, the petitioner provided copies of its state quarterly wage reports for 2002 and 2003 as well as copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, and 2003. They reflect that the name of the filer was "Aquinas Corporation." Underneath that name is the name of the petitioner, "San Tomas Convalescent Hospital." A copy of a 2004 state licensing certificate indicates that Aquinas Corporation is authorized to operate the petitioning nursing facility. The returns reflect that the petitioner uses a standard calendar year to file its tax returns. The returns contain the following information:

	2001	2002	2003
Ordinary Income	\$ 891,017	\$ 658,814	\$ 748,205
Current Assets (Sched. L)	\$ 1,273,922	\$1,407,168	\$1,356,135
Current Liabilities (Sched. L)	\$ 371,008	\$ 464,952	\$ 311,644
Net current	\$ 902,914	\$ 942,216	\$1,044,491

It is noted that 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).

The regulation at 20 C.F.R. § 656.3¹ 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.

Employment means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

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

¹ 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.

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 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.*

In this case, on December 21, 2005, the director requested additional evidence regarding the petitioner's ability to pay the wage. The director emphasized that the petitioner had submitted over fifty I-140 petitions from 2002 to the present. Of these, 22 had been approved. The director requested that the petitioner submit evidence that the petitioner had the ability to pay the beneficiary and all other pending applications the certified wage from the priority date to the present.

The director also requested that the petitioner provide an explanation why the petitioner had not employed any of the pending applicants or approved applicants since the third quarter of the 2004 and to additionally explain why the petitioner had not employed anyone since the end of the fourth quarter of 2004. The director also requested evidence demonstrating that a current offer of permanent full-time employment existed for the beneficiary. The director observed that the beneficiary lives over 300 miles from the petitioning company and questioned the motivation to move to work for the petitioner at the proffered wage.

In response, the petitioner resubmitted copies of its tax returns for 2001 through 2003 in order to demonstrate its ability to pay the wages for all the approved I-140 petitions and pending petitions. The petitioner also submitted a letter, dated January 19, 2006, from [REDACTED] its administrator, who states that the petitioner was offering a permanent, full-time position to the beneficiary and that the beneficiary had not started working for the petitioner. Another document, also dated January 19, 2006, entitled Offer of Employment Certification, signed by [REDACTED] also states that the petitioner is offering a permanent, full-time position as nursing assistant to the beneficiary.

[REDACTED] also 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. [REDACTED] added 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.

In her letter, [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. [REDACTED] stated that Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. Ms. [REDACTED] 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.

The state quarterly wage reports submitted with the petitioner's response are those of Aquinas Corporation for

2001, 2002, and 2003. 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 paid \$36,328,839.48 in wages during the third quarter of 2005, but it does not contain information which indicates that had paid any of the petitioner's employees.

The petitioner also provided a letter, dated January 3, 2006, from the office manager of He states that the beneficiary has been given caregiver assignments from October 2004 until the present.

On April 26, 2006, the director denied the petition. In this decision, the director concluded that the actual employer in this case was not the petitioner as it has the ability to hire and to control the beneficiary's employment. In addition, the director noted that 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 and also refers to a letter from the petitioner dated October 1, 2004.² The director indicated that the contract between and San Tomas Convalescent Hospital indicates that would be considered the "legal employer" of the beneficiary and that the hiring and firing of the beneficiary would be the responsibility of. Therefore, the director concluded that would be the beneficiary's actual employer, rather than the petitioner. The director also determined that the evidence failed to indicate that the beneficiary intended to move from the Los Angeles area to a location over 300 miles away to accept the certified position.

It is noted that the director's decision refers to a disclosure statement issued by regarding its responsibilities to the petitioner and the employees at its site. It is unclear if this document was submitted with the petitioner's response to the notice of intent to deny or initially with the petition. The statement specifies that would require the petitioner to continue to carry out its responsibility to hire, to fire and to assign its employees' wages. would handle payroll, administrative services, and as the "legal employer", if applicable, would manage employee benefits. The statement emphasizes that as a tribally owned staffing company, is a sovereign entity. Thus, not all state and federal laws regarding employment apply to functions. In particular, the statement indicates that 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 administration, there is no allowance for attorneys' fees to be covered by the employer, should an employee sue the employer. 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.³

² The letter from the petitioner and the contract between the petitioner and Business Solutions to which the director refers in this decision is not found in the record.

³ It is noted that the front side of the disclosure bears only the signature of the petitioner's president and administrator. The reverse side of the same disclosure includes the signature of and the illegible signature of the president of Markings on this page contain dates indicating that it was sent by facsimile machine on August 20, 2003 and November 10, 2003. There is also a date of May 20, 2004. It is not clear, but, during 2003, the petitioner may have faxed this page to for signature, after the petitioner's president had signed it. As such, the petitioner and may have entered into this agreement during 2003. According to its website, was established during April 2003. See (accessed April 2, 2007.)

On appeal, counsel asserts that the petitioner has been the underlying bona fide employer with the ability to hire and fire and to discipline employees, which would include the beneficiary. Counsel asserts that the petitioner has the right to control the details of the work of its employees, rather than [REDACTED]. Counsel also maintains that the beneficiary has committed herself to work for the petitioner through her own motivation to obtain legal status and by signing a new employment agreement with the petitioner that includes a penalty and liquidated damage clause. In support of these assertions, counsel submits a declaration by [REDACTED] dated May 22, 2006. [REDACTED] states that the petitioner had hired [REDACTED] be an interim employment agency, but that their contract has since been terminated. She states that [REDACTED] had merely acted as the petitioner's alter-ego, following the petitioner's instructions. She claims that the petitioner selected and hired the prospective workers and that [REDACTED] was just an agent with no power to supervise and control employees. With this declaration, counsel has submitted a copy of a May 1, 2006, letter from the petitioner to [REDACTED] giving a 30-day notice of termination of the staffing contract. Additionally, a declaration, dated May 22, 2006, signed by the beneficiary has been provided in which she states that she is motivated to move to [REDACTED] to accept employment with the petitioner not because of the salary offered, but because of the opportunity to legalize her status. Also submitted is an employment agreement, dated May 23, 2006, which is more than five years after the priority date, between the petitioner and the beneficiary whereby the beneficiary has agreed to pay a penalty provision of \$10,000 in case of breach and pretermination of her employment without the petitioner's consent.

We find that there is insufficient information to make a decision in this case. As noted above, although the director refers to a contract between the petitioner and [REDACTED], it is not contained in the record. Nor is an October 2004, letter, upon which the director relies in his denial. Without evidence of the actual contract under which the petitioner and [REDACTED] operated, we cannot render a decision as to which entity would be considered as the beneficiary's actual employer. The case will be remanded in order for the director to specifically obtain this document, as well as the October 2004 letter to which he refers, in order to better determine the business relationship between these two entities. It is noted that while the letter from Ms. [REDACTED] refers to the business arrangement between [REDACTED] and the petitioner, her letter is not a contract and would be given only limited evidentiary weight. Similarly, [REDACTED] current declaration offered on appeal is not sufficient for purposes of meeting the burden of proof in demonstrating the specific terms of a written contract that the parties were operating under during the relevant period. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted above, the tax returns indicate that the petitioner's net income of \$891,017 for 2001, \$658,814 for 2002, and \$748,205 for 2003 are sufficient to pay the proffered wage of the instant beneficiary. However, before the petitioner's ability to pay the proffered wage may be determined, the petitioner must establish whether it has been able to pay the combined proffered wages of all beneficiaries of the multiple petitions that it has filed during the relevant period, which were pending since each respective priority date was established. It is noted that current electronic Citizenship and Immigration Services (CIS) records show that a total of 132 cases have been filed by the petitioner over the last several years. On remand, the director should specifically obtain evidence of the amount of the proffered salaries, and any amounts paid to any beneficiaries as wages during the period under examination in order to calculate the petitioner's total obligation. This should also be requested on remand.

It is noted that in order to determine a petitioner's ability to pay a given wage, CIS will review 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.⁴

The case will be remanded for the director to conduct further investigation consistent with this opinion and request any additional evidence from the petitioner pursuant to the requirements of section 203(b)(3) of the Act. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.

⁴Besides net income, a petitioner may demonstrate its ability to pay a given wage through its net current assets. A corporate petitioner'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. The difference between these amounts is its net current assets. 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.