U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 2 5 2006

WAC 03 184 53724

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary[1] permanently in the United States as a nursing assistant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition of the visa petition. The director denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment based immigrant, which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 26, 2001.[2] The proffered wage as stated on the Form ETA 750 is $1,625.87 per month ($19,510.44 per year). The Form ETA 750 states that the position requires one year of experience.

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[1]The beneficiary's married name is Ms [redacted]

[2] It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns 2000, 2001 and 2002; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on April 7, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 2000, 2001, 2002, and 2002. The director also requested, *inter alia*, evidence of the beneficiary's employment and copies of all W-2 Wage and Tax statements from the start date to 2003.

Consistent with the regulation at 8 CFR § 204.5(l)(3)(ii), the director requested, *inter alia*, evidence of the beneficiary's foreign employment history.

In September 23, 2004, in another request for evidence, the director observed that the petitioner had submitted documents in two names and requested evidence concerning the business relationship between these two named organizations. The director requested a detailed listing naming all beneficiaries with approved and/or pending I-140 petitions with evidence of the petitioner's ability to pay for all the beneficiaries.

Consistent with the regulation at 8 CFR § 204.5(l)(3)(ii), the director requested, *inter alia*, additional evidence from [redacted] concerning the beneficiary's employment.

In response to the request for evidence, the petitioner submitted, among other documents, copies of the following documents: an explanatory letter; a business tax certificate; a State of California business license; a fictitious business name statement; a brochure about the business; Form W-2 statement for 203 employees; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for four calendar quarters that were accepted by the State of California; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for 2003; information that the beneficiary began employment with the [redacted], Whittier, California, as a certified nursing assistant from November 27, 1995 to November 11, 1996, and, as a licensed vocational nurse from November 11, 1996 to the present (i.e. May 20, 2004).

The director issued a notice of intent to deny processing the petition on December 28, 2005. In the notice the director observed that the petitioner had multiple pending petitions. The director requested evidence of the petitioner's ability to pay for all petitions. The director also stated " ... the petitioner has not employed any of ... [the then pending] applicants [i.e. beneficiaries] or approved applicants since the 3rd quarter of 2004." Further, the director requested " ... an explanation of why the petitioner has not employed anyone since the end of the 4th quarter of 2004." In summary, the director questions, *inter alia*, whether or not the beneficiary (including those beneficiaries with other approved or pending petitions including those beneficiaries in possession of CIS Form I-765 Employment Authorization Documents enabling them to work in the United States) will receive a permanent, full-time employment position?

The petitioner responded to the notice of intent to deny processing on January 23, 2006, and submitted, *inter alia,* the following documentary evidence.

The petitioner stated in the letter dated January 23, 2006, from [redacted] administrator, that the petitioner is offering to employ the beneficiary as a nursing assistant at $1,625.87 per month.

[redacted], Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with [redacted] According to the letter, [redacted] ...pays the employees of ...[the petitioner] and bills the same for the gross wages, employer taxes and related insurance. The payroll taxes are withheld and paid under [redacted]'s Federal Employer Tax ID Number."

However, in the records of proceeding in this case was found an undated attested "Disclosure" agreement signed by both [redacted] and the petitioner detailing [redacted] responsibilities as the employee staffing company for the petitic [3] In pertinent part, the one-page agreement lists the administrative services provided to the petitioner in the agreement that include, but by its terms are not limited to the following: human resource management expertise; new hire reporting; unemployment claims management; payroll check preparation; federal and state withholding calculations; occupational injury indemnity and medical benefit coverage and claim; W-4 and I-9 Form management; wage garnishments; and, W-2 preparation. Further[redacted] informed the petitioner in the Disclosure agreement " ... as the "legal employer," [redacted] if applicable, will manage benefits." As a caveat, [redacted] indicated in the agreement that job-related injuries would be managed differently than by "typical state or federal administrative agencies and judges."

Based upon the above referenced document, as between the petitioner and [redacted] was the legal employer of employees, including the beneficiary that may have worked in the petitioner's convalescent hospital. It may be assumed that prior to January 5, 2006, the undated Disclosure agreement controlled.

California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for four calendar quarters that were accepted by the State of California were submitted with a submittal sheet listing [redacted] as the employer.

The U.S. federal tax returns submitted stated that the petitioner reported taxable incomes of $891,017.00, $658,814.00, $748,205.00, and $807,606.00 for tax years 2001, 2002, 2003 and 2004.[4]

There is a letter on [redacted] stationery ([redacted] Whittier, California)[5] dated January 12, 2006, prepared by [redacted] HR Receptionist, stating in pertinent part " ... [redacted] has been employed with [redacted] from November 27, 1995 to present (i.e. January 12, 2006) as a part time Licensed Vocational Nurse in the Transitional Care Department, ... [of the [redacted] earning $20.50 per hour."

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[3] There is a hand written notation on the bottom of this Disclosure agreement that stated "Pls. Don't use this doc. See new letter from [redacted] dated January 5, 2006."

[4] The petitioner submitted a petition for tax year 2000 before the priority date of February 21, 2001. Evidence submitted before the priority date does not have probative value of the ability to pay the proffered wage from the priority date.

[5] Whittier and San Jose, California are approximately 360 miles apart in California. The director questioned the intent of the beneficiary, once a permanent residency visa would be issued, to relocate to the San Jose area, at a lower wage rate. Counsel stated that the beneficiary has since relocated.

The director denied the petition on May 2, 2006, finding, *inter alia,* that the evidence submitted did not establish that the petitioner that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition.

On appeal, counsel asserts " ...[the] petitioner is a bona-fides employer who has been the underlying employer, with the ability to hire & fire and discipline employees; that should include the beneficiary." Counsel then provides notice that " ... [redacted] has been terminated and Petitioner now directly hires employees including the beneficiary."

Counsel has submitted the following documents to accompany the appeal statements submitted on May 25, 2006, June 21, 2006, and, June 25, 2006: a legal brief dated May 25, 2006; an explanatory letter; a Declaration by [redacted] administrator dated May 25, 2006; a copy of the notice of decision dated May 2, 2006, in this matter; a statement from [redacted] dated May 25, 2006; a letter dated May 1, 2006 sent by the petitioner to [redacted] and, an employment agreement between the petitioner and the beneficiary dated May 30, 2006. Counsel contends that according to a statement given by [redacted] is an employment agency without the ability to select, hire, supervise and fire the employee beneficiary.

Counsel also contends, in various arguments, that it is the ability to control the details of the work that is evidence of an employer/employee relationship. Counsel asserts that ""... the Service has not detailed the ability to control the details of the employer's work." We do not agreed that the scope of employment responsibilities between the petitioner and [redacted] is relevant to the issue of whether or not petitioner has established that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition. Since [redacted] s not a party to the labor certification or the petition such an agreement could not prove an employment between the petitioner and the beneficiary.

Further, it is the petitioner's burden to establish by evidence that it is permanent full-time employer who will employ the beneficiary according to the terms of the labor certification. The burden of proof in these proceedings rests solely with the petitioner not CIS. Section 291 of the Act, 8 U.S.C. § 1361.

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey,* 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.,* 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon,* 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.[6]

[6] In the present case, the "employment relationship" between [redacted] and the petitioner was not, according to the record of proceeding, disclosed during the labor certification process.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

Since the beneficiary has not worked with the petitioner according to the letter statement dated January 23, 2006, from [redacted] administrator in the record of proceeding, it is not clear why counsel's is making master/servant, agency or scope of control contentions in this particular fact situation upon appeal.[7] However such assertion begs the admission that counsel has made in her appeal statement mentioned above. Counsel has characterized the petitioner as "the underlying employer" in the relationship between [redacted] Solutions and petitioner.[8] Based upon what the petitioner has disclosed to date, we find at the time the Alien Employment Application was accepted [redacted] was intended to be the employer of record (by the Disclosure agreement between the petitioner and [redacted] and using counsel's terminology on appeal, was the "overlying employer," or according to the Disclosure agreement between the petitioner and [redacted] was the legal employer.

On appeal, counsel stated and presented evidence that the petitioner has entered into an employment agreement with the beneficiary, dated May 30, 2006.[9] The employment term is for two years commencing upon the date of the agreement. There is no evidence submitted that the beneficiary ever worked for the petitioner under the agreement. Counsel has submitted a brief dated June 25, 2006, in this matter in which she stated that the beneficiary is the "direct" employer of the beneficiary but there is no independent evidence

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[7] To recount the evidence submitted by the petitioner, and not at issue in this matter, [redacted] Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with [redacted] According to the letter, [redacted] " ...pays the employees of ...[the petitioner] and bills the same for the gross wages, employer taxes and related insurance. The payroll taxes are withheld and paid under [redacted] Federal Employer Tax ID Number." Counsel also stated that [redacted] does not the required licensing to exercise supervision in a nursing home and for that reason, "this alone negates the control test" that the petitioner has raised in counsel's brief. It is reasonable that Mainstay could employ the beneficiary to work in the petitioner's facility without requiring a nursing residence, operating license, since the petitioner would provide the license.

[8] In the present case, the "employment relationship" as characterized by counsel, between [redacted] Solutions and the petitioner was not, according to the record of proceeding, disclosed during the labor certification process. The U.S. Department of Labor's (USDOL) regulation at 8 C.F.R. § 656.21, *et seq.*, regarding Applications for Alien Employment (Form ETA 750 A/B) required in pertinent part that that the petitioner (employer/applicant therein) submit in the form or on its attachments " Two copies of the employment contract, each signed and dated by both the employer and the alien (not their agent) ...", that a duplicate contract be furnished to the alien, and, any other "agreement or conditions not specified " ...on the *Application for Alien Employment Certification* form." It is common industry practice to make the employment contract contingent upon the receipt of a right to work document within the United States.

[9] Counsel also asserts the agreement or relationship with [redacted] has been terminated as of May 1, 2006, approximately five years after the priority date. Since the beneficiary has never been employed, the beneficiary would not have been an employee of either the petitioner or Mainstay Business Solutions by the evidence presented.

such as a pay statements that the beneficiary is in fact employed by the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, there is no evidence of an employment relationship or the intent to employ the beneficiary between the petitioner and beneficiary before May 30th of 2006.

Further, CIS electronic database records show that the petitioner filed I-140 petitions on behalf of approximately 67 other beneficiaries since 1996, with approximately one-half of that number approved. Although the evidence in the instant case indicated financial resources of the petitioner greater than the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. Approximately 30 petitions are still in process, either pending or denied (denied petitions may be appealed, re-filled, or the labor certifications reused for other beneficiaries). When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries.[10] The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the priority dates of those petitions, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition. The director issued a notice of intent to deny on December 28, 2005. In the notice the director observed that the petitioner had multiple pending petitions. The director requested evidence of the petitioner's ability to pay for all petitions. The petitioner has not submitted the requested information, that is employment information (i.e. start dates current status and wage information). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner had not established that it would employ the beneficiary as a permanent full-time employer beginning on the priority date of the visa petition of the visa petition. The petitioner also failed to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending

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 dismissed.

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[10] There is a statement by [redacted], in the record of proceeding, that stated that there are 22 I-140 petitions pending, and, "At $19,5510.44 [sic] annually, that would translate to a total of $429,229.69 annually." Ms. [redacted] stated that the tax returns submitted prove that the petitioner has the ability to pay the wages proffered. No wage data was submitted to substantiate this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).