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

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 05 2009

WAC 04 178 50212

IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the Immigrant Petition for Alien Worker (I-140). The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The director issued a new decision and denied the petition again and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner, [redacted], 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 it demonstrated its intent to directly employ the beneficiary on a full-time, permanent basis. The director denied the petition on April 26, 2006.

The AAO remanded the petition to the director to obtain additional evidence as to whether the petitioner or Mainstay Business Solutions (Mainstay), described by the petitioner as its alter ego, would be considered as the beneficiary's actual employer.

On remand, the director issued a request for evidence, dated May 26, 2008, to the petitioner. Based upon the response provided by the petitioner, the director denied the petition on July 25, 2008 and certified it to this office for review.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[1]

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.

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. § 656.3 states:

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[1] The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

> *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.
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> *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 his initial denial, the director concluded, based on a contract in the record, that the actual employer in this case was Mainstay, not the petitioner, as Mainstay has had the ability to hire and to control the beneficiary's employment. The director indicated that in the contract between Mainstay and [redacted], Mainstay would be considered the "legal employer" of the beneficiary. Further, the hiring and firing of the beneficiary would be the responsibility of Mainstay. In addition, the director noted that Mainstay also had the ability to contract the beneficiary out to clients other than the petitioner. The director also refers to a letter from the petitioner dated October 1, 2004.[2] Based on the contract, the director concluded that Mainstay 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.

The director's initial decision referred to a disclosure statement issued by Mainstay regarding its responsibilities to the petitioner and the employees at its site. It was unclear if this document was submitted with the petitioner's response to the notice of intent to deny or initially with the petition, but it stated that Mainstay would require the petitioner, [redacted], 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 emphasized 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 particular, the statement indicated 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 pointed 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 were described as including: 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 was not dated.[3]

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

[3] It is noted that the front side of the disclosure bears only the signature of [redacted], the petitioner's president and administrator. The reverse side of the same disclosure includes the signature of [redacted] and the illegible signature of the president of Mainstay. Markings on this page contain dates indicating that it was sent by facsimile machine on August 20, 2003 and

On appeal, counsel asserted 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 maintained that the petitioner has the right to control the details of the work of its employees, rather than Mainstay. Counsel also asserted 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 submited a declaration by [redacted] dated May 22, 2006. [redacted] stated that the petitioner had hired Mainstay to be an interim employment agency, but that their contract has since been terminated.[4] She states that Mainstay 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 Mainstay was just an agent with no power to supervise and control employees. This declaration was accompanied by a copy of a May 1, 2006, letter from the petitioner to Mainstay giving a 30-day notice of termination of the staffing contract. Additionally, a declaration, dated May 22, 2006, signed by the beneficiary was provided in which she stated that she was motivated to move to San Jose to accept employment with the petitioner not because of the salary offered, but because of the opportunity to legalize her status. Also submitted was 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 agreed to pay a penalty provision of $10,000 in case of breach and pretermination of her employment without the petitioner's consent.

Other evidence offered was a letter, dated January 19, 2006, from [redacted] the petitioner's administrator, who stated that the petitioner was offering a permanent, full-time position to the beneficiary and that the beneficiary had not started working for the petitioner. [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. [redacted] similarly stated that the petitioner has contracted with Mainstay to

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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 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. According to its website, Mainstay was established during April 2003. *See* http://www.mainstaybusiness.com/index.cfm?navid=7 (accessed April 2, 2007.)

[4] A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

handle payroll, workers' compensation, loss control, and a host of other employment-related services. [redacted] claimed that Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. [redacted] further 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 appeal, the AAO found that a remand was necessary in order to determine whether the petitioner or Mainstay Business Solutions could be considered the beneficiary's intended actual employer because the contract between these entities was not contained in the record. Nor was the October 2004 letter, upon which the director relied in his denial.

The AAO remanded the case in order for the director to obtain a copy of the actual contract between [redacted] and Mainstay Business Solutions, as well as the October 2004, letter, to which the director referred in his decision, in order to better determine the business relationship between these two entities.

The AAO noted that while the letter from referred to the business arrangement between Mainstay and the petitioner, her letter is not a contract and would be given only limited evidentiary weight. Similarly, [redacted]'s 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)).

The AAO further noted that its review of the petitioner's federal tax returns indicated that it had sufficient net income of $891,017 in 2001; $658,814 in 2002; and $748,205 for 2003 to pay the proffered wage of the beneficiary, but that such a determination must be predicated on a conclusion that the petitioner would be considered as the actual intended U.S. employer of the beneficiary. Additionally, before the petitioner's ability to pay the proffered wage could be determined, the petitioner must establish whether it had 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. The AAO noted that current electronic United States Citizenship and Immigration Services (USCIS) records show that a total of 132 cases were filed by the petitioner over the last several years.

The AAO stated that 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.

On remand, the director issued a request for evidence on March 3, 2008. He instructed the petitioner to submit copies of all contracts between it and Mainstay Business Solutions from 2003 to the present. He also informed the petitioner that it had submitted over 132 petitions for immigrant employment over the last several years and instructed the petitioner to provide a list of all immigrants who work for the petitioner, including names, date of hire, and actual wages paid to each

immigrant employee, with the documentation to cover the period from the date of approval and date of hire to the present.[5]

Counsel's response included a copy of the petitioner's contract with Mainstay Business Solutions with no visible signature date, but there is a facsimile date of November 10, 2003, appearing on the signature page, which contains the signatures of the representatives of the petitioner and Mainstay. A copy of the previously submitted disclosure statement containing the signature of [redacted] on behalf of the petitioner and listing Mainstay's administrative services and declaration that it is to be the "legal employer," is also included in the response. This disclosure is also referenced on paragraph A2 of the contract. A copy of a letter, dated February 27, 2008 is also submitted by counsel. It is signed by Mainstay's general counsel and states that the petitioner terminated Mainstay's services in May 2006.

In response to the director's request for names, dates of hire and actual wages paid to other sponsored beneficiaries, counsel's transmittal letter indicates that there is no list of sponsored beneficiaries (immigrants) who work for the petitioner because for a variety of reasons, they no longer work for the petitioner.[6]

The director's decision of July 25, 2008, accompanying his notice of certification, again determined that direct employment and the intent to hire and control the beneficiary's employment were with Mainstay Business Solution, not the petitioner. The director concluded that employment related concerns such as payroll, worker's compensation insurance, health insurance, new hire reporting and retirement was performed by the staffing agency, Mainstay Business Solutions.

In viewing the contract submitted in response to the director's RFE on remand, the contract consistently refers to the workers as Mainstay employees and not as petitioner's employees. It indicates on paragraph A1 of page 1 that Mainstay will recruit, screen and hire employees for assignment at the petitioner's workplace. Paragraph A2 of page 1, states that Mainstay will have sole responsibility for hiring and terminating the employees who work at the petitioner's place of business. Paragraph A5 of page 1 indicates that the petitioner (referred as Customer) has no right to set the level of compensation for employees at its site, only Mainstay has this right. Paragraph 6

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[5] Current USCIS records, as of December 31, 2008, reflect that the petitioner has filed 225 petitions.

[6] The petitioner did not indicate when each sponsored individual left the petitioner's employ. The petitioner would need to show that it could pay the proffered wage for each respective beneficiary until such beneficiary left the petitioner's employment. Additionally, a review of USCIS electronic records demonstrates that the petitioner continues to file additional petitions. The petitioner must demonstrate that it can pay for the newly filed workers as well. The petitioner did not provide any evidence that such sponsored workers had been terminated or evidence that sponsored workers had resigned. USCIS may reject a fact stated in a petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

states that Mainstay will "withhold, pay, and report all taxes and issue employee W-2 forms at the end of each year with respect to each of its employees provided" as required by law. Paragraph(s) 7, 8 and 9 provide that Mainstay will provide the applicable tribe's occupational injury indemnity and medical benefits ordinance equivalent to the state's worker's compensation statutes to the employees, as well as maintaining unemployment, general liability and fidelity insurance to each of its employees assigned to the petitioner.

Paragraph B1 of page 2 of the contract indicates that the petitioner will provide a job description and scope of the *temporary* assignment for which it requires a Mainstay employee to be assigned to the petitioner's place of business. Paragraph B7 of page 2 indicates that Mainstay will remedy misconduct by one of its employees and shall have the right to withdraw its employee(s) if the petitioner fails or refuses to follow Mainstay's recommendations to correct such misconduct committed against a Mainstay employee. Paragraph C4, page 4 indicates that the petitioner may not request that Mainstay employees work offshore or outside the state without Mainstay's express written consent.

As noted above, the copy of the contract between the petitioner and Mainstay submitted in response to the director's request for evidence on remand, does not identify a commencement date within the document or with the signatures, but indicates a facsimile date of November 10, 2003. In the absence of specific confirmation, it appears that from at least November 2003 until May 2006, (based on counsel's letter indicating termination), the employees working at the petitioner's business were Mainstay's employees, over whom Mainstay had significant control such as directly paying the salaries, withholding taxes, providing W-2s, and paying the tribal equivalent of worker's compensation insurance and unemployment insurance. It also had the authority to remove its employees from the petitioner's place of business should the petitioner fail to cure misconduct at its worksite such as discrimination or harassment of Mainstay employees, as well as the authority to place its employees only in temporary assignments with the petitioner.

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 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.*

As indicated above, in this case, the evidence indicates that during a period of time from at least November 2003 to May 2006, the contract between the petitioner and Mainstay Business Solutions indicated that the petitioner's intent to be the beneficiary's actual employer offering permanent full-time employment did not exist. Mainstay Business Solutions acting as a staffing agency was the actual employer. Thus, the petitioner was unable to sustain a bona fide job offer as the intended employer offering a full-time permanent job. 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 is not eligible to file a visa preference petition on behalf of the beneficiary. The job offer did not revive simply because the petitioner sought to terminate its contract with Mainstay. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

It is noted that the director's denial submitted to the AAO on certification indicates that the director found that the arrangement between the petitioner and Mainstay Business Solutions to qualify as a misrepresentation of a material fact disqualifying a visa approval for the beneficiary. In this matter, although the contract executed by the petitioner and Mainstay Business Solutions indicates that Mainstay Business Solutions was the actual direct employer acting as a third party staffing agency, the evidence does not sufficiently reflect that this conduct amounted to willful misrepresentation pursuant to section 212(a)(6)(c)(i) of the Act as cited by the director.

With respect to the petitioner's ability to pay the beneficiary's proffered wage of $1,938.34 per month, annualized to $23,260 per year, the director indicates that the DE-6 wage reports showed an average wage of $20,800 paid to 158 employees and reflects the petitioner's ability to pay the proffered wage. The AAO's previous decision indicated the petitioner's financial position as to its net income shown on its federal tax returns and suggested that further information related to the combined salaries of the multiple beneficiaries should be solicited before any final determination in this regard can be made. The AAO cannot concur with the director's conclusion because such wage reports are not in the record in this case and the petitioner's failure to sufficiently address the director's request for evidence of its ability to pay its beneficiaries' their combined proffered wages precludes a favorable finding in this regard.[7] 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).

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[7] Additionally, as noted above, USCIS records now indicate that the petitioner has filed for 225 employees. How many of these petitions are currently pending or being pursued is unclear.

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.

ORDER: The director's decision is affirmed. The petition will remain denied.