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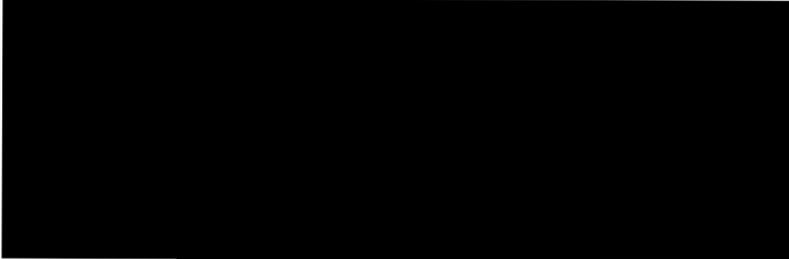
U.S. Department of Homeland Security  
20 Mass, N.W. Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE:

WAC 04 003 50710

Office: CALIFORNIA SERVICE CENTER

Date: NOV 07 2006

IN RE:

Petitioner:  
Beneficiary:



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:



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 remanded to the director.

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, 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 February 21, 2001.<sup>1</sup> 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 six months of experience.

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<sup>1</sup> 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; a job verification letter dated July 21, 2003 from [REDACTED] stating that the beneficiary was employed from July 1995 to April 2001 as a care giver and house keeper; an undated letter from [REDACTED] stating that the beneficiary was employed as a care giver from March 4, 1995 to June 1995; two State of California certificates, one for nurse assistant and one for home health aide issued to the beneficiary; certificates of completion from the American Red Cross for C.E.P Skills test, and from the American Health Association for healthcare provider; certificates of completion or achievement from the [REDACTED] Health Career Center for "New Nursing Assistant Training," "Home Health Aide Course," and clinical performance; a certificate of completion for attainment of 24 credit hours continuing education in content relating to patient care approved by the Department of Health Services; a certificate of attainment from the American Red Cross for nurse assistant training accomplishment; a certificate of commitment issued by the company Convatec for attendance at a certified nursing assistant program; a certificate evidencing attendance at a program relating to infection control review as well as other documentation.

The director issued requests for evidence on May 19, 2004, and December 28, 2004. The latter request related to the adjustment application that is beyond the jurisdiction of the AAO to adjudicate.

In the former notice, 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.

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 of employment to present.

In response to the request for evidence, the petitioner submitted, among other documents, a "A list<sup>2</sup> of beneficiaries with approved and/or pending I-140 (Immigrant Petition For Alien Worker) Petitions;" a business tax certificate; a State of California business license; a fictitious business name statement; a brochure about the business; a 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; and, the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax return for 2003.

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 3<sup>rd</sup> quarter of 2004." Further, the director requested "... an explanation of why the petitioner has not employed anyone since the end of the 4<sup>th</sup> 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

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<sup>2</sup> According to the petitioner's list, it filed I-140 visa petitions, with CIS Forms I-485/I-485A and I-765 Applications for Employment Authorization documents for 47 listed alien filed between November 20, 2002 to July 19, 2004

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 in a response and explanatory letter dated January 9, 2006, submitted U.S. federal tax returns for years 2000, 2001, 2002, 2003 and 2004.

Further the petitioner submitted the beneficiary's check stubs from "the date of hire" to May 2004, and, for the last three months of 2005; an employment certification, and, counsel stated that the beneficiary had relocated near to the petitioner's business location.

The petitioner stated in the letter dated January 9, 2005, from Julia A. Javier, administrator, that the petitioner is currently employing the beneficiary as a nursing assistant at \$12.25 per hour. She said the beneficiary commenced employment on March 1, 2004.

Mainstay Business Solutions, 2 Executive Circle, Suite 100, Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with Mainstay Business Solutions." According to the letter, Mainstay Business Solutions "...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 Mainstay's Federal Employer Tax ID Number ...."

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 Mainstay Business Solutions 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.<sup>3</sup>

The director denied the petition on April 27, 2006, finding, *inter alia*<sup>4</sup>, 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, *inter alia*, the petitioner is a "... bona-fide 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 "... Mainstay [Business Solutions] has been terminated and Petitioner now directly hires employees including the beneficiary ...."

Counsel has submitted the following documents to accompany the appeal statement: an explanatory letter dated May 22, 2006 from counsel; a copy of the notice of decision dated April 27, 2006, in this matter; a statement from [REDACTED] dated May 22, 2006; a letter dated May 1, 2006 sent by the petitioner to Mainstay

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<sup>3</sup> The petitioner submitted a tax return 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.

<sup>4</sup> The director erroneously stated that the petitioner filed the petition for a professional or skilled worker classification but this is an error.

Business Solutions; and, an employment agreement between the petitioner and the beneficiary dated May 23, 2006.<sup>5</sup>

On June 21, 2006, counsel submitted a brief in this matter together with a copy of the letter mentioned above from the petitioner to Mainstay Business Solutions dated May 1, 2006 and a copy of the notice of decision. Counsel contends that according to a statement given by [REDACTED] Mainstay Business Solutions is an employment agency without the ability to select, hire, supervise and fire the employee beneficiary.

Counsel also contends, in various arguments in the brief, that it is the ability to control the details of the work that is evidence of an employer/employee relationship.

Counsel asserts that "... [CIS] has not detailed the ability to control the details of the employer's work."<sup>6</sup> 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 U.S. 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.

Although the advisory opinions of other Government agencies are given considerable weight, CIS 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.

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<sup>5</sup> 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/applicants 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.

<sup>6</sup> In the present case, the "employment relationship" as characterized by counsel, between Mainstay Business Solutions and the petitioner was not, according to the record of proceeding, disclosed during the labor certification process.

We do not agree that the scope of employment responsibilities between the petitioner and Mainstay Business Solutions 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. Counsel's introduction of master/servant, agency or scope of control arguments<sup>7</sup> begs the admission that counsel has made in her appeal statement mentioned above. She has characterized the petitioner as "the underlying employer" in the relationship between Mainstay Business Solutions and petitioner.

To recount the evidence submitted by the petitioner, and not at issue in this matter, Mainstay Business Solutions, 2 Executive Circle, Suite 100, Irvine California stated in a letter dated January 5, 2006, that the petitioner is "... in an employment relationship with Mainstay Business Solutions." According to the letter, Mainstay Business Solutions "...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 Mainstay's Federal Employer Tax ID Number ...." Further, on appeal, counsel stated and presented evidence that the petitioner has entered into an employment agreement with the beneficiary, dated May 2006, and that the agreement or relationship with Mainstay Business has been terminated as of May 1, 2006, approximately five years after the priority date. There is no evidence of an employment agreement or relationship between the petitioner and beneficiary before May of 2006 not involving Mainstay Business Solutions as the overlying employer.

In contravention to the lack of an employment agreement required under the regulations, and the fact that the beneficiary looked to Mainstay Business Solutions for its wage payments for ten months in 2005,<sup>8</sup> there is a letter from the petitioner stating that Mainstay Business Solutions was the *alter ego* of the petitioner (and she contends by implication that the petitioner was the employer). What the term *alter ego* means in the context of the regulation at 8 C.F.R. § 656.21, *et seq.* was not explained by the petitioner.

No written employment agreement between Mainstay Business Solutions and the beneficiary is found in the present case, and, the referenced agreement between the petitioner and Mainstay Business Solutions that was terminated on May 1, 2006, was submitted in this case.<sup>9</sup> No evidence was submitted concerning any employment agreement between the petitioner and the beneficiary prior to 2006. As already noted, such an agreement is required to be included in the labor certification or in its attachments by regulation. *See* 8 C.F.R. § 656.21, *et seq.*

By the preponderance of the evidence submitted in this case, and as found in the record of proceeding, the petitioner had not established that it would employ the beneficiary as a permanent full-time employer

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<sup>7</sup> Counsel states that Mainstay Business Solutions does not have 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.

<sup>8</sup> In response to the notice to deny the petition counsel submitted approximately 12 pay statements issued to the beneficiary by Mainstay Business Solutions between the dates December 16, 2005 to December 15, 2006, that stated an hourly rate of \$12.00 and \$12.25 per hour. According to the petitioner's statement in the record of proceeding, Mainstay Business Solutions is the employer of record under Mainstay's federal employer identification number (FEIN).

<sup>9</sup> Since Mainstay is not a party to the labor certification or the petition such an agreement could not prove an employment between the petitioner and the beneficiary.

beginning on the priority date of the visa petition of the visa petition.

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. 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).

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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.

Evidence was submitted to show that the Mainstay Business Solutions employed the beneficiary since March 1, 2004, although there is a letter from the petitioner stating it is also the employer. According to the petitioner's statement in the record of proceeding, Mainstay Business Solutions is the employer of record under Mainstay's federal employer identification number.

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. No information was submitted why the petitioner did not employ the beneficiary from the date the beneficiary received her Employment Authorization Document through the auspices of the petitioner, or why the petitioner did not similarly employ other beneficiaries it supported.

No agreement was submitted between Mainstay Business Solutions and the petitioner (other than a termination letter) or the beneficiary.

No employment contract signed and dated by both the employer and the alien (not its or their agent<sup>10</sup>) as of the priority date (i.e. February 21, 2001) was submitted in this case.

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<sup>10</sup> See 8 C.F.R. § 656.21, *et seq.*

No evidence was submitted by the petitioner of the proffered wages of the pending beneficiaries. The AAO cannot by the evidence submitted determine whether or not the petitioner has the ability to pay the proffered wages of all beneficiaries.

The director has referenced in his decision an agreement detailing Mainstay's responsibilities relative to the beneficiary, but it is not found in the record of proceeding. The only information that the petitioner disclosed in this case was that the agreement was terminated on May 1, 2006.

Thus, the AAO will remand the case to the director and the director can undertake any procedural mechanisms or request any additional information or evidence including but not limited to a document that might outline the business relationship between the petitioner and Mainstay including the effective dates of any such relationship, necessary to make an additional determination.

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

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