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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER  
WAC 04 003 50710

Date:

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

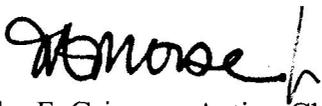
ON BEHALF OF PETITIONER:

[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 27, 2006.

On November 7, 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. The AAO's remand also noted that the petitioner had failed to submit sufficient evidence of its ability to pay the beneficiary of the instant petition, as well as the wages of all sponsored beneficiaries.

On remand, the director issued a request for evidence, dated December 7, 2006, to the petitioner. Based upon the response provided by the petitioner, the director denied the petition on March 24, 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).<sup>1</sup>

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).

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<sup>1</sup> 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.

The regulation at 20 C.F.R. § 656.3 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 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 the contract between Mainstay and San Tomas Convalescent Hospital indicates that Mainstay would be considered the "legal employer" of the beneficiary and that the hiring and firing of the beneficiary would be the responsibility of Mainstay. The director also determined that although the petitioner stated that the beneficiary works at the petitioning company's location as of the date of hire on March 1, 2004, no evidence could be found that the petitioner directly employed anyone from the 4<sup>th</sup> quarter of 2004 to the present (date of decision, April 27, 2006).<sup>2</sup>

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 issue is moot because the contract between the petitioner and Mainstay was terminated. In support of these assertions, counsel submitted a declaration by [REDACTED] dated May 22, 2006. Ms. [REDACTED] stated that the petitioner had hired Mainstay to be an interim employment agency, but that their contract has since been terminated.<sup>3</sup> 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. Also submitted was an employment agreement, dated May 23, 2006, which is more than five years

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<sup>2</sup> The beneficiary's check stubs from "date of hire" to May 2004 were provided, as well as for the last three months of 2005. In response to the director's notice of intent to deny the petition, approximately 12 pay statements issued to the beneficiary by Mainstay Business Solutions covering three months in 2004 and the last three months in 2005. Six of the statements covering March, April and May of 2004, reflect an hourly wage of \$12.00 per hour. The other six covering October, November and December 2005 show an hourly wage of \$12.25.

<sup>3</sup> 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).

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.<sup>4</sup>

Other evidence offered was a letter dated January 5, 2006, from [REDACTED], Human Resources Manager, Mainstay, Irvine, California. In her letter, Ms. [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 handle payroll, workers' compensation, loss control, and a host of other employment-related services. Ms. [REDACTED] claimed that Mainstay pays the petitioner's employees, and bills the petitioner for the gross wages, employer taxes, and related insurance. Ms. [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.

We herein note that while the letter from [REDACTED] referred to the business arrangement between Mainstay and the petitioner, her letter is not a contract and will be given only limited evidentiary weight. Similarly, [REDACTED]'s May 22, 2006, 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 the petitioner had sufficient net income of \$891,017 in 2001; \$658,814 in 2002; \$748,205 for 2003; and \$807,606 for 2004 to pay the proffered wage of \$1,625.87 per month (annualized to \$19,510.44) to the beneficiary. However, the AAO noted that the record lacked information related to payment of wages, employment status and priority dates of other sponsored beneficiaries. Thus, before its ability to pay the proffered wage to the instant beneficiary could be determined, the petitioner must establish whether it had been able to pay the combined proffered wages of all sponsored beneficiaries of the multiple petitions that it has filed during the relevant period, beginning at the respective priority dates. Such a determination must also be predicated on a conclusion that the petitioner would be considered as the actual intended U.S. employer of the beneficiary.

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 and whether, in view of the multiple I-140 petitions filed by the petitioner, that the

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<sup>4</sup>It is noted that this agreement, dated May 23, 2006, was required to be included in the labor certification or in its attachment by regulation. See 8 C.F.R. § 656.21. The priority date established by the Form ETA 750 as February 21, 2001, shows that it was not part of the labor certification proceedings.

petitioner had established its ability to pay the respective proffered wages to the instant beneficiary as well as the other sponsored beneficiaries.

As mentioned above, on remand, the director issued a request for evidence on December 7, 2006. He instructed the petitioner to submit copies of all contracts between it and Mainstay Business Solutions from 2001 to the present and to provide copies of contracts that outline the business relationship between Mainstay and the petitioner with the effective dates of all agreements. The director also requested that the petitioner provide copies of employment contracts between the petitioner and the beneficiary since the priority date of March 26, 2001.<sup>5</sup> He requested the petitioner to submit evidence that it could pay the proffered wages to all pending beneficiaries from their respective priority dates to the present.<sup>6</sup> Further requested was a copy of the petitioner's federal tax return for 2005; copies of the beneficiary's Wage and Tax Statements (W-2s) for 2004 and 2005; copies of the beneficiary's federal tax returns for 2001 through 2005; copies of the state quarterly wage reports for all employees for the last four quarters; and an explanation why the petitioner did not employ the beneficiary or other beneficiaries from the date that they obtained their employment authorization document.

Counsel's response, dated February 26, 2007, included a copy of the petitioner's undated contract with Mainstay Business Solutions, but there is a facsimile date of November 10, 2003, which appears on the signature page. It contains the signatures of the representatives of the petitioner and Mainstay. A copy of a referenced 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. The disclosure was an attachment to the agreement between the petitioner and Mainstay Business Solutions.<sup>7</sup> It stated that Mainstay would require the petitioner, [REDACTED], to continue to carry out its responsibility to hire, to fire and to assign its employees' wages. Mainstay would handle payroll, administrative services, and as the "legal employer," if applicable, would manage employee benefits. The statement 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 disclosure pointed out

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<sup>5</sup> The director misstated the priority date in this request. For this petition, it is February 21, 2001.

<sup>6</sup> Current USCIS records, as of January 27, 2009, reflect that the petitioner has filed 226 petitions, including 11 Form I-129 petitions, with the remaining 215 being Form I-140 petitions. Additionally, the petitioner filed 59 Form I-140 petitions in 2007 and 2008, alone.

<sup>7</sup> Markings on the agreement and the disclosure attachment 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 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).

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.

In response to the director's request for evidence issued on remand, the petitioner provided copies of its state quarterly wage reports for the last three quarters of 2006, not the last four quarters as requested by the director. The petitioner also provided a copy of its 2005 federal tax return, but did not provide any further evidence that it could pay the proffered wages of all sponsored beneficiaries from their respective priority dates to the present.<sup>8</sup>

The director's decision of March 24, 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.

A central issue in this matter is whether Mainstay Business Solutions was the actual intended employer of the beneficiary, acting as a staffing agency for the petitioner. 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. The contract provided, in part, the following:

Mainstay Business Solutions agrees to provide, and Customer hereby agrees to subscribe for, the services of personnel employed by Mainstay Business Solutions (hereinafter referred to as "employees") and other ancillary services provided by Mainstay Business Solutions, including, but not limited to personnel placement, upon the following terms and conditions:

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<sup>8</sup> 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).

1. Mainstay will recruit, screen and hire employees for assignment at Customer's place of business . . .
2. Mainstay Business Solutions will have sole responsibility for screening, hiring, and terminating its employees;
3. Mainstay Business Solutions will ensure that an Employment Eligibility Verification form (I-9) is completed for each employee assigned to Customer's place of business;
4. . . . Mainstay Business Solutions will maintain all personnel files and payroll records for its employees.
5. Mainstay Business Solutions retains the right to determine and set the level of compensation and fringe benefits of its employees. Customer has no authority to alter, change or increase the compensation and/or benefits. . .
6. Mainstay Business Solutions 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 to Customer, as required by law;
7. Mainstay Business Solutions will maintain Occupational Injury Indemnity and Medical Benefits coverage for its employees . . .
8. Mainstay Business Solutions agrees to maintain unemployment, general liability, and fidelity insurance with respect to each of its employees provided to Customer;
9. Mainstay Business Solutions will administer all unemployment claims with respect to each of its employees assigned to Customer's workplace;
10. Mainstay Business Solutions will provide Customer with an itemized invoice for each Mainstay employee assigned to Customer's workplace for each pay period.

#### Customer's Responsibilities

1. Customer will provide Mainstay Business Solutions with a job description specifying the job duties and scope . . .
2. Customer will promptly notify Mainstay Business Solutions in the event there is any material change in the terms and conditions of an employee's temporary assignment or the job duties required by the Customer . . .
3. Customer will review, approve and sign all time cards of Mainstay Business Solutions employees on assignment to Customer. Customer's signature on timecards authorizes Mainstay Business Solutions to pay the employee and bill Customer for all hours indicated on such timecards.
4. Customer will notify Mainstay Business Solutions of any unusual wage and hour practices of Customer . . . ;
5. Customer will exercise good judgment and management relating to the day-to-day supervision of Mainstay Business Solutions' employees. . .
6. Customer will maintain its premises and work areas in compliance with all applicable health and safety laws and regulations . . .customer will further comply . . .with the directives of Mainstay Business Solutions' safety and risk management program . . . Mainstay Business Solutions shall have the right to

- inspect Customer's premises at any time to ensure a safe workplace is being provided to Mainstay Business Solutions employees . . .;
7. Customer will notify the CEO of Mainstay Business Solutions or its Human Resources Director, immediately in the event of a discrimination or sexual harassment complaint involving a Mainstay Business Solutions employee . . .
  8. Customer will notify Mainstay Business Solutions promptly if Customer should decide it no longer wishes to accept the services of any particular Mainstay Business Solutions employee. Mainstay Business Solutions will be responsible for removing its employee from the Customer's workplace if so requested by Customer.

This contract submitted in response to the director's RFE on remand refers consistently to the workers as Mainstay employees and not as petitioner's employees. As noted above, it indicates that Mainstay will recruit, screen and hire employees for assignment at the petitioner's workplace. Mainstay will have sole responsibility for hiring and terminating the employees who work at the petitioner's place of business. It 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. Mainstay will also "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. Further, 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.

The contract additionally 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. Mainstay will also 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. Finally, the contract 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. It may be determined that from at least November 2003 until May 2006, (based on Ms. [REDACTED] termination letter in the record) that 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. It is further noted that the agreement provides for Mainstay's on-site inspection of the petitioner's premises.

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 an

employment staffing agency, the evidence, as the record in this proceeding currently stands, 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 \$1,625.87 per month, annualized to \$19,510.44 per year, the director states that following the May 2006 employment agreement between the petitioner and the beneficiary, the DE-6 wage reports indicate that she worked part-time during the second and third quarters of 2006 and had no wages paid by the petitioner during the fourth quarter of 2006. The director indicated that although full-time employment is not required to approve a visa petition, the lack of employment may demonstrate a lack of intent to fulfill an obligation for full-time permanent employment. 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 obtained before any final determination in this regard can be made.

The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of her February 21, 2001 priority date to the present. The AAO notes that the petitioner did not specifically respond to the director's request that it demonstrate its continuing ability to pay the respective proffered wages to all sponsored beneficiaries. Further, the petitioner omitted the first quarter's 2006 wage reports from its response.<sup>9</sup> 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).<sup>10</sup>

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.

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<sup>9</sup> As noted in the director's initial decision, it could find no evidence indicating that the petitioner directly employed anyone from the 4<sup>th</sup> quarter of 2004 to the present (date of decision, April 27, 2006).

<sup>10</sup> Additionally, USCIS records now indicate that the petitioner has filed for 226 employees. How many of these petitions are currently pending or being pursued is unclear.