U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 07 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is a residential care home. It seeks to employ the beneficiary permanently in the United States as a nursing aide. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary met the requirements of the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's original August 23, 2007, decision, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary met the requirements of the labor certification.

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 not available in the United States.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 12, 2001. The proffered wage as stated on the Form ETA 750 is $1,662.25 per month or $19,947 annually.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

Relevant evidence submitted on appeal includes a request for appointment of agent and mail forwarding, an authorization for assistance/self representation,[2] a statement of assets and liabilities,

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] On appeal, the petitioner requests the following:

> This is to request [USCIS] to kindly allow us to appoint an agent ([redacted] to receive correspondence from the USCIS at:
>
> [redacted]
>
> Forwarding your correspondence to [redacted] office will achieve the following:
>
> 1) Avoid misdelivery of important USCIS mail which result in delay;
> 2) Avoid complete loss of mail;
> 3) Prevent denial or abandonment of the petition which are the consequences of untimely response to your correspondence;
> 4) Maintain the confidentiality of our petition.
>
> Please grant our request [sic] your kind consideration.

The regulation at 8 C.F.R. § 292.1 provides general representation provisions in immigration matters and lists following six categories of representatives who may represent a person entitled to representation: (1) Attorneys in the United States, (2) Law students and law graduates not yet admitted to the bar, (3) Reputable individuals, (4) Accredited representatives, (5) Accredited officials, and (6) attorneys outside the United States. However, the regulation governing representation in filing

copies of the 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns, for and [redacted] copies of personal bank statements for [redacted] and [redacted], and a letter, dated September 17, 2007, from the petitioner explaining the labor certification requirement that the beneficiary have the legal right to work. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, which reflects that the petitioner was a "C" corporation, and copies of the petitioner's 2004 through 2006 Forms 1120S, U.S. Income Tax Returns

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immigration petitions and/or applications with USCIS is the regulation at 8 C.F.R. § 103.2(a)(3), which provides in pertinent part that:

> (3) *Representation.* An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

Therefore, it is clear that the regulation at 8 C.F.R. § 103.2(a)(3) limits the three categories of representatives, that is, attorneys in the United States, attorneys outside the United States and accredited representatives only in representing applicants or petitioners in filing immigration applications or petitions before USCIS with properly executed Form G-28, while the regulation at 8 C.F.R. § 292.1 allows all six groups of representatives to assist applicants or petitioners with non-filing immigration matters. In the instant case, is not an attorney in or outside the United States, nor an accredited representative as defined in § 292.1(a)(4). Therefore, Ms. [redacted] is not authorized by any regulations to represent a petitioner in filing an I-140 immigrant petition and/or an appeal from the denial of an I-140 petition.

The other categories listed in 8 C.F.R. § 292.1 (law students, law grads, reputable individuals) may ONLY appear in person with an applicant or petitioner at an interview literally before, as in the presence of, a Department of Home Security (DHS) official who must make a discretionary decision to permit them to appear after conducting an inquiry as to the requirements in section 292.1. The regulation at 8 C.F.R. § specifically requires that a reputable individual must get a permission for his appearance from the official before whom he wished to appear. In the instant case, the AAO cannot permit [redacted] appearance as a reputable individual to represent the petitioner or receive direct information from the AAO on this appeal. The regulation set forth the following terms and conditions for reputable individuals' representation: he/she is appearing on an individual case basis, at the request of the person entitled to representation; he/she is appearing without direct or indirect remuneration and filed a written declaration to that effect; and he/she has a pre-existing relationship or connection with the person entitled to representation. The record shows that Ms. [redacted] has represented many petitioners and applicants in filing petitions and applications. It is unlikely that [redacted] met all the regulatory-preset terms and conditions in each of her numerous representations despite her assertions and documentation in the instant case.

for an S Corporation.[3] The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage or to the beneficiary's legal right to work.

The petitioner's 2001 through 2003 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions or net incomes of -$276, -$10,827, and $5,311, respectively. The petitioner's 2001 through 2003 Forms 1120 also reflect net current assets of -$4,077, -$32,808, and -$27,641, respectively.

The petitioner's 2004 through 2006 Forms 1120S reflect ordinary incomes or net incomes of -$27,945, $443,412 (from Schedule K), and $68,347, respectively. The petitioner's 2004 through 2006 Forms 1120S also reflect net current assets of -$68,027, -$21,904, and -$3,110, respectively.

The letter, dated September 17, 2007, submitted on appeal, from the petitioner states:

> Finding #1: The beneficiary was not in legal status at the time the request for Labor Certification was filed, and therefore, has not met the minimum requirements.
>
> The request for permanent labor certification was filed because our job offer is permanent in nature, and not temporary, seasonal, off-peak or occasional, which are the requirements for Temporary Labor Certification or H2-B.
>
> At the time of filing of the request on April 12, 2001, there was no other visa category under which our job offer will fall under. This is the only category, which we believe will not involve fraud or misrepresentation of facts intended to obtain an immigration benefit. We would like to appeal to the favorable exercise of you discretion to consider our showing of "Good Faith," which is defined in Black's Law Dictionary as "honesty of purpose, freedom from intent to defraud, and being faithful to one's duty or obligation."
>
> We plead to your mercy and kind consideration.

On appeal, the petitioner states, "we are presenting the employer's Assets and Liabilities, Individual Income Tax Returns and Bank Statements to show that Employer has the financial ability to hire a worker for their care home from the date of the application to the present as required by law. And also to explain why its [sic] states in the application "must have legal right to work.""

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. The petitioner's ability to pay the proffered wage is an essential element in

[3] The petitioner's tax returns reflect that it elected to switch to an "S" corporation on January 1, 2004.

evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on August 25, 2006, the beneficiary does not claim the petitioner as a past or present employer. In addition, the petitioner has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary to establish that it employed the beneficiary in any of the pertinent years, 2001 through 2006. Therefore, the petitioner has not established that it employed the beneficiary in 2001 through 2006 and is obligated to show that it had sufficient funds to pay the entire proffered wage of $19,947 from the priority date of April 12, 2001 and continuing to the present.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by federal case law. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that USCIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang,* 719 F. Supp. at 537.

In 2001 through 2003, the petitioner was organized as a "C" corporation. For a "C" corporation, USCIS considers net income to be the figure shown on line 28 of the petitioner's Form 1120, U.S. Corporation Income Tax Return or line 24 of the petitioner's Form 1120-A. The petitioner's tax returns demonstrate that its net incomes in 2001 through 2003 were -$276, -$10,827, and $5,311, respectively. The petitioner could not have paid the proffered wage of $19,947 from its net incomes in 2001 through 2003.

In 2004 through 2006, the petitioner was organized as an "S" corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional 2005 income and deductions shown on its Schedule K, the petitioner's net income for 2005 is found on line 17e for 2005. Because the petitioner did not have additional 2004 and 2006 income and deductions shown on its Schedule K, the petitioner's net income for 2004 and 2006 is found on line 21 of page one of the petitioner's IRS Form 1120S.

In the instant case, the petitioner's net incomes for 2004 through 2006 were -$27,945, $443,412, and $68,347, respectively. The petitioner could not have paid the proffered wage of $19,947 from its net income in 2004, but it could have paid the proffered wage of $19,947 from its net incomes in 2005 and 2006. Therefore, the petitioner has established its ability to pay the proffered wage of $19,947 in 2005 and 2006, but not in 2001 through 2004.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2001 through 2004 net current assets were -$4,077, -$32,808, -$27,641, and -$68,027, respectively. (The petitioner has already established its ability to pay the proffered wage in 2005 and 2006 from its net incomes.) The petitioner could not have paid the proffered wage of $19,947 from its net current assets in 2001 through 2004. Therefore, the petitioner has not established its ability to pay the proffered wage in 2001 through 2004.

On appeal, the petitioner submits copies of a statement of assets and liabilities, copies of the 2001 through 2006 Forms 1040, U.S. Individual Income Tax Returns, for [redacted] and [redacted], and copies of personal bank statements for [redacted] and [redacted] as evidence of its ability to pay the proffered wage of $19,947.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO will not consider the owners of the petitioner's tax returns, personal bank statements, or personal statement of assets and liabilities when determining the petitioner's ability to pay the proffered wage.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was incorporated in 1999. The petitioner has provided its tax returns for 2001 through 2006, with only the 2005 and 2006 tax returns establishing the petitioner's ability to pay the proffered wage of $19,947. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The second issue in this case is whether or not the beneficiary meets the requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

> (ii) *Other documentation* – (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.
>
> *(D) Other workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 12, 2001.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401,

406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess four years of high school. Block 15 states:

> If hired must speak, read and write English; willing to obtain First Aid, CPR, Health Screening Report issued by the State of California Health and Welfare Agency; willing to be fingerprinted to be submitted to the Department of Justice; legal right to work.

Based on certified Block 15 "Other Special Requirements" set forth above, the applicant for the petitioner's position of nursing aide must have four years of high school; must speak, read, and write English; must be willing to obtain First Aid, CPR, Health Screening Report issued by the State of California Health and Welfare Agency; willing to be fingerprinted to be submitted to the Department of Justice; and must have the legal right to work.

In the instant case, the petitioner submitted a copy of the beneficiary's fingerprints, a copy of the beneficiary's Health Screening Report, a copy of the beneficiary's certificate of completion for Adult CPR, dated September 20, 2000, and a copy of the beneficiary's high school diploma.

In his decision, the director noted that in response to a request for evidence (RFE), the petitioner acknowledged that the beneficiary was not in legal status when the application for labor certification was filed and that the legal right to work requirement was intended for U.S. workers who might apply for the position.

On appeal, the petitioner states that the beneficiary was not in legal status at the time the request for labor certification was filed and appeals to USCIS' discretion to "consider our showing of 'Good Faith.'"

Simply asserting that the reported legal right to work requirement was intended for U.S. workers does not qualify as independent and objective evidence. 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).[5] The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor, but was not done so in this case. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Comm. 1971). As the petitioner listed the applicant must have the right to work, the

[5] Further, we note that a U.S. worker would have the right to work so that the petitioner's argument is not clear.

beneficiary would need to show this at the time of the priority date. The petitioner must show that the job offer is realistic from the time of the priority date. Again, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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 appeal is dismissed.