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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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FILE:

Office: NEBRASKA SERVICE CENTER

Date: SEP 01 2010

IN RE:

Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 petitioner¹ is a residential care home for the elderly. It seeks to employ the beneficiary permanently in the United States as a nurse assistant/caregiver. As required by statute, the Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL), accompanied the petition. The director determined, *inter alia*, 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 the petitioner had not established that the beneficiary meets the educational, training, or experience and any other requirements of the labor certification. Therefore, 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, issues in this case are whether the petitioner has the ability to pay the proffered wage as of the priority date, and whether the beneficiary meets the minimum qualifications of the labor certification.

¹ Initially, the petitioner was represented by [REDACTED] [REDACTED] is not a licensed attorney. The regulation governing representation in filing immigration petitions and/or applications with U.S. Citizenship and Immigration Services (USCIS) is found 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.

A review of the most recent Roster of Recognized Organizations and Accredited Representatives maintained by the Executive Office for Immigration and Review, available on the Internet at <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed August 17, 2010), indicates [REDACTED] [REDACTED] is not an accredited representative of an organization recognized by the Board of Immigration Appeals (BIA). Therefore, the AAO may not recognize [REDACTED] in this matter. Further, a California federal grand jury has since indicted [REDACTED] on May 27, 2010, on charges stemming from an investigation by U.S. Immigration and Customs Enforcement (ICE) into allegations she engaged in immigration, mail and tax fraud. According to the indictment as returned, [REDACTED] counseled foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, to apply for the DOL's employment labor certification so they could work in residential health care facilities.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on September 24, 2002. The proffered wage as stated on the Form ETA 750 is \$1,426.00 per month (\$17,112.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

The petitioner submitted no documentary evidence with the petition and labor certification.

Accompanying the appeal, the petitioner submitted, *inter alia*, the following evidence: two personal joint federal income tax (Forms 1040) returns for 2005 and 2007;³ two federal income tax (Forms 1065) returns for 2006 and 2007; three Wage and Tax (Forms W-2) Statements stating wages paid by the petitioner to the beneficiary in 2005-\$11,556.80; 2006-\$20,036.89; and in 2007-\$25,141.90; a letter dated May 31, 2008, by [REDACTED], owner/administrator of the petitioner; and copies of the petitioner's operating licenses.

The record indicates the petitioner is structured as a limited liability company.⁴ On the petition, the petitioner claimed to have been established in 2005 and to currently employ three workers.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

³ The 2007 Form 1040 was submitted without a Schedule C or Wage and Tax (W-2) Statements.

⁴ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole

According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. Accordingly, it appears the business in question may have been operated as a sole proprietorship from the priority date until the organization of the LLC in 2005. An individual, [REDACTED] doing business as [REDACTED] appears to have been the filer of the Form ETA 750.

On the Form ETA 750, signed by the beneficiary on September 16, 2002 under penalty of perjury, the beneficiary did not claim to have worked for the petitioner. According to a letter dated May 31, 2008, by [REDACTED] owner/administrator of the petitioner, the beneficiary has been a fulltime employee since September 24, 2002, at the yearly salary of \$19,500.00.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As a threshold issue, the petitioner has also failed to establish that it, as an LLC, is a successor-in-interest to the sole proprietor that originally filed the labor certification. The labor certification was filed with the DOL by a sole proprietor in 2002. In 2005, the petitioner, an LLC, was formed in the State of Nevada. An LLC is a distinct legal entity which is separate from its owners and members, and the assets of its members and of other enterprises or individuals. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the sole proprietor that filed the labor certification is a different entity than the petitioner, which did not exist at the time the labor certification was filed with the DOL.

A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the

proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation.

predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The record contains no evidence to establish a valid successor relationship. There is no evidence of the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

The fact that the petitioner is owned by one or more of the sole proprietors, or that the petitioner has the same name and address of the predecessor business organization, is not sufficient to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the petitioner is a successor-in-interest to the sole proprietor that filed the labor certification. The petition is not accompanied by a proper labor certification. 8 C.F.R. § 204.5(1)(3)(i).

The petition will be denied for this reason as well. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Assuming for sake of argument that the petitioner is a successor-in-interest to the employer identified in the labor certification, the record does not establish that the business had the ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. In the instant case, as already stated, there are three Wage and Tax (Forms W-2) Statements stating wages paid to the beneficiary in 2005-\$11,556.80; 2006-\$20,036.89; and in 2007-\$25,141.90 in the record. Therefore, assuming a *bona fide* successorship has occurred, the petitioner has paid the beneficiary the proffered wage in 2006 and 2007.

According to the letter dated May 31, 2008, the petitioner contends that the beneficiary has been a fulltime employee since September 24, 2002, at the yearly salary of \$19,500.00. Clearly, the petitioner has made an inconsistent statement that has not been explained by evidence in the record.

The W-2 Statement submitted for 2005 states wages paid in that year of \$11,556.80, and no wage/salary/compensation evidence was submitted for 2002, 2003, and 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. Texas 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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[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." *Chi-Feng Chang* at 537 (emphasis added).

According to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent

residence. The predecessor's one Form 1040 for 2005 stated its adjusted gross income as detailed in the table below.

- In 2002, the petitioner did not submit a tax return.⁵
- In 2003, the petitioner did not submit a tax return.
- In 2004, the petitioner did not submit a tax return.
- In 2005, the petitioner's Form 1040 stated an adjusted gross income of \$58,795.00.

Therefore, for the year 2005, the petitioner appears to have had sufficient adjusted gross income to pay the proffered wage, or the difference between the wages actually paid to the beneficiary and the proffered wage. However, the petitioner did not submit household expenses for the sole proprietor for 2005. Therefore, it cannot be concluded that the petitioner had the ability to pay the difference between wages paid and the proffered wage in 2005. *See Ubeda v. Palmer*, 539 F. Supp. 647.

The petitioner did not submit wage, salary or compensation evidence from the petitioner to the beneficiary, or federal tax returns, audited financial statements or an annual return for 2002, 2003, and 2004). Therefore, the petitioner did not establish that it had sufficient net income and adjusted gross incomes to pay the proffered wage, or the difference between the wages actually paid to the beneficiary and the proffered wage, in 2002, 2003, 2004, or 2005.

On appeal, the petitioner asserts that the petitioner's and sole proprietor's tax returns for 2005, 2006 and 2007, are proof of the employer's ability to pay the proffered wage. The petitioner's assertion must be qualified. As the director stated in his decision dated September 10, 2008, according to the regulation at 8 C.F.R. § 103.2(b)(1):

(b) Evidence and processing.

(1) Demonstrating eligibility at time of filing. An applicant or petitioner must establish that he or she is eligible for the requested benefit *at the time of filing the application or petition*. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition. (Emphasis added).

Despite being put on notice by the director that the petition was submitted without all of the required evidence, the petitioner failed to submit evidence from the priority date according to the regulation at 8 C.F.R. § 204.5(g)(2).

⁵ Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

On appeal, the petitioner contends that a letter submitted concerning the beneficiary demonstrates the ability to pay the proffered wage. The subject letter dated May 31, 2008, contends that the beneficiary has been a fulltime employee of the petitioner since September 24, 2002, at the yearly salary of \$19,500.00. However, no documentary evidence was submitted to establish that the petitioner did in fact employ the beneficiary in 2002, 2003, and 2004, such as payroll records, cancelled checks, cash receipts, identification of the petitioner's employees by name and social security numbers, job titles, duties, hours worked, wages paid, by quarterly payroll reports, or by unemployment compensation and workmen compensations reports. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. 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).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the 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 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 relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner is organized as a multi-member limited liability company. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. No Form 8832 is in the record, and there is no evidence of such an election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes, however the

petitioner has utilized two IRS tax return Forms, 1040 and 1065 to report adjusted gross income and net income in alternate years (or else has failed to submit its Form 1065 tax return in 2005).

The petitioner submitted Forms 1040 for 2005 and 2007, and Forms 1065 for 2006 and 2007, and no financial evidence whatsoever for the initial three years from the priority date in 2002. For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's 2006 and 2007 Forms 1065 Schedules K have no relevant entries for additional deductions.

However, since the petitioner is not a single-member LLC, it cannot be considered to be a sole proprietorship for federal tax purposes. In the context of the determination of the petitioner's ability of pay the proffered wage, if the petitioner was a single member LLC then it would file a Form 1040, and the LLC's net income would be reported on Schedule C to Form 1040. The petitioner is not a multi-member LLC, but assuming for the sake of argument that the 2005 Form 1040, Schedule C is relevant here, the Schedule C in 2005 filed by the proprietor stated a net income loss of <\$32,666.00> for 2005 for the business. Again, reviewing the Form 1040 for 2005, if it was not for the receipt of wages from unstated source(s) (Form 1040, Line 1) of \$97,127.00, the taxpayers could not have stated adjusted gross income of \$57,795.00 in that year since the business suffered a loss in 2005 of <\$32,666.00>. The subject business was not self-sustaining in 2005, 2006, and 2007.

In 2006 and 2007, the petitioner also stated additional losses from the operation of the business of <\$17,195.00> and <\$54,111.00> respectively as reported on Line 22 of the Forms 1065, U.S. Partnership Income Tax Returns for the LLC.

In summary, the business stated sustained losses of <\$32,666.00>, <\$17,195.00>, and <\$54,111.00> in 2005, 2006 and 2007 respectively, and according to the federal tax returns submitted, was not viable. Otherwise, there is a paucity of information in the record concerning the petitioner's business organization and finances. There is no information in the record concerning the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. No State of Nevada limited liability company registration statement or operating agreement identifying the petitioner was submitted. It is not clear that the petitioner employed any fulltime workers in 2002, 2003, 2004 or 2005. 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 in 2002, 2003, 2004 and 2005.

An additional issue is whether the petitioner has established that the beneficiary meets the educational, training, or experience and any other requirements of the labor certification.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 states that the position requires three months experience in the offered position. According to the labor certification, a related occupation is household domestic worker.

The Form ETA 750, Part A, Line 13, describes the job duties as follows:

Clean House (4) rms; assist (5) frail elderly, ages 60-100 with Alzheimer's Disease, diabetic, hypertension, cancer, stroke victims, Kidney Disease, incontinent, wheelchair bound, disabled, blind, deaf. Assist with shower, bed bath, sponge bath, tub bath, ambulating, exercising, shaving; assist with medication; provide hair care, mouth care, bowel care, skin care, personal hygiene; vacuum; wash dishes; wash-iron-dry clothes and linen; hand-wash soft clothes; straighten rooms; change diapers; empty urine bag if necessary; clean up mess and make up beds; prepare and serve meals, snacks. Heavy lifting required for wheelchair bound and those with walkers and canes. Inspect all health hazards, furniture and equipments. Watch signs of physical, emotional health, depression, fear, anger, cuts, busies, and or sores. May wake up at night for toilet needs, empty commodes. Reposition residents on their sides to avoid sores and skin irritations. Report and log any unusual, or uncommon behavior to licensee, social worker, and psychologists.

According to the Form ETA 750B, the beneficiary stated under penalty of perjury that she was employed fulltime as a dental assistant in the [REDACTED] the Philippines, from November 1993 to April 2002. According to the beneficiary's description of job duties, while there, she assisted the dentist in performing dental works and she assisted patients in preparing forms regarding personal data. Prior to this employment, the beneficiary stated she was employed fulltime as a caregiver for [REDACTED] the Philippines, from January 1991, to December 1992, in a private home. According to the beneficiary's description of job duties, while there, she took care of an elderly resident. She assisted in bathing, grooming and personal hygiene, and gave medications as prescribed by a physician. Also, she stated she changed linens, cleaned-up mess; washed dishes, cleaned the house and did the laundry.

According to the petition, the beneficiary entered the United States on April 24, 2002. The Form ETA 750 was accepted on September 24, 2002. On appeal, the petitioner submitted the beneficiary's secondary school diploma with a signed certification from St. Anthony's Academy, Inc. dated March 27, 1979; and approximately 15 certificates evidencing the beneficiary's vocational training in the United States as a care giver in 2002, 2004, 2005, 2006, 2007, and 2008.

According to the Form ETA 750, Section 15, entitled "Other Special Requirements," any applicant and the beneficiary must obtain first aid training, undertake a health screening, undergo a background examination and be trained by the employer in the offered job as described above. It is clear from the record that the beneficiary received vocational training to conduct the offered job in the United States

after her arrival and for the most part after the priority date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

(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.

The petitioner failed to submit any evidence according to the above regulation although it was placed on notice by the director's decision that such evidence is necessary. There is insufficient evidence in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above. No letters or statements according to the regulation at 8 C.F.R. § 204.5(l)(3) or 8 C.F.R. § 204.5(g)(1) were submitted by the petitioner. Other than the beneficiary's statements in the Form ETA 750, Part B, of her work experiences, there is no other description of the beneficiary's job experience.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.