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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 09 2011

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case.¹ 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 \$630. 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,
Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

¹ This decision is being reissued to a forwarding address for the petitioner provided by the U.S. Postal Service.

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 household. It seeks to employ the beneficiary permanently in the United States as a housekeeper/child monitor. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, and denied the petition accordingly.

The record shows that the appeal is properly filed and 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 September 22, 2008 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, as the record did not establish that she has a current California driver's license and no arrests or driving tickets as required by the labor certification application.

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 other 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). Here, the labor certification application was accepted on May 14, 2002.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel submits a copy of the 2008 California Driver Handbook and a copy of the beneficiary's B1/B2 visitor's visa dated November 26, 2002. Other relevant evidence in the record includes a copy of the beneficiary's voter registration card

² 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).

from [REDACTED] dated February 17, 2004. The record does not contain any other evidence relevant to the beneficiary's qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, 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 minimum required education, training, experience and special requirements for the offered position are set forth at Part A, Items 14 and 15, of Form ETA 750. Item 14 relates to education, training and experience. The petitioner requires no training or experience. Item 15 relates to other special requirements for the offered position. In the instant case, Part A, Item 15 of the labor certification states that the offered position requires an individual with a "current valid California driver's license. No arrests or driving tickets."

The record of proceeding shows that on March 28, 2007, the petitioner had Part A, sections 6 and 7 of the Form ETA 750 corrected to reflect their new address, and a new address where the beneficiary would work, as [REDACTED] Florida, respectively. No changes to the qualifications sections were made.

There is no evidence in the record to demonstrate that the beneficiary was licensed to drive in California as of the priority date, May 14, 2002. Therefore, as of the priority date, the beneficiary had not met the special qualification required by the petitioner. Accordingly, the evidence in the record does not establish that the beneficiary possessed a "California driver's license" by the priority date.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she represented that she was employed by the [REDACTED] [REDACTED] from July 1984 through May 2002.

On appeal, counsel asserts that unlike the requisite job qualifications in *Madany v. Smith*, 696 F.2d 1008, in the instant matter the special requirement of having a California driver's license is not critical to the requisite job qualifications. Counsel further asserts that the petitioner's purpose for requiring a California driver's license was for the beneficiary to be able to legally drive the petitioner's children around, and that when the labor certification was originally filed the petitioner resided in California. Counsel indicates that the California Driver Handbook states, "Visitors over 18 years old with a valid driver license from their home state or country

may drive in California without getting a driver license as long as their home state license remains valid.” Counsel submits a copy of the [REDACTED] as evidence. Counsel also submits a copy of the beneficiary’s B1/B2 visitor’s visa dated November 26, 2002, and states that during the time in which the petitioner received confirmation of the labor certification filing date, the beneficiary was temporarily in the United States. Counsel also asserts that the beneficiary, during this period, was a police officer in Peru, had no arrests or tickets, and had a valid driver’s license in her home country of Peru. The record of proceeding contains a copy of the beneficiary’s driver’s license issued to her in Peru on September 28, 2004.

Contrary to counsel’s claim, the petitioner noted in the special requirements section of the labor certification that the beneficiary “*must have*” a current valid California Driver’s license. (Emphasis added). The labor department certified the application to include this special requirement, after testing the labor market with the driver’s license as a requirement for the position.³ Although counsel claims that the special requirement applied to the petitioner while she was living in California and that she no longer resides in that state, there is nothing in the record of proceeding or any approved amendment to the special requirements section of the labor certification to substantiate that a current valid California driver’s license is no longer required. There is no evidence to demonstrate that the beneficiary had a valid driver’s license either in her country or in the United States as of the priority date, May 14, 2002. Although counsel claims that the beneficiary was in compliance with the labor certification as of the priority date in that she was visiting California and possessed a valid driver’s license from Peru, the petitioner did not submit evidence that the beneficiary had a valid license in Peru. Further, the labor certification relates to a permanent position in the United States as of the priority date, and requires a “current valid California driver’s license,” not one obtained at a later date.⁴ A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

³ The job duties are described on the ETA 750 as: [REDACTED]. Duties include preparation of meals for family, assisting children with homework, driving children to and from school and extracurricular activities. General housekeeping duties will include laundry, ironing, cooking, and house cleaning.”

⁴ The AAO does not have the authority to amend the terms of an approved labor certification application.

The AAO notes further that there is no evidence in the record to substantiate counsel's claim that the beneficiary has no arrest record or tickets. Although counsel states that the beneficiary was/is a police officer in Peru, on the labor certification at part 15 section a, the beneficiary describes her prior employment as a technical specialist for the police department in Peru. The record does not establish that the police department in Peru requires no arrests or driving tickets as a condition of employment.

In *Matter of Wing's Tea House*, 16 I&N Dec. at 160, the Commissioner explicitly noted that the filing date of the petition in this immigrant visa preference category means the date the labor certification was filed with the DOL. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

In summary, the petitioner has not established that the beneficiary meets all of the requirements of the job offered by the priority date, including the "other special requirements" for the offered position set forth at Part A, Items 15 of Form ETA 750.

Even though the labor certification may be prepared with the alien in mind, United States Citizenship and Immigration Services (USCIS) has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at 7.

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

ORDER: The appeal is dismissed.