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



U.S. Citizenship
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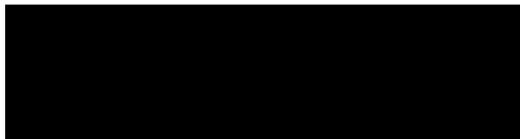
DATE: Office: NEBRASKA SERVICE CENTER
MAY 09 2011

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 \$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,

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 petitioner is a convalescent hospital which seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director states that on November 18, 2008 in his Request for Evidence (RFE) he asked the petitioner to submit evidence to establish its ability to pay the beneficiary's proffered wage for 2001 through 2007 plus evidence of wages paid to the beneficiary for the same time frame. The director further states that he also asked that the petitioner submit a copy of the beneficiary's nursing assistant certificate to establish that he fulfilled the special requirement specified in item 15 of Part A of the Form ETA 750. The director denied the petitioner finding that as of February 3, 2009, the petitioner had not submitted any additional evidence for consideration.

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.

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 regulation at 8 C.F.R. § 204.5(g)(2) provides 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 above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *See* 8 C.F.R. § 204.5(d).

The petitioner must demonstrate that on the priority date, the beneficiary met the qualifications stated on the Form ETA 750 certified by the USDOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as

stated on the Form ETA 750 is \$10.46 per hour (\$21,756.80 per year). The Form ETA 750 states that the position requires nine months experience in the job offered and a nurse assistant certificate.

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.¹

The petitioner is structured as a C corporation and claims to have been established in September 1980 and to employ 125 workers when the petition was filed. The submitted IRS Forms 1120, U.S. Corporation Income Tax Returns, from [REDACTED] reflect operations on a tax year basis beginning April 1 and ending March 31. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on April 25, 2001, he stated he had been employed by the petitioner as a nurse assistant since December 1995.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750 labor certification application. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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, United States Citizenship and Immigration Services (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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay. In this matter, the petitioner submitted IRS Forms W-2, Wage and Tax Statement, as evidence of wages paid to the beneficiary by the petitioner from 2001 through 2010. The Forms W-2 for 2001 through 2007 state that the wages were paid to a person named [REDACTED] having social security number [REDACTED]. The W-2s for 2008 through 2010 list the social security number for the beneficiary as [REDACTED] under the name [REDACTED].² The petitioner submits a United States Social Security Administration (USSSA) Form SSA-L191, dated March 20, 2011, Retirement, Survivors and Disability Insurance Earning Records Information, for [REDACTED] showing USSSA accepted his claim that he earned wages from [REDACTED]s" from 2000 through 2006 and

¹ 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 this case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² In its response to the AAO RFE received March 21, 2011, the petitioner submitted a card for [REDACTED] documenting the issuance of an IRS Individual Taxpayer Identification Number [REDACTED] under that name.

from [REDACTED] California, from 2000 through 2003 under social security number [REDACTED]. The amounts accepted as belonging to the beneficiary coincided with the amounts shown as being paid to [REDACTED] from 2001 through 2006.

However, despite this clarification, the Forms W-2 are still not persuasive evidence of wages having been paid to the beneficiary. As noted by the AAO in its RFE, the Forms W-2 in the record bear two different social security numbers, both purportedly attributable to the beneficiary: [REDACTED] and [REDACTED]. However, the petitioner answered "none" to the query in the Form I-140 asking for the beneficiary's social security number when this information, if true, must have been available to it. In response to the AAO's RFE, counsel claims that the "social security number used by Beneficiary was inadvertently omitted on Form I-140." This explanation is not credible, especially since the beneficiary also responded "none" in 2008 to queries asking for his social security number in his Form I-485, Application to Register Permanent Residence or Adjust Status, and in his Form G-325A, Biographic Information. Although it is clear from the record as a whole that the beneficiary has used at least one alias and at least one individual tax identification number, the petitioner's and the beneficiary's representations in the Form I-140, Form I-485, and Form G-325A that neither social security on the Forms W-2 belongs to the beneficiary casts doubt on this evidence and its relevance to wages being paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Accordingly, the Forms W-2 will not be accepted as persuasive evidence of wages having been paid to the beneficiary.

Regardless, assuming the persuasiveness of the Forms W-2, the IRS Forms W-2 stated to belong to the beneficiary issued to him by [REDACTED] for 2001 through 2010 are shown in the table below:

Year	Net Income
2001	\$16,288.21
2002	\$16,862.27
2003	\$16,895.48
2004	\$9,287.63
2005	\$12,217.48
2006	\$18,184.09
2007	\$16,451.90
2008	\$18,171.11
2009	\$18,531.36
2010	\$20,163.10

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$21,756.80 per year during 2001 through 2010, even accepting the Forms W-2 *in arguendo*.

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 next examines the net income figure reflected on the petitioner's federal income tax return which were submitted on appeal, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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 gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp, at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F.Supp 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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.

“[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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120. The petitioner’s net income for the years of the requisite period is shown below:

<u>Year</u>	<u>Net Income</u>
2001	-\$15,267
2002	\$2,968
2003	-\$17,599
2004	\$340
2005	\$12,206
2006	\$53,974
2007	\$16,892
2008	-\$11,157
2009	-\$8,475

Therefore, for the years 2001 through 2005 and 2007 through 2009, the petitioner did not have sufficient net income to pay the proffered wage. Even accepting the Forms W-2 as persuasive evidence of wages having been paid to the beneficiary, the petitioner did not have sufficient net income to pay the difference between the wages paid and the proffered wage in 2001, 2002, 2003, 2004, 2008, and 2009.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ 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 the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns demonstrate its net current assets for the required period, as shown in the table below:

<u>Year</u>	<u>Net Current Assets</u>
2001	-\$159,732
2002	-\$120,067

³According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

2003	-\$8,291
2004	-\$59,393
2005	-\$19,376
2006	\$214
2007	-\$229,658
2008	\$20,496
2009	\$283,293

Therefore, for the years 2001 through 2008 the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner had sufficient net current assets to pay the proffered wage in 2009. Even accepting the Forms W-2 as persuasive evidence of wages having been paid to the beneficiary, the petitioner did not establish that it had sufficient net current assets or net income to pay the difference between the proffered wage and the wages paid in 2001, 2002, 2003, and 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel submits a letter from the petitioner dated February 24, 2009 stating the company did not receive a letter requesting further documents. Also, counsel states the petitioner never received the November 18, 2008 correspondence from USCIS. The record reflects that on November 18, 2008, the director sent the petitioner an RFE to the petitioner's correct address of record. The petitioner can not effectively argue that it did not receive the director's RFE and the information it contained because it was sent to the address of record and it is the petitioner's responsibility to receive mail at that address. Also, the petitioner was informed in the director's decision dated February 3, 2009 that it had failed to submit evidence to establish its ability to pay the beneficiary's proffered wage for 2001 through 2007 plus evidence of wages paid to the beneficiary for the same time frame. In that same decision, the director also informed the petitioner that it had not submitted a copy of the beneficiary's nursing assistant certificate to establish that he fulfilled the special requirement listed in item 15 of Part A of the Form ETA 750. On appeal, the petitioner was not precluded from forwarding the requested evidence. Furthermore, as the AAO sent an RFE to the petitioner on February 9, 2011, the petitioner has had ample notice and opportunity to supplement the record.

Counsel argues the petitioner has shown it can pay the proffered wage. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the USDOL.

Finally, as noted in the AAO's RFE, the petitioner has filed other Forms I-140 for other beneficiaries which have been pending simultaneously. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing

until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

However, it must be noted that the petitioner has failed to provide evidence, despite being specifically requested to submit information by the AAO, regarding these simultaneously pending petitions. The petitioner did not provide the priority date of [REDACTED] and evidence of any wages having been paid to the beneficiary of the petition [REDACTED] from the priority date to 2009, wages having been paid to the beneficiary of the petition [REDACTED] from the priority date of February 14, 2003 to the date that beneficiary adjusted to permanent resident status, wages having been paid to the beneficiary of the petition [REDACTED] from the priority date of April 19, 2001 to the date that beneficiary adjusted to permanent resident status, wages having been paid to the beneficiary of the petition [REDACTED] from the priority date of June 30, 2005 to the date that beneficiary adjusted to permanent resident status, or wages having been paid to the beneficiary of the petition [REDACTED] from the priority date of April 16, 2001 to the date that beneficiary adjusted to permanent resident status. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. §103.2(b)(14). Accordingly, it must be concluded that the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date in the instant case, as well as its ability to pay the proffered wage of these other beneficiaries.

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, supra*. The petitioning entity in *Sonogawa* had been in business for over 11 years. 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 this case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets. The petitioner also has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Therefore, the AAO concludes that the petitioner has not demonstrated adequate financial strength through its net current income, net current assets, or any other means to demonstrate its ability to pay the beneficiary the proffered wage beginning on the priority date. There are also unexplained inconsistencies in the record pertaining to the identity of the beneficiary, which undermine the credibility to the evidence submitted and the petition as a whole. Finally, as noted above, as the petitioner has had simultaneously pending Form I-140 petitions pending for multiple beneficiaries, and as the petitioner has not established its ability to pay the proffered wage for the instant beneficiary alone, it cannot be concluded that the petitioner's job offer to the beneficiary is realistic. 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 beginning on the priority date.

A second issue in this matter is whether the petitioner has established that the beneficiary is qualified for the proffered position.

The regulation at 8 C.F.R. § 204.5(1)(3)(A) and (D) provides:

(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.

Section 203(b)(3)(A)(i) of the Act 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements* of the individual labor certification" (emphasis added).

Although the facts of *Matter of Wing's Tea House, supra*, concern the beneficiary's experience and not any special requirements, 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 USDOL. 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'r 1971). "To do otherwise would make a farce of the preference [s]ystem and priorities set up by statute and regulation." *Id.*

In *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), the labor certification job description included the requirement that the prospective employee be able to obtain, or already have, a Virginia nursing license. Because the beneficiary did not possess a Virginia nursing license by the priority date, the court focused on the meaning of the phrase "able to obtain." The beneficiary argued that this language means being "eligible to sit" for the examination, and that she satisfied this requirement through her foreign nursing education. The court found that, in that case, merely being eligible to sit for an exam was not sufficient.

In summary, the petitioner must establish 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, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snappnames.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.*

On appeal counsel submits the following documents to establish that the beneficiary had attained a nursing assistant certificate to establish that he fulfilled the special requirement required in item 15 of Part A of the Form ETA 750.

1. A letter dated February 24, 2009 from [REDACTED] who states that [REDACTED] aka [REDACTED] has been employed at the [REDACTED] in the capacity of a full-time certified nursing assistant.
2. A notice to [REDACTED] informing him that he passed the written portion of the State of California Nurse Aide examination on August 18, 2000.
3. A certificate from [REDACTED] showing he completed the pre-certification course for the nursing assistant training program on [REDACTED]
4. A letter dated August 21, 2000 in reference to the nursing assistant certification examination for the State of California from the Testing Site Coordinator of the Nurse Assistant Training & Assessment Program of the Regional Health Occupations Resource Center in Mission Viejo, California. The letter informs potential employers that [REDACTED] had successfully passed the written and manual portions of the Nurse Assistant Training and Assessment Program

Examination on August 21, 2000.

5. Nurse Aide preliminary evaluation results document number 769001 showing an unnamed applicant received passing scores for the skills and written portions of the evaluation.

6. A State of California Department of Health Services Nurse Assistant Certificate for [REDACTED] effective [REDACTED] expiring [REDACTED].

7. An undated State of California Licensing and Certification Program, Aide and Technician Certification Section, Form HS 0929, Request to Change Address and/or Name, [REDACTED] requesting a certificate name change from [REDACTED] z.

In response to the AAO RFE dated February 9, 2011, the petitioner submits a copy of the beneficiary's nursing assistant certificate effective May 15, 2001 and expiring November 18, 2011 showing he fulfilled the special requirement specified in Item 15 of Part A of the Form ETA 750. However, the priority date of this petition is April 27, 2001. Accordingly, as the beneficiary did not meet the special requirement in Item 15 of the Form ETA 750 by the priority date, the petition will be denied for this additional reason.

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

ORDER: The appeal is dismissed.