

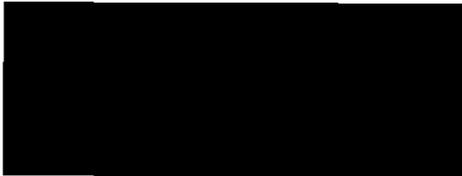
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B6

DATE: **FEB 29 2012** Office: NEBRASKA SERVICE CENTER

FILE: 

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:



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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on November 16, 2010, the AAO dismissed the appeal. The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. The motion will be dismissed.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a nursing aide pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as an unskilled worker. 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 determined that the petitioner failed to demonstrate that the beneficiary met the minimum requirements for the job at the time the request for certificate was accepted. Therefore, the director denied the petition. The AAO dismissed the appeal on this basis and also determined that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary.

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

As set forth in the director's January 14, 2009 denial, the primary issue in this case is whether or not the beneficiary possessed the certified nurse assistant (CNA) certificate prior to the priority date as set forth on the Form ETA 750.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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, which is February 11, 2003. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's

interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that USDOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, the item 14 of the Form ETA 750A requires a "CNA Certificate" for the proffered position. The petitioner did not submit a CNA certificate for the beneficiary. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide the beneficiary's CNA certificate. The petitioner's failure to submit this document cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserted that the training required in item 14 of the Form ETA 750A should be logically interpreted to mean "CNA certification or equivalent." However, the Form ETA 750 does not specify the minimum training requirement of a CNA Certificate might be met through an equivalent. The labor certification application, as certified, does not demonstrate that the petitioner would accept an equivalent of a CNA Certificate when USDOL oversaw the petitioner's labor market test.

On motion, counsel outlines the State of California CNA requirement history, argues that the CNA certificate requirement should not be construed as being a literal requirement, and that as there was no conceivable way for the beneficiary to meet the requirement of the job. Counsel argues the petitioner would not have expended significant time, money and effort on prevailing wage determinations, job advertisements, legal assistance and filing fees through this multi-year process had it known that its petition would fail because it listed this job requirement.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Therefore, counsel's assertion on appeal cannot overcome the ground of the director's denial that the petitioner failed to demonstrate that the beneficiary possessed a CNA certificate prior to the priority date and, thus, met the minimum training requirement for the proffered position. The petition cannot be approved and the denial of the petition must be affirmed.

On motion, counsel submitted evidence pertaining to the petitioner's ability to pay the proffered wage. 8 C.F.R. 204.5(g)(2). Based on this evidence, which is now contained in this record, it is determined the petitioner has now overcome the issue of its ability to pay, a separate issue raised by

the AAO in its November 16, 2010 determination. That portion of the AAO's decision is withdrawn.

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 AAO's prior decision, dated November 16, 2010, is affirmed. The petition remains denied.