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U.S. Department of Homeland Security  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
CIS, AAO, 20 Mass, Rm 3042  
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Washington, DC 20536



File: WAC 01 294 56987

Office: CALIFORNIA SERVICE CENTER Date:

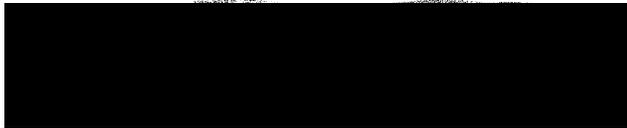
DEC 9 - 2003

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)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is in the business of residential group homes. It seeks to employ the beneficiary permanently in the United States as a program aide. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

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.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 9, 1998.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date.

The Application for Alien Employment Certification (Form ETA 750), in block 14, exacted one year of experience in the job offered. Form ETA 750 required verifiable references in Block 15. The issue in these proceedings is whether the evidence proved these elements.

Counsel initially submitted insufficient evidence of both the beneficiary's experience and the petitioner's ability to pay the proffered wage. On November 1, 2001, the director requested additional evidence (Form I-797/2001) to establish that the petitioner had the ability to pay the proffered wage or had paid it from the priority date and continuing to the present.

Form I-797/2001 also required the petitioner to establish that the beneficiary possessed the experience listed on the Form ETA 750. The director stated (emphasis in original),

Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.

Counsel submitted in response a letter dated December 2, 1997 from JV, Facility Administrator, Sunshine Drug Treatment and Rehabilitation Center, Abong-Abong, Zamboanga City, Philippines (Sunshine letter). It stated in pertinent part,

TO WHOM IT MAY CONCERN:

This is to certify that [the beneficiary] has been working as a part time staff worker in this facility since May 10, 1993 up to January 1996. . . .

This certification is being issued for whatever purpose it may serve.

On February 2, 2002, the director issued another request for evidence of the claimed experience (Form I-797/2002). It suggested four types of evidence to verify the missing terms of the beneficiary's prior work experience. Counsel responded with the beneficiary's own notarized, self-serving declaration of March 28, 2002 (2002 declaration). The director determined that it did not suffice as evidence of experience and denied the petition.

On appeal, counsel insists that the Sunshine letter meets the standard of 8 C.F.R. § 204.5(g)(1) and that the 2002 declaration be considered and fully credited as proof of one (1) year of experience. To the contrary, a pertinent regulation defines employment as full time, and, therefore, part-time work will not suffice. See 20 C.F.R. § 656.3 *Employment*. Evidence shall be on the previous employer's letterhead and describe the specific duties of the alien. The 2002 declaration does not meet the standard of 8 C.F.R. § 204.5(g)(1).

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In 1993, the beneficiary was 17 years old. He came in once or

twice a week according to one of seven (7) letters from patients whom the beneficiary assisted. The record supports the interpretation that the beneficiary worked part time or as a volunteer. Other letters assert that Sunshine facility existed. One states a time period of employment of the beneficiary, and two mention the closing of Sunshine. The beneficiary has nothing to say of the access of any writer to the records of the employer. All letters appear to come from the same typewriter, to be the same, with minor variations, and to engage the same notary public in Labuyo, Tangub City, Misamis Occidental, Philippines. The petitioner does not explain the connection of this place with the one at which the beneficiary worked, Abong-Abong.

Moreover, counsel provided a photocopy of what is said to be the beneficiary's staff badge from Sunshine. The record does not reveal why it was not presented in response to Form I-797/2002, how it came to be available on appeal, or what the beneficiary says of its circumstances to confirm its authenticity.

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

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.

Counsel declares that the beneficiary's prior work experience is unavailable due to factors outside his control, that Zamboanga City is in a remote province of the Philippines named Abong-Abong, and that typewritten verification on letterhead is unattainable there. The director did not exact typewritten verification, and counsel, having produced the Sunshine letter, cannot now say that the proof of employment is unattainable.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On appeal, counsel speculates on hearsay that the employer has closed and that records are unavailable. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In any case, it is too late to submit the critical verification of experience on appeal.

8 C.F.R. § 103.2 (b) states in part:

*Evidence and processing - (1) General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is considered part of the relating application or petition.

When additional evidence is requested, 8 C.F.R. § 103.2(b)(8) prescribes:

In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:

(i) Submit all the requested initial or additional evidence;

(ii) Submit some or none of the requested additional evidence; or

(iii) Withdraw the application or petition.

I-707/2002 specifically exacted the proof of the previous experience, as stated by Form ETA 750, but the petitioner did not provide it within the time to respond. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Provisions of 8 C.F.R. § 103.2(b) mandate that:

(13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

Block 15 of Form ETA 750 required that one (1) year of previous experience be verifiable. Counsel even argues, in the alternative, that verification of the experience is not attainable. The AAO has no authority to dispense with a term of the labor certification.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

Alternatives for verification of experience may include payroll records, Records of Wage and Tax Payments (Forms W-2), and employer quarterly wage reports. The petitioner made none available in these proceedings.

A careful review of all of the evidence reveals that the petitioner did not demonstrate that the beneficiary had one year of experience in employment related to the program aide position as required by the Form ETA 705 in blocks 14 and 15. Therefore, the petitioner has not overcome the director's decision

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.