



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: WAC 02 198 50738 Office: CALIFORNIA SERVICE CENTER Date: JUN 18 2004

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

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

*[Signature]*  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a board and care home. It seeks to employ the beneficiary permanently in the United States as a board and care manager. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had failed to establish that the position could be classified as a skilled worker pursuant to section 203(b)(3)(i) of the Act and denied the petition.

On appeal, counsel for the petitioner requests reclassification of the position as one requiring an "other worker" under section 203(b)(3)(A)(iii) of the Act.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), 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 or seasonal nature, for which qualified workers are not available in the United States.

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.

The regulatory provisions at 8 C.F.R. §§ 204.5(l)(3)(ii)(B) and 204.5(l)(4) further provide that if the petition is for a skilled worker, the petition must be submitted with evidence that the beneficiary meets the educational, training and experience requirements of that classification. The determination of whether a position is classified as one for a skilled worker (requiring at least two years of training and/or experience) or one for an other worker (requiring less than two years training and/or experience) is based on the training and/or experience required by the terms of labor certification approved by the DOL.

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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is July 16, 1999. The visa petition indicates that the petitioner was established in 1994 and has five employees.

The minimum education, training, and experience required for an applicant seeking the position of a board and care manager is described in the alien labor certification, "Offer of Employment," (Form ETA-750, Part A). In this case, item 14 of the ETA-750 states that the completion of grade school and high school is required. No college education or formal training is required, but an applicant must have a minimum of two years of employment experience in the job offered of a board and care manager. Item 15 provides for other special

requirements. In this case, item 15 shows that the petitioner had previously specified that an applicant could substitute a diploma for a doctor of medicine in lieu of two years of experience as a board and care manager. As indicated by the DOL stamped notation, however, this requirement was deleted on April 29, 2002.

The record indicates that on August 26, 2002, the director requested the petitioner to submit additional evidence establishing that the beneficiary possesses the experience required on the labor certification. The director also requested that the petitioner provide evidence of any wages it paid to the beneficiary from 1999 through 2001.

In response, counsel submitted a letter from the petitioner's owner stating that the petitioner had not employed the beneficiary during the period specified by the director request for evidence. The letter further states that the beneficiary has met the requirements for the job by virtue of a combination of education, training and experience. The owner also submitted copies of the beneficiary's Doctor of Medicine diploma and a grade transcript from De La Salle University, Philippines, as well as a letter from one of the beneficiary's previous employers, "G-Street Care Home," located in Sacramento, CA.

The director concluded that "the minimum qualifications/experience" for the position of board and care manager "is less than two years." Since the petition was submitted for classification as a skilled worker, which requires a minimum of two years training and/or experience under section 203(b)(3)(A)(i) of the Act, the director found that the petition must be denied.

On appeal, counsel merely requests without elaboration, that the petition be considered for classification as an "other worker" requiring less than two years of training and/or experience, pursuant to section 203(b)(3)(A)(iii) of the Act. Counsel does not challenge the director's interpretation of the ETA-750 as one that does not require a skilled worker. Consideration of a change of classification submitted for the first time on appeal will not be considered. Moreover, the director is not obliged to consider such a change in classification where a petitioner evidenced no intent to designate a different visa classification prior to the initial adjudication.

That said, it is clear that the labor certification describes a skilled worker classification. Although the record reflects that the DOL had considered the petitioner's requirements set forth in item 15 as too restrictive, there is no indication that any DOL amendments included the deletion of a minimum of two years of work experience as a board and care manager. Upon review of Part A of the original approved labor certification showing the corrections certified by the DOL, it is evident that two years of experience in the position offered of board and care manager remains a requirement for this position. CIS must look to the labor certification to determine the qualifications for the position. It 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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

The evidence required to support an alien's training or employment experience is set forth at 8 C.F.R. § 204.5(l)(3). A beneficiary's employment experience 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. The director should review the evidence contained in the record relating to the beneficiary's education and experience measured against the skilled worker classification as required by the terms

of the approved labor certification. Specifically, the director should consider whether the beneficiary's employment for G-Street Care Home from January 1998 to September 1999 meets the requirements of the labor certification as of the priority date, July 16, 1999. We note that 8 C.F.R. 204.5(l)(2) provides that relevant post-secondary education can substituted for training, not experience.

Therefore, in view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to adjudicate the petition as that of a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). The director may request any additional evidence deemed necessary. Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.