

Identifying data deleted to
prevent clearly unwarranted
disclosure of personal privacy
PUBLIC COPY



U.S. Citizenship
and Immigration
Services

B6

[Redacted]

FILE: [Redacted]
WAC-03-053-51629

Office: CALIFORNIA SERVICE CENTER

Date: AUG 17 2005

IN RE: Petitioner: [Redacted]

Beneficiary: [Redacted]

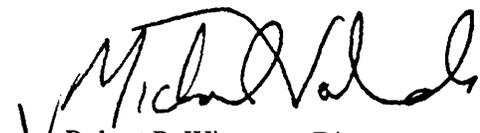
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.


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 a nursing facility for the elderly. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and denied the petition accordingly.

On appeal, counsel of record submits a brief and re-submits previously submitted evidence. The petitioner is considered self-represented at this point in the proceedings, however, since counsel of record is currently in inactive status with the California state bar and is thus not able to practice law or to continue as its representative for the petitioner under 8 C.F.R. §§ 292.1(a)(1) and 1.1(f). No other attorney or accredited representative has entered a notice of entry of appearance as attorney or representative in this matter.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. 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 June 19, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of accountant. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------|---|
| 14. | Education | |
| | Grade School | C |
| | High School | C |
| | College | C |

College Degree Required
Major Field of Study

Bachelor's Degree
Accounting, Related

The applicant must also have three years of training in order to perform the job duties listed in Item 13, which states the following:

Will apply principles of accounting to analyze financial information and prepare financial reports. Compile and analyze financial information to prepare entries to accounts, such as general ledger accounts, documenting transactions. Analyze financial information detailing assets, liabilities, and capital. Prepare balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audit contracts, orders, and vouchers. Prepare reports to substantiate individual transactions prior to settlement.

Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury on May 8, 2001. On Part 11, eliciting information about educational achievements, the beneficiary indicated that he attended the Philippines School of Business Administration studying accounting for which he received a bachelor's degree in 1975. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he was employed as a trainee with the petitioner from May 2000 to the time the application was filed, was unemployed from January 1999 to April 2000, and prior to that, was employed as an accountant with MHE-Dematic (P), Inc. in Paranaque, Philippines, from January 1995 to December 1998. No additional employment experience was listed by the beneficiary.

With the initial petition, the petitioner submitted a copy of a diploma issued by the Philippines School of Business Administration reflecting that the beneficiary received a Bachelor of Science in Business Administration in 1975. Accompanying copies of transcripts reflect that the beneficiary majored in accounting. Additionally, the petitioner submitted a letter signed by [REDACTED] Finance Manager, on MHE-Dematic (P) Inc. (MHE-Dematic) letterhead with general contact information, certifying that the beneficiary worked for MHE-Dematic as a full-time accountant from January 4, 1995 to December 15, 1998.

The director issued a request for evidence on February 10, 2003¹ and, *inter alia*, sought "letters, contracts, and pay statements to verify the beneficiary worked for [MHE-Dematic]." The director requested contact information to confirm MHE-Dematic's current and former employees.

On May 15, 2003, the director faxed a request to the U.S. consular officer stationed at the American Embassy in Manila, Philippines, to undertake an investigation to verify the employment claims of the beneficiary.

¹ The director's request for evidence requested many other items in regard to separate issues that will not be discussed in this decision since the director did not raise the issues in his final decision and the AAO's review of the record of proceeding did not determine that the issues would result in additional grounds for the AAO's dismissal.

In response to the director's request for evidence, the petitioner submitted the same letter it submitted initially and counsel stated that the petitioner complied with the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and the beneficiary "was employed in the said company as a full-time Accountant from January 1995 until December 1998."

On June 3, 2003, the director issued a notice of intent to deny, which, *inter alia*, noted that the beneficiary was not clearly eligible for classification under the third preference category. The petitioner's response did not contain any additional evidence or documentation pertaining to the specific issue of the beneficiary's qualifications.

On September 19, 2003, the director received the results of the investigation from the consular officer stationed at the American Embassy in Manila, Philippines, which stated the following:

On 11 August 2003, verification with MHE-Dematic (P), Inc. was conducted by this investigator at it's [sic] address along [REDACTED] Sucat, Paranaque. Contact person met was [REDACTED] Personnel Manager of MHE-Dematic since March 1988; per records check on company's payroll records, negative results were obtained for any recorded name of Subject. Mr [REDACTED] also commented that he is not familiar with Subject's name and that he would have known Subject had [sic] the latter been employed since he was already the Personnel Manager by March 1998. Hence, said claim of subject and the MHE-Dematic Certification presented was confirmed to be false and fraudulent. . .

On October 9, 2003, the director issued another notice of intent to deny to the petitioner explaining the results of the consular investigation and informing the petitioner it was the director's intention to deny the petition because the beneficiary was not qualified for the proffered position because he did not have qualifying employment experience.

In response, counsel stated that a "published and binding decision" issued by the AAO indicated that a beneficiary did not have to report all of his or her experience on the ETA 750 and states that the beneficiary has qualifying employment experience with NAESS Shipping Philippines, Inc. (NAESS). The petitioner submitted a copy of a letter from Capt. [REDACTED], Chief, Operations Division, on NAESS letterhead with contact information, stating that the beneficiary was employed as a radio officer from December 1985 to June 1994 and performed the following duties:

1. Operating Inmarsat satellite communication and emergency equipment.
2. Preparing payroll for the crewmembers.
3. Keep[ing] record of all crewmembers [sic] documentation issued/expiration dates.
4. Preparing documents for every port entry.

The petitioner also submitted a letter evidencing the beneficiary's vessel assignments while employed as a radio operator for NAESS, copies of contracts between NAESS and the beneficiary, and a copy of a prior AAO decision.

The director denied the petition on December 7, 2003, noting that neither the petitioner nor counsel addressed the derogatory information from the consular investigation of the beneficiary's claimed prior employment experience. The director determined that the beneficiary's duties while employed as a radio operator with NAESS are not

comparable to the duties of the proffered position and thus the beneficiary is not qualified for the proffered position.

On appeal, counsel reasserts past arguments and submits previously submitted documents.

The regulation at 8 C.F.R. § 204.5(1)(3) 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Additional evidence is in the record of proceeding that is pertinent to the adjudication of the beneficiary's stated qualifications for the proffered position. In connection with an application to adjust status to lawful permanent resident based upon the underlying visa petition, the beneficiary submitted Form G-325, Biographic Information sheet. The Form G-325 has multiple sections and two sections that elicit employment information for the past five years as well as the beneficiary's last occupation prior to coming to the United States. The beneficiary signed the form in November 2002 above a statement informing the signatory of penalties for knowingly and willfully falsifying or concealing a material fact. On the Form G-325, the beneficiary indicated that he has been employed with the petitioner since February 2001 as an Office Manager and prior to that he was an Assistant Office Manager for Royal Palms from July 1999 to January 2001. On the section concerning his occupation abroad, he represented that he was an accountant for MHE Dematic from January 1995 to December 1998.

The problem that arises in this case is the multiple inconsistencies in information and representations provided by the beneficiary. *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." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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 the ETA 750B, the beneficiary represented that he was a "trainee" with the petitioner since May 2000, not an office manager since February 2001 as he represented on the G-325. On the ETA 750B, the beneficiary represented that he was unemployed from January 1999 through April 2000, not an assistant office manager with Royal Palms from July 1999 to January 2001 as he represented on the G-325. Finally, the beneficiary's

representation about being employed as an accountant with MHE Dematic has already been impeached as fraud. It is significant that neither the petitioner nor counsel responded to the allegations of fraud in this case. Since there is no evidence the petitioner committed or was aware of fraud, the matter will not be remanded to the director for invalidation of the labor certification application. However, the beneficiary is not eligible for the employment-based immigrant visa sought on his behalf, not only because he committed fraud, but because the additional employment experience he claims supports his qualification for the proffered position involved radio operations on a shipping vessel not mathematical calculations in the professional position of accountant for a nursing home for the elderly. The skills the beneficiary allegedly obtained while employed at NAESS do not match the duties of the proffered position in any identifiable way. One involves the operation of technical equipment and clerical skills while the other involves professional analytical skills to prepare financial documentation regulated through state licensure. There is no plausible rationale for comparing the radio operator experience to the proffered position.

Prior counsel's assertion that the AAO decision supports the use of the radio operator past employment experience is also without merit because the decision is not published and binding as counsel states. Counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Additionally, a review of that decision reflects facts distinguishable from the instant petition. In the unpublished, non-precedent decision relied upon by prior counsel, no commission of fraud occurred.

Additionally, the AAO notes that many of the factual assertions put forth came from prior counsel throughout these proceedings. 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).

Thus, because of the inconsistencies and implausible information and representations made concerning the beneficiary's prior employment experience, the AAO concurs with the director's determination that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position because there is insufficient evidence that he has three years of qualifying work experience.

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.