

Information related to
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

Bl

FEB 28 2005



FILE: WAC 03 028 55243 Office: CALIFORNIA SERVICE CENTER Date:

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

PETITION: Immigrant petition for Alien Worker as an Other Worker 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
Robert P. Wiemann, Director
Administrative Appeals Office

CC: [Redacted]

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 petition will be remanded for further investigation and entry of a new decision.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 failed to establish that the beneficiary had the requisite work experience or satisfied the terms of the offered position as set forth on the labor certification.

On appeal, the petitioner¹ submits additional evidence and asserts that it establishes the beneficiary's eligibility for the position offered.

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 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. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 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 March 7, 2001. The visa petition, filed November 5, 2002, however, indicates that the petitioner was not established until August 2001 and currently employs three workers. The address given as the location of the care facility on the Immigrant Petition for Alien Worker (I-140) and the labor certification is [REDACTED] San Ramon, California. By way of contrast, the tax returns submitted in support of the petitioner's ability to pay the proffered wage list a petitioner as a limited liability company with the same employer identification number, but established on July 3, 2000.

Part B of the ETA-750, signed by the beneficiary on February 21, 2001, does not reflect that the petitioner

¹ The record contains a G-28, Notice of Entry of Appearance as Attorney or Representative signed by "Evelyn Sineneng-Smith" as a "Bonded Immigration Consultant, Juris Doctor Bond #WM11211877." There is no indication in the record that, pursuant to 8 C.F.R. §§§§ 103.2(a)(3), 1.1(f), 292.1(a)(4), or 292.1(a)(2)(i), (iii) and (iv), that [REDACTED] is an attorney or an accredited representative. [REDACTED] does not appear to be listed as accredited representatives by the EOIR. As the petitioner signed the appeal (Form I-290B), the petitioner will be considered as self-represented. For future reference, this representative should submit evidence that she qualifies to represent any alien pursuant to the above provisions. It is noted that 8 C.F.R. § 292.1(a)(2)(iii) and (iv) require a law graduate to file a statement that she is appearing under the supervision of a licensed attorney or accredited representative and that **she is appearing without direct or indirect remuneration from the alien he or she represents** and that she has secured the permission by the official before whom she wishes to appear. It is unclear how securing a bond fulfills any of these requirements. Until appropriate evidence is submitted, CIS cannot recognize [REDACTED] as an alien representative. A copy of this decision will be sent to [REDACTED]

employed the beneficiary at that time. The beneficiary lists two previous jobs on the ETA 750B. From August 1991 until August 1993, he claims that he worked full-time at the "Royal Hotel and Restaurant" in Nagoya, Japan as a "chief cook/domestic worker." His duties are given as preparing and cooking meals, cleaning rooms, making beds, and cleaning bathrooms. From January 1994 to November 2000, the beneficiary states that he worked full-time at the "Gin House Snack Bar" in Camiling, Tarlac, Philippines. His duties are stated as maintaining cleanliness of the place, preparing cooking and serving meals, and other related duties.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the offered position is a caregiver. The Department of Labor occupation job titles associated with this position are listed at the bottom right as Occupational Code 31-1012; nursing aides, orderlies and attendants. The duties of the certified position are given in some detail in item 13 and include cleaning, preparing meals and snacks for elderly persons who may be wheelchair-bound, disabled, or blind or deaf. The applicant will assist with exercising, skin care, personal hygiene, changing urine bags if necessary, hair care, mouth care, and assisting with medication. He or she will watch for signs of trouble with physical or emotional health, depression, bruises or sores, as well as reposition patients on the beds to avoid skin irritations.

Also set forth on item 14, the applicant must have three months of work experience in the job offered of caregiver. Item 15, states further requirements that appear to be based on being hired, such as demonstrating the ability to speak, read and write English, obtain first aid and CPR certificates, as well as know food nutrition, preparation etc.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that "evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 204.5(1)(3) also provides in relevant part:

(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.

Because the record did not initially contain sufficient documentation in support of the beneficiary's qualifying employment experience and credentials, the director requested additional evidence on April 24, 2003. The director requested evidence establishing that the beneficiary possesses three months of pertinent full-time experience as specified on the ETA 750A. The director advised the petitioner that the evidence of prior experience should establish that the experience was obtained prior to the priority date of March 7, 2001 and that it should be provided in letter form from the relevant employer showing the title and name of the author, as well as the beneficiary's job title, duties, dates of employment and hours worked per week. The director instructed the petitioner that contracts and pay statements should also be submitted in order verify the beneficiary's work

history. The petitioner further requested several additional forms of documentation including copies of the petitioner's business licenses, state quarterly wage reports for the last four quarters filed, photographs of the petitioner's business premises, evidence of the beneficiary's financial support, and evidence supporting the petitioner's ability to pay the proffered wage.

In response, the petitioner submitted copies of its 2001 and 2002 federal tax returns, copies of photographs of its premises, as well as copies of various state quarterly reports beginning with the quarter ending December 31, 2001. The December 2001 report shows that the petitioner employed the alien and paid him \$1200 that quarter. Although a copy of the alien's Wage and Tax Statement (W-2) for 2002 was submitted showing payment of wages to him, no W-2 is included in the record for 2001.

The petitioner also supplied photographs of its premises, a copy of an emergency disaster plan that appears to have been signed on February 26, 2001, a copy of a California Department of Social Services license issued to the petitioner effective June 22, 2001, and a copy of a certificate indicating that Jocelyn F. Santos had successfully completed a residential-elderly Administrator state certification program on August 16, 2000.

The petitioner also provided a copy of first aid completion cards signifying that the beneficiary completed first aid courses on March 22, 2001 and March 13, 2003, respectively, as well as copies of two certificates indicating that the beneficiary completed dementia care training seminars on September 5, 2001 and August 7, 2002. A declaration by the beneficiary, dated June 9, 2003 was also submitted as evidence of financial support. He states that he has been living with his sister who has supported him from November 2000 until March 2001. He further adds:

On March 7, 2001 I was petitioned by Queens Care Home, which opened February of 2001. From March 2001 to September 2001 we only have few clients. I helped at the facility from time to time and gained on the job training and experiences. I only started working full time last October of 2001 because the facility became full and more staff is needed.

Finally as proof of the beneficiary's prior qualifying past work experience as a caregiver, the petitioner submits copies of business permits from the Philippines styled as "Mayor's Permits" from 1995, 1996, 1998, and 1999. They all reference the beneficiary and all but the one from 1995 refer to the Grin House Snack Bar. The petitioner also includes a letter from the beneficiary, dated June 9, 2003. He explains that he can't provide a letter from the Royal Hotel and Restaurant in Nagoya, Japan because he has had no contact with them since August 1993 and doesn't have any friends of family who could help him obtain the documentation.

The director denied the petition on September 12, 2003. The director noted that although the two prior jobs that the beneficiary had listed on the ETA 750B involved cooking and cleaning, they clearly did not satisfy the requirements necessary to be a caregiver. The director concluded that the beneficiary's statement submitted in response to the director's request for evidence related to his financial support also suggested that he did not gain any relevant caregiver experience until March 2001. The director additionally noted that the record failed to indicate that the beneficiary had not met the requirements set forth in item 15 in that he had secured first aid and CPR training as of the priority date and had not established that he knew food nutrition, food preparation, etc.

On appeal, the petitioner points out that item 15 also includes "if hired" as the condition precedent of obtaining the relevant first aid and health screening report and the state of California no longer requires a CPR certificate as

a requirement for working in a care home. The petitioner also asserts that the “if hired” phrase also applied to such knowledge of food preparation and menu planning. Alternatively, the petitioner claims that the beneficiary learned such skills when he worked at the [REDACTED] Hotel and Restaurant in Japan.

The petitioner also provides two additional letters from two of the beneficiary’s previous employers. The first letter is dated October 7, 2003 and is signed by [REDACTED] a licensed vocational nurse. She states that the beneficiary worked for her part-time from November 15, 2000 to March 30, 2001 by taking her daughter to and from school, feeding her and helping her with her schoolwork. The second letter appears to be from the Senor Sto. Nino Hospital in Camiling, Tarlac, Philippines. It is dated October 4, 2003, but appears to be attested to on October 4, 2004, although the second page is notarized as October 4, 2003. It is signed by [REDACTED] M.D., Medical Director. [REDACTED] states that the beneficiary worked as a nursing aide at the hospital from August 28, 1993 until January 1994. He doesn’t state whether this work was full-time or part-time, but summarizes various personal care duties performed as well as duties including assisting with medication under the nurses’ supervision and watching for patient signs and symptoms.

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 this case, the AAO concurs with the petitioner’s assertion as to the meaning of the requirements listed in Item 15 as being contingent upon the hiring of the beneficiary, and thus may not be required to be shown until after the priority date of the petition.

The AAO considers the letter submitted by [REDACTED] to be insufficient to establish the beneficiary’s past experience in the medically-related caregiving that Item 9 and Item 14 of the labor certification require. If established as credible, at the most it may indicate that the beneficiary has provided meals for a child while babysitting part-time for a four month, two week period. The documentation provided to establish the beneficiary’s experience at the restaurant in Japan and the restaurant/ bar in the Philippines is also problematic. The question arises why the beneficiary could not submit something other than copies of business permits relating to the Grin House Snack Bar to corroborate his employment in the Philippines. It is obvious that he was related to the establishment through some kind of ownership interest, but it is noted that nothing in these business permits described his duties as a “domestic worker/cleaner.” It is further noted that while 8 C.F.R. § 204.5(g)(1) provides that other documentation may be submitted when employers’ letters are shown to be unavailable, it requires more than a beneficiary stating that no attempt can be made to secure such evidence because of lack of contacts in Japan. Finally, the fact that the labor certification is for a caregiver that is the equivalent to a nurse’s aide, orderly, or attendant, begs the question why such relevant experience as working at the Senor St. Nino Hospital was omitted from the ETA 750B. Nevertheless, the petition is being remanded to the director to conduct further investigation and review as to whether, in view of the letter submitted by [REDACTED] on appeal, the beneficiary has accrued sufficient relevant experience as a caregiver to satisfy the terms of the labor certification.

In addition, the director should review the evidence submitted in support of the petitioner's ability to pay the proffered wage in 2001, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Although the petitioner appears to have employed the beneficiary, it isn't clear from the federal tax return contained in the record whether its net income or any net current assets could cover any difference between what was paid to the beneficiary and the proffered wage of \$19,802.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire 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.