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U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 02 239 50487

Date: **AUG 29 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The petitioner appealed. The appeal will be sustained.

The petitioner operates a residential care facility. He seeks to employ the beneficiary permanently in the United States as a caregiver/household domestic worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The petitioner¹ employed four employees at the time the petition was signed and dated on July 18, 2002.

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 unavailable.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 8, 1999. The proffered wage as stated on the Form ETA 750 is \$1,277.47 per month (\$15,329.64) per year.² The Form ETA 750 states that the position requires three months of experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor ("USDOL"); and, personal U.S. Internal Revenue Service Form tax returns.

¹ The petitioner owns/operates four similar facilities in San Francisco, CA.

² It has been seven years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

Because the director determined, among other things, the evidence submitted with the petition was insufficient to show that the beneficiary has the requisite experience as stated on the labor certification petition, consistent with the regulation at 8 CFR § 204.5(l)(3)(ii) the director requested on March 11, and, June 15, 2004, additional pertinent evidence.

The director requested additional evidence of the beneficiary's current and prior job experience. The director requested the beneficiary's W-2 Wage and Tax Statements for the start of employment with the petitioner (if applicable) until the present (1999-2003), and, California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.

The director requested evidence that the beneficiary possesses four years of high school education.

According to the regulation above cited, the director requested evidence of the beneficiary's job training and specifically in first aid, CPR, and evidence of having a health screening report as required by the State of California.

The director requested additional documentation concerning the beneficiary concerning his prior listed job experience on letterhead with the beneficiary's job title, duties, dates of employment and number of hours worked including the beneficiary's foreign experience.

In response to the above requests, *inter alia*, the petitioner submitted the following documents: W-2 Wage and Tax Statements from 1999, 2000, 2001, 2002 and 2003 stating wages paid of \$2,600.00, \$12,825.00, \$14,275.00, \$15,110.00 and \$16,125.00 respectively; DE-6 statements; the State of California license to operate the facility; the beneficiary's four year high school education diploma; a health screening report; an E.M.S. and first aid attainment statements; a favorable fingerprinting exam result; a [REDACTED] Pharmacy, Isabela, Philippines employment verification that the beneficiary worked as a nursing aide in [REDACTED] (also known as the Municipality of Cauayan, Health Center) from January 1, 1995 to July 10, 1996; and, a Seaman's Employment Contract evidencing that the beneficiary served as a messman aboard a Greek vessel from July 17, 1996 to February 25, 1999.

The director denied the petition on December 14, 2004, finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the counsel asserted that that the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition based upon his work experience at [REDACTED] (also known as the Municipality of Cauayan, Health Center) from January 1, 1995 to July 10, 1996, and a one year course as a health aide at St. Jude College, Manila, Philippines in 1977.

- Counsel has submitted upon appeal the following documents: the beneficiary's resume of work experience: a [REDACTED], Isabela, Philippines employment verification that the beneficiary worked as a nursing aide in [REDACTED] (also known as the Municipality of Cauayan, Health Center) from January 1, 1995 to July 10, 1996 made March 16, 1999; a certificate of attainment that the beneficiary completed a one year course as a health aide at St. Jude College, Manila, Philippines in 1977; copies of receipt notices Form I-797C; and, immigration and identity documents.



The issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. 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 March 8, 1999. 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, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of caregiver/household domestic worker.

In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School Blank
 - High School 4
 - College Blank
 - College Degree Required no
 - Major Field of Study Blank
 - Training Blank
 - Experience
 - Job Offered - Years/Mos. Blank/ 3 mos
 - Related Occupation Blank
 - Years/Mos. Blank

The Application for Alien Employment Certification, Form ETA-750B, item 11, stated that the beneficiary has a health aide certificate attained after a one-year program at St. Jude College, Manila, Philippines in 1978.

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of caregiver/household domestic worker:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER

 12 Skaise St., Piraeus, Greece

NAME OF JOB

Messman

DATE STARTED

Month July Year 1996

DATE LEFT

Month February Year 1999
KIND OF BUSINESS
Ship
DESCRIBE IN DETAIL DUTIES...
Assisted the chief cook ...
NO. OF HOURS PER WEEK
84

(b)

NAME AND ADDRESS OF EMPLOYER
[REDACTED], Cauayan, Isabela, Philippines
NAME OF JOB
Caregiver
DATE STARTED
Month Jan. Year 1995
DATE LEFT
Month July Year 1996
KIND OF BUSINESS
Health Center
DESCRIBE IN DETAIL DUTIES...
Took care of frail elderly patients ...
NO. OF HOURS PER WEEK
40

There is independent objective evidence from [REDACTED] Isabela, Philippines employment verification that the beneficiary worked as a nursing aide in [REDACTED] (also known as the Municipality of Cauayan, Health Center) from January 1, 1995 to July 10, 1996, a verification made March 16, 1999; and, a certificate of attainment that the beneficiary completed a one year course as a health aide at St. Jude College, Manila, Philippines in 1977. Therefore, there is a statement 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 to satisfy the requirement of three months job experience as a caregiver. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 met that burden.

ORDER: The appeal is sustained.