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FILE: [REDACTED]
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Office: CALIFORNIA SERVICE CENTER

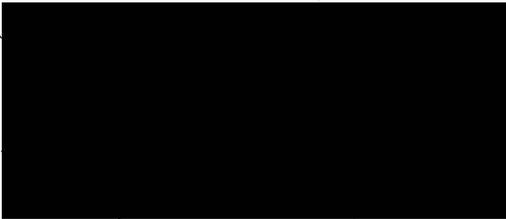
Date: JUL 27 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioners are private householders. They seek to employ the beneficiary permanently in the United States as a home attendant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioners had failed to submit evidence establishing the beneficiary's qualifying work experience and denied the petition accordingly.

On appeal, the counsel asserts that the petitioners have established that the beneficiary has obtained the required qualifying employment experience.

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 other 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 regulation at 8 C.F.R. § 204.5(l)(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.

(D) **Other workers.** If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The petitioners must show that a beneficiary has the necessary education and experience specified on the labor certification as of the priority 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). Here, Form ETA 750 was accepted for processing on February 26, 2001.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must possess. In this matter, item 14 provides that the applicant for the position of a home attendant must have six months of experience in the job offered. The certified position includes duties involving monitoring and assisting a quadriplegic in health, hygiene, feeding and basic personal care needs. The ETA 750B, signed by the beneficiary on February 21, 2001, indicates that the beneficiary has been working for the petitioner since December 7, 2000.

In support of demonstrating that the beneficiary possessed six months of work experience as a home attendant, with the petition, the petitioners initially submitted a copy of a letter, dated January 16, 2001, from a Filipino businessman named [REDACTED] certifies that the beneficiary had worked as a full-time caregiver in his home from "February 4, 1985 to March 13, 1990." He does not identify the individuals

requiring the care but describes the beneficiary's duties in fairly detailed language similar to that used in the labor certification, and vouches for her diligence.

The director referred the matter for an investigation overseas to verify the beneficiary's claimed employment with the [REDACTED]. According to the report, a field investigation was conducted at the [REDACTED] home on May 16, 2003. The investigator encountered [REDACTED] the 64 year-old wife of [REDACTED] who signed the January 16, 2001, letter verifying the beneficiary's employment with them. According to the investigator [REDACTED] looked at the letter signed by her husband, confirmed his signature and confirmed that the beneficiary had worked for them as a caregiver from 1985 to 1990. The investigator states that [REDACTED] reacted differently to the letter's contents. "She said that [REDACTED] together with her mother, [REDACTED] did work for them from 1985 to 1990. [REDACTED] worked as an all around house helper while Concepcion, who was then 24 years old, does the babysitting of [REDACTED] two small children. That was the only job done by Concepcion, contrary to what had been stipulated in the certification letter."

The investigator then asked to interview her husband, [REDACTED] but was informed by [REDACTED] that he might not be able to read the letter because he suffered from diabetes and had blurred vision. The investigator concludes the encounter by asking [REDACTED] why her husband might have signed such a letter if the job description was not accurate. [REDACTED] thought that maybe it was prepared for him and the contents were not properly explained and that Concepcion or her mother duped him to sign it.

Based on this report, on April 19, 2004, the director issued a notice of intent to deny the petition, concluding that the beneficiary's babysitting duties as referenced by [REDACTED] did not qualify her to perform the duties of a home attendant as set forth on the ETA 750. The petitioners were afforded thirty (30) days to provide additional evidence or argument in support of the petition.

The petitioners, through counsel, provided five "declarations" in response to the director's notice. Two are from [REDACTED] one is from their daughter; one is from a neighbor, and the beneficiary provides her own declaration. They can be summarized as follows:

- 1) [REDACTED] statement, dated May 11, 2004, reveals that the beneficiary and her mother worked for his family. The beneficiary was hired to take care of his two daughters, [REDACTED] and [REDACTED] as well as his sister, [REDACTED]. Her primary job was to care for [REDACTED] who had cerebral palsy and his sister, who had lupus. He itemizes her primary duties as assisting with baths and clothing changes; monitoring [REDACTED] physical therapy, changing bedding, washing and ironing [REDACTED] cleaning [REDACTED] bedroom; and preparing and serving food to [REDACTED] and [REDACTED] and the rest of the family, as well as "administering prescription and non-prescription medication pursuant to [REDACTED] and [REDACTED]" and other miscellaneous duties.
- 2) [REDACTED] statement is similar to her husband's in stating the beneficiary's primary job was to take care of [REDACTED]. She explains her statements to the investigator in connection with her description of beneficiary's duties as being motivated by her anxiety not to discuss [REDACTED] disease with people outside the family. She claims that to acknowledge that her husband's original statements in his employment verification letter were accurate, she would have had to discuss her daughter's cerebral palsy, which

she tries to avoid. She now states that her husband's description of the beneficiary's duties was correct.

- 3) [REDACTED] is the [REDACTED] other daughter. She confirms that the beneficiary took care of her and her aunt and sister, but spent most of her time with [REDACTED] and Cita because of their medical conditions. She refers to her father's statement for the summary of the beneficiary's duties.
- 4) [REDACTED] friend and former neighbor verifies that he personally observed the beneficiary take care of [REDACTED] doing such things as preparing and serving food and helping them to take their medications.
- 5) The beneficiary's affidavit basically confirms [REDACTED]'s summary of her duties. She adds that while [REDACTED] may have referred to her as a baby sitter, she took care of her sick sister-in-law and very sick baby for about five years.

The director found that [REDACTED] declaration about avoiding discussion of her daughter's cerebral palsy was not persuasive in light of the fact that she could have just confirmed the care of her sister-in-law [REDACTED]. The director determined that while the beneficiary worked in the [REDACTED] home, she performed babysitting duties for the two small children, rather than acting as a home attendant. The director concluded that through the petitioner, the beneficiary submitted fraudulent documents in order to meet the requirements.

On appeal, counsel resubmits copies of the declarations of the [REDACTED] their daughter, [REDACTED] and the beneficiary, and asserts that they support the fact of the employment of the beneficiary, as well as the nature of her duties. Counsel questions the reliability of the investigator's interview and whether there was an attempt to interview [REDACTED] corroborate [REDACTED] statements that he may have been tricked into signing the statement.

Although counsel's point is well-taken, it is noted that [REDACTED] could have provided a simple statement on his declaration as to the circumstances surrounding his signature on the first letter. That said, for the reasons mentioned below, the AAO concurs that weight of the evidence indicates that the beneficiary accrued six months of experience as a home attendant as of the priority date of February 26, 2001.

It is noted that CIS jurisdiction encompasses a review of the qualifications of a beneficiary for the designated position. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In cases where the required experience must be determined from prior jobs, it is appropriate for CIS to look to job duties of previous employment, not just job titles. *See Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991) (*en banc*).

In this case, it is noted that the investigator did attempt to seek an interview with [REDACTED] through [REDACTED] but was told that he was in ill health. The facts appear to be that the [REDACTED] household contained two persons

with serious medical conditions, [REDACTED] with cerebral palsy and [REDACTED] with lupus. The beneficiary worked in the home for approximately five years helping to take care of these persons, as well as the other daughter, [REDACTED] but primarily focused on [REDACTED] and [REDACTED]. Whether one calls it babysitting or not, her sustained duties included the care of a child with cerebral palsy. She was observed by a neighbor performing these duties including helping with medications and preparing and serving food. While [REDACTED] remarks to the investigator may have been untoward and unclear as to motivation, as the director suggested, there appears to be no dispute about the fact and duration of the beneficiary's employment in the [REDACTED] household. With respect to the beneficiary's qualifying six months of experience as a home attendant, the weight of the evidence supports the conclusion that it has been satisfactorily demonstrated.

In view of the foregoing, the previous decision of the director will be withdrawn and the appeal will be sustained. The record will be returned to the director to continue with normal processing of the beneficiary's I-485.

ORDER: The appeal is sustained. The petition is approved.