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**U.S. Citizenship
and Immigration
Services**

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BC

FILE:



EAC 04 030 52737

Office: VERMONT SERVICE CENTER

Date:

MAY 18 2006

IN RE:

Petitioner:

Beneficiary:



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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner¹ is an individual with children. It seeks to employ the beneficiary permanently in the United States as a child's nurse also called child monitor on the labor certification cover letter. 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 and denied the petition accordingly. The director denied the petition accordingly.

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 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

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 1, 2001. The proffered wage as stated on the Form ETA 750 is \$10.83 per hour (\$22,526.40 per year). The Form ETA 750 states that the position requires three months experience.

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

¹ The correct spelling of the petitioner's name according to counsel is [REDACTED]

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a U.S. Internal Revenue Service Form tax return 2001;² a job offer letter; a Domestic Service Agreement; an affidavit from [REDACTED] made March 12, 2003; an affidavit from [REDACTED] made March 11, 2003; and, an affidavit from the beneficiary made March 12, 2003.

Because the evidence submitted did not demonstrate that the beneficiary has the requisite three months work experience, the director, on July 8, 2004, requested pertinent evidence. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the director requested that evidence of the beneficiary's experience be in the form of letters from trainers or former 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.

In response to the request for evidence, counsel stated in her letter dated September 29, 2004, "Letters from the former employers are unavailable ..." without further elaboration. Counsel submitted an affidavit made September 25, 2004, from relatives of a former employer; four photos; and, an affidavit from the beneficiary made September 27, 2004.

The director denied the petition on December 17, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the former employer was unwilling to verify the beneficiary's work experience because of possible employer sanctions although the beneficiary worked there for about 11 months, and, for the petitioner, the "beneficiary has more than three months experience in housekeeping and nursing" prior to March 2001. Further, counsel cites *Matter of Lendy Muller*, 00-INA-125 (BALCA Sept 26, 2000) that counsel contends allows alternatives to letters from past employers in certain circumstances.

Counsel has submitted the following documents to accompany the appeal statement: an explanatory letter dated January 12, 2005; a letter from the petitioner; and, a letter from the beneficiary.

The issue to be discussed in this case 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. 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, sets forth the minimum education, training, and experience that an applicant must have for the position of a child's nurse.

² The adjusted gross income stated by the petitioner in the tax return was \$171,600.00.

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 Blank
 - Major Field of Study Blank
 - Training Blank
 - Experience
 - Years/Months 0/3
 - Related Occupation
 - Specify Housekeeping or nursing
 - Years/Months 0/3

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of child’s nurse.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[Redacted]

NAME OF JOB
 Child’s Nurse
 DATE STARTED
 Month – 11 [November] Year - 1997
 DATE LEFT
 Month – 09 [September] Year - 1998
 KIND OF BUSINESS
 Childcare
 DESCRIBE IN DETAIL DUTIES...
 Observes and monitors play activities of children; ...
 NO. OF HOURS PER WEEK
 40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

[Redacted]

NAME OF JOB
 Housekeeper and Child Nurse
 DATE STARTED
 Month – 09 [September] Year - 1998
 DATE LEFT
 Month – 09 [September] Year- 1999
 KIND OF BUSINESS
 Child care and house keeper
 DESCRIBE IN DETAIL DUTIES...

Plans, prepares, cooks, and serves meals and refreshments
NO. OF HOURS PER WEEK
50

Along with the petition, the petitioner submitted an affidavit made March 12, 2003, from [REDACTED] of Des Plaines, Illinois, that she transported the beneficiary on a weekly basis to and from her employment with [REDACTED] at 833 Heatherstone Drive, Schanmburg, Illinois 60173 where the beneficiary was employed as a child nurse from November 1997 to September 1998.

Also submitted with the petition, a similar affidavit was March 11, 2003, from [REDACTED] Rye, New York, stated that he assisted her with transportation to the residence of [REDACTED] 3 Whitman, Hastings on Hudson, New York 10706 from September 1998 to August 1999.

In response to the director's request for evidence, the petitioner submitted an affidavit made September 25, 2004, from [REDACTED], Hastings on Hudson, New York. The couple state they are relatives of [REDACTED], Hastings on Hudson, New York 10706. They recount that they observed the beneficiary working in their relative [REDACTED] residence as a housekeeper and child nurse in 1998 and 1999.

Further in response to the director's request for evidence, the petitioner submitted an affidavit made September 27, 2004, from the beneficiary confirming the above and her information stated in the labor certification. As further confirmation, the beneficiary submitted copies of four photos of the beneficiary with the children and the children's father [REDACTED] at Hastings on Hudson, New York.

To support the appeal, the petitioner has submitted an undated letter stating that the beneficiary has been employed fulltime as a childcare monitor in his household since September 1999.

A letter dated January 4, 2005, was submitted by [REDACTED] of Briarcliff Manor, New York, stating that the beneficiary worked for him as a housekeeper "for a couple of months in 1999." Further, he said that the beneficiary took care of his grandchildren.

There is no inconsistencies in information provided by the beneficiary, and, there is credible evidence of her prior job experience as a child care monitor, child's nurse, and house keeper for the petitioner prior to the priority date, as well as correlative photographic evidence that she worked in [REDACTED] household during the period stated as confirmed by witnesses by their direct observation.

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 established that the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has met that burden.

ORDER: The petition is sustained.