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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 18 2006**  
WAC 04 102 53517

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

The petitioner is a householder in a private residence. He seeks to employ the beneficiary permanently in the United States as a home health aid. 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 has not sustained the burden to demonstrate that the beneficiary had the minimum requirements at the time the request for labor certification was filed. 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 29, 2001. The proffered wage as stated on the Form ETA 750 is \$95.00 per day. The Form ETA 750 states that the position requires one month experience.

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

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;<sup>1</sup> an employment

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<sup>1</sup> The Form G-235A prepared by the beneficiary identified her father and mother to be Philippines born

agreement; an explanatory letter; the petitioner's personal U.S. Internal Revenue Service Form tax returns; and, a Certification dated April 19, 2001 from a prior employer, Far East Home Care, of the beneficiary.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 22, 2004, *inter alia*, pertinent evidence of the beneficiary's experience listed on the Form ETA 750. The director requested evidence of the beneficiary's prior experience "on the previous employer's letterhead showing the name and title of the person verifying this information." The director requested letters, contracts and pay statements and the number of hours worked each week.

In response to the request for evidence of the petitioner's prior experience beginning on the priority date, petitioner submitted an undated certification from Far East Home Care; the petitioner's personal U.S. Internal Revenue Service Form tax return; and, a schedule of monthly expenses.

The director repeated his request on September 7, 2004, of *inter alia*, pertinent evidence of the beneficiary's experience listed on the Form ETA 750 on the previous employer's letterhead showing the name and title of the person verifying the information. The director requested letters, contracts and pay statements and the number of hours worked each week.

In response to the request for evidence of the petitioner's prior experience beginning on the priority date, *inter alia*, an explanatory letter from counsel that stated in part "... Unfortunately, her previous Employer, Far East Home Care, is unwilling to provide a new employment certification on their letterhead (no salient reason given)."

The director denied the petition on December 16, 2004, finding that the petitioner has not sustained the burden to demonstrate that the beneficiary had the minimum requirements at the time the request for labor certification was filed.

On appeal, counsel asserts that the beneficiary's prior employment experience was documented and certification was submitted. Further, it is counsel's position, "... where an alien's prior experience is unavailable, based on factors outside the alien's control (i.e. previous employer out of business, remoteness of alien to previous experience in space and time, etc.), the Service should consider other evidence to prove this element [emphasis removed] ...."

Counsel has submitted the following copies of the documents to accompany the appeal statement: a brief; a G-28 Form; Form I-797C; the decision; the labor certification; a receipt notice; a Form 797 request for evidence dated June 22, 2004; an undated Certification from a prior employer; a Form 797 request for evidence dated September 7, 2004; an explanatory letter from dated November 22, 2004 from counsel; a Certification from Far East Home Care Inc. dated April 19, 2001; a Declaration of Employment from the beneficiary dated February 14, 2005; an employment verification dated December 31, 2004 from an certified nursing assistant; a Declaration of Employment from a certified nursing assistant dated January 17, 2005; and, a Declaration of Employment from [REDACTED] dated January 31, 2005

No evidence was submitted to show that the petitioner employed the beneficiary. The beneficiary stated on that form she was employed by Far East Home Care, Inc. as a caregiver from April 2000 to July 2000.

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national citizens.

Another 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, item 14 sets forth the minimum education, training, and experience that an applicant must have for the position of a home health aid.

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

14.

Education .....	
Grade School	Blank
High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank
Training	Blank
Experience .....	
Year/Months	0/1
Related Occupation	Blank

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 home health aid.

15. a.

**WORK EXPERIENCE**

**NAME AND ADDRESS OF EMPLOYER**



**NAME OF JOB**

Home Health Aid

**DATE STARTED**

Month - 05 [May] Year - 00 [2000]

**DATE LEFT**

Present [i.e. March 20, 2001]

**KIND OF BUSINESS**

Private Residence

DESCRIBE IN DETAIL DUTIES...

Provide daily health care to a patient at home ....

NO. OF HOURS PER WEEK

40

15. b.

WORK EXPERIENCE

NAME AND ADDRESS OF EMPLOYER

NAME OF JOB

Home Care Aid

DATE STARTED

Month - 04 [April] Year - 00 [2000]

DATE LEFT

Month - 04 [April] Year- 00 [2000]<sup>2</sup>

KIND OF BUSINESS

Private Duty Nursing Care Provider

DESCRIBE IN DETAIL DUTIES...

Provide medical care to patients at their homes ....

NO. OF HOURS PER WEEK

40

The beneficiary also stated that she was unemployed from November 1997 to March 2000 on the labor certification.

In this case the undated job certification that the petitioner submitted with the petition to prove the beneficiary's work experience as a caregiver was given by [REDACTED] noted as a case manager and admission coordinator. He stated that the beneficiary was employed by Far East Home Care from April 2000 to July 2000. He stated that the beneficiary worked on an assignment basis "from one week at a time to several weeks" caring for elderly patients. No pay rate is given.

A job certification dated April 19, 2001, was given by [REDACTED] Director of Operations for Far East Home Care Inc. She also states that the beneficiary worked as a caregiver for this employer from April 2000 to July 2000. No description of her duties or pay rate is given.

An affidavit made February 14, 2005 by the beneficiary states that she was employed by Far East Home Care Inc. as a home care aide/caregiver from April 2000 through July 2000 full time.

[REDACTED] of Monterey Park, California contributed two statements for the beneficiary. [REDACTED] stated that he is a certified nursing assistant and in that employment capacity between the dates, December 15, 1997 through January 30, 1998, worked with the beneficiary in her capacity as a live-in caregiver in a certain household. He stated that the beneficiary earned \$100.00 each week there.

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<sup>2</sup> This appears to be a mistake on the form.

[REDACTED] of Chatsworth, California contributed a statement for the beneficiary dated January 31, 2005. He verified through his statement of the beneficiary's "... employment for my 3 year old grandson ... as a live-in caregiver 40 hours a week, January 1, 2001-April 3, 2001 for which she was paid \$700.00 per month."

There are employer's documents from two individuals in managerial capacities that both state the beneficiary was employed by Far East Home Care from April 2000 to July 2000. There are three statements from [REDACTED] of Chatsworth, California, and, Frank Corral of Monterey Park, California that state the beneficiary has a total of approximately 5 months of job experience as a care giver. Based upon the totality of the job verifications submitted by the petitioner, credible independent objective evidence was submitted that the beneficiary had at least one-month job experience as a home health aid.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had 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.