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U.S. Citizenship
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FILE: WAC 03 141 54217 Office: CALIFORNIA SERVICE CENTER Date: SEP 05 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.

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 dismissed.

The petitioner operates a residential-elderly care facility. He seeks to employ the beneficiary permanently in the United States as a caregiver. 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 qualifications as stated on the labor certification petition. 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 CFR § 204.5(1)(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 5, 2001. The proffered wage as stated on the Form ETA 750 is \$1,501.08 per month (\$18,012.96) per year.¹ 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 with attached amendments for Alien Employment Certification, approved by the U.S. Department of Labor (“USDOL”).

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

¹ It has been five 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.”

the regulation at 8 CFR § 204.5(l)(3)(ii) the director requested on July 12, 2003, September 23, 2003 and, November 20, 2003, additional pertinent evidence.

In response to the above requests, *inter alia*, the petitioner submitted the following documents: U.S. federal Tax returns from 2001 and 2002 and 2003; DE-6 statements; a diploma from Central Colleges of The Philippines, Quezon City, on April 1, 1978, in the General Secondary Course (Department of Education, Culture and Sports); proofs of attainment in first aid; a favorable health screening report; a favorable fingerprint screening report; a certification from De Ocampo Memorial Hospital, Nagtajian, Manila Philippines that the beneficiary worked there as a nursing aide from May 1982 to August 1990; and, a copy of the diploma from Far Eastern University, Manila, Philippines dated March 21, 1982 that the beneficiary received degree in nursing aide study; and, a copy of a grades transcript from Far Eastern University showing subjects taken from 1980 through 1982.

The California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the following quarters ending on the last day of September 2002, January 2003, April 2003, and, July 2003, stated that the beneficiary received wages in the amounts of \$6,100.00, \$6,125.00, \$6,568.75, and \$6,745.00 respectively. The beneficiary was noted as caretaker/cook for the petitioner's facility in the statement submitted.

The director issued a request for evidence on September 23, 2003, and, on October 22, 2004, a notice of intent to deny the petition requesting, *inter alia*, the original diploma from Far Eastern University, Manila, Philippines dated March 21, 1982 confirming that the beneficiary received a degree in nursing aide study there as she stated in the labor certification, and the original of a grades transcript from Far Eastern University showing subjects taken from 1980 through 1982. The beneficiary had only produced copies of her diploma and grades transcript.

After the above two requests, the petitioner did not submit the original diploma or transcripts but instead the petitioner stated on November 16, 2004, that although two year of college education was included in the labor certification, that requirement was not included in the job recruiting advertisement conducted.²

Further, the beneficiary by her letter dated November 16, 2004, stated that although a request was made of Far Eastern University, Manila, Philippines, for the original documents (i.e. degree in nursing aide diploma and grades transcript), the school stated that the documents were stored and not readily accessible.

Instead, according to the beneficiary, the Far Eastern University, Manila, Philippines provided a letter with paid receipt found in the record of proceeding that the beneficiary had enrolled in a course of study leading to a degree of Bachelor of Science, major in zoology, having attended the school from 1978 to 1982.

This letter contradicts the documents submitted by the petitioner showing a degree or certificate in nursing aide studies attained by study at the school by the beneficiary, and a grades transcript from Far Eastern University showing subjects taken from 1980 through 1982 to support that diploma. The Far Eastern University letter and invoice were submitted without explanation concerning these contradictions (i.e. when the beneficiary attended school; what subjects she studied; and; what diploma received), raised by the school's letter.

² This is an admission against interest since the petitioner does not have the discretion to change the criteria in the Application for Alien Employment in the recruiting period by addition, modification or deletion. Failure to advertise the position of caregiver according to the terms of the Alien Employment Application as certified is a *Per Se* disqualification.

The issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite qualifications 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). According to a letter dated July 31, 2003, the beneficiary worked for the petitioner since May 5, 2001.

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.

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

14.	Education	
	Grade School	Blank
	High School	<u>4 yrs.</u>
	College	<u>2</u>
	College Degree Required	<u>no</u>
	Major Field of Study	Blank
	Training	Blank
	Experience	
	Job Offered - Years/Mos.	<u>Blank/ 3 mos</u>
	Related Occupation	Blank
	Years/Mos.	Blank

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 her attainment of more than two years of "required college education."

In the record of proceeding, upon CIS inquiry to the Far Eastern University, Manila, Philippines, the school stated to the CIS investigator that the beneficiary's name did not exist in the school files and that the evidence submitted was "spurious".

The Application for Alien Employment Certification, Form ETA-750B, item 11, stated that the beneficiary has a degree or certificate in the field of study, nursing, attained after attending a two-year program at Far Eastern University, Manila, Philippines between the dates June 1980 to March 1982. No credible evidence supports this statement.

Upon appeal, counsel submitted "a certified true copy" of the beneficiary's official transcript of records from that school. The stamped, sealed and numbered transcript of grades for the beneficiary evidenced attendance between

the years 1978 through 1982, at the Far Eastern University, Manila, Philippines, in what the school states is a zoology major field of study.³ Therefore, the submitted evidence contradicts the statement noted in the labor certification concerning the nursing studies diploma or certificate attainment. The documents submitted by the petitioner showing a degree or certificate in nursing aide studies attained by study by the beneficiary, and, a grades transcript from Far Eastern University showing subjects taken from 1980 through 1982 to support that diploma or certificate are also suspect and in fact contradicted by the later submitted documents of a different degree and longer course of study. A review of the certified transcript (years 1978 through 1982) does not evidence any nursing aide studies courses to support the earlier documents submission or the statement in Section 11, ETA 750 Part B.

Counsel contests the director's finding that the petitioner had not established that the beneficiary has the requisite qualifications as stated on the labor certification petition by stating that the beneficiary did study at the school, although as already stated at length, there are inconsistencies between the documents referencing the beneficiary's education at Far Eastern University, Manila, Philippines which counsel has failed to explain or note. Similarly, counsel complains that the petitioner's/beneficiary's personal representative committed errors to their detriment, however, again, counsel has failed to explain or produce independent objective evidence to correct the record of proceeding.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence.

Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

³ Counsel submitted a credentials evaluation (although according to the labor certification no four year college degree was required, nor did the petitioner advertise in the recruitment phase of the labor recruitment of workers for a two year college requirement) by Education Evaluators International Inc. dated February 16, 2005, that the beneficiary completed studies at Far Eastern University, Manila, Philippines, equating to three years of college course work, but the evaluator does not state the major field of study.

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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 not met that burden.

ORDER: The appeal is dismissed.