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FILE:

WAC-04-230-53740

Office: CALIFORNIA SERVICE CENTER

Date: JUL 13 2007

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional 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 dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a residential advisor (residential care facility manager). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's February 8, 2006 denial, the director determined that the petitioner had not established that the beneficiary had the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must 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 April 4, 2001.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. On appeal, counsel submits an experience letter dated March 1, 2006 from Cruz Medical Clinic & Industrial Services pertinent to the beneficiary's qualifications. Relevant evidence in the record includes the beneficiary's resume, nurse license issued by the Philippines, a completion card for MEDIC First Aid training programs, certificates issued by the petitioner for completion of various trainings, and the beneficiary's Bachelor of Science in Nursing and transcripts from Manila Central University. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel argues that the beneficiary worked as a staff nurse and an office manager, and therefore, this experience should meet the two years of experience in any other health related job as required in Parts 14 & 15 of the Form ETA 750.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of residential advisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                              |                                    |
|-----|------------------------------|------------------------------------|
| 14. | EDUCATION                    |                                    |
|     | Grade School                 | 6 years                            |
|     | High School                  | 4 years                            |
|     | College                      | Blank                              |
|     | TRAINING                     | Blank                              |
|     | EXPERIENCE                   |                                    |
|     | Job offered                  | 2 years                            |
|     | Related Occupation           | Blank                              |
|     | Related Occupation (specify) | <b>Any related health care job</b> |

The duties of the proffered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states other special requirements as follows: "Experienced in dealing with confused patients, paranoid, wanderer and patients with chronic pulmonary disease. Proof of Health Report required and T.B. skin test."

The beneficiary set forth her credentials on Form ETA-750B and signed her name on March 20, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she represented that she worked as a full time (40 hours a week) staff nurse for Cruz Medical Clinic & Industrial Services in Makati City, Philippines from November 1993 to January 2000. She does not provide any additional information concerning her employment background on that form or on Form G-325A, Biographic Information, signed on August 17, 2004. In her resume, the beneficiary claimed that she worked for Cruz Medical Clinic & Industrial Services as a staff registered nurse from November 1993 to January 2000 and has been working as a manager for the petitioner since October 15, 2004.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The instant I-140 petition was submitted on August 19, 2004 without evidence pertinent to the beneficiary's qualifications as required by the above regulation. The record contains the beneficiary's degree, transcripts, and training certificates submitted in response to the director's request for evidence (RFE) dated May 17, 2005. The position does not require any college education, but the beneficiary's degree and transcripts at least proves that the beneficiary meets the grade school and high school requirements of the Form ETAS 750.

The Form ETA 750 does not require any training for the proffered position, and therefore, the beneficiary's training certificates are not necessarily dispositive. Furthermore, those training certificates cannot establish the beneficiary's qualifications for the proffered position because they were not obtained prior to the priority date. The record did not contain any evidence to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date. Therefore, the director issued a notice of intent to deny (NOID) on August 15, 2005. In the NOID, the director stated that the record contained no evidence to show that the beneficiary had the requisite experience stated in the ETA 750 and granted 33 days to submit information and/or documentation. In response to the director's NOID, the petitioner submitted a copy of the beneficiary's nursing license and her resume but without evidence from former employers, including letters, pay stubs, tax forms, or wage statements. The director denied the petition. On appeal counsel submits an experience letter from the beneficiary's former employer.

The issue in the instant case is whether the petitioner with this letter established the beneficiary's requisite two years of experience prior to the priority date. The purpose of the request for evidence or notice of intent to deny is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given 33 days to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's NOID. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the portion of the director's decision denying the petition for the beneficiary's qualifications is affirmed.

The AAO also notes that the petitioner would have failed to establish the beneficiary's qualifications for the proffered position with the evidence newly submitted on appeal.

The regulation at 8 C.F.R. § 204.5(g)(1) requires such evidence must be in the form of letter from current or former employer or trainer and must include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. The experience letter newly submitted on appeal is on letterhead of Cruz Medical Clinic & Industrial Services and was dated March 1, 2006, signed by [REDACTED] and notarized by [REDACTED], a Notary Public. This letter stated concerning the beneficiary's work experience in pertinent part that:

This is to certify that [the beneficiary] worked as my nurse at my clinic situated at the above address from November 1, 1998 to January 31, 2000. She also served as my office manager during the same period.

The letter is from the doctor, and thus it is a letter from a former employer. The letter verifies that the beneficiary worked as a part-time nurse and a part-time office manager, however, it does not verify how many hours a week the beneficiary worked as an office manager and how many hours as a nurse. This experience letter does not include a specific description of the duties the beneficiary performed as required by the regulation. Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. In addition, without a specific description of the duties, the AAO cannot determine whether the beneficiary's experience with Cruz Medical Clinic & Industrial Services qualifies her to perform the duties of the proffered position set forth in Item 13 of the

Form ETA 750A. On appeal, counsel argues that the beneficiary's experience with Cruz Medical Clinic & Industrial Services as a part-time nurse and a part-time office manager should be counted as 2 years of experience in any other health related job. However, as previously noted, the employer did not indicate that it would accept any years of experience in related occupation to meet the qualification requirements on the Form ETA 750A. Furthermore, the beneficiary worked for the doctor from November 1, 1998 to January 31, 2000, for total 15 months, which does not meet the two years of experience requirements in the instant case. The petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750 with the letter from [REDACTED]. Therefore, the AAO would dismiss the appeal even if the AAO considered the sufficiency of the evidence submitted on appeal.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a residential care facility manager, and further failed to establish that the beneficiary is qualified for the proffered position. Counsel's assertions on appeal fail to overcome the ground of denial in the director's decision.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. **Here, that burden has not been met.**

**ORDER:** The appeal is dismissed.