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**JUN 25 2007**

FILE: WAC 03 141 54217 Office: CALIFORNIA SERVICE CENTER

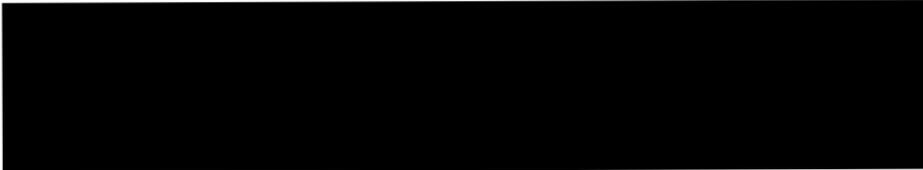
Date:

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, 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. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will remain denied.

The petitioner is a residential-elderly care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. 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 concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite educational qualifications as set forth on the labor certification and denied the petition on January 4, 2005.

The petitioner filed an appeal, through counsel on February 2, 2005. On appeal, counsel asserted that the director erred in determining that the petitioner had failed to establish that the beneficiary possessed the required two years of college as set forth on the labor certification. The AAO similarly determined that the petitioner had not established the beneficiary's educational credentials and dismissed the appeal on September 6, 2006.

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.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.<sup>1</sup>

Based on a review of the submissions on motion and counsel's brief which contain no statement of facts supported by affidavits or other documentary evidence pertinent to the matter at hand, the motion will be considered as a motion to reconsider under the regulation at 8 C.F.R. § 103.5(a)(3), as an assertion that the AAO decision was an incorrect application of law or [Citizenship and Immigration Services (CIS)] policy.

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<sup>1</sup> It is noted that the petitioner applied for a visa classification under section 203(b)(3)(A)(iii) of the Act, as that of an other, unskilled worker (requiring less than two years of training or experience). The regulation at 8 C.F.R. § 204.5(l)(4) provides that the determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the position by the prospective employer, as certified by the Department of Labor. In this matter, the DOL's requirements include two years of college. Pursuant to the regulation at 8 C.F.R. § 204.5(l)(2), relevant post-secondary education may be considered as training in the skilled worker category. Thus, the only visa classification that would have been available to this beneficiary, if otherwise qualified, would have been that of a skilled worker under section 203(b)(3)(A)(i) of the Act. The record contains no evidence that the petitioner requested that the visa classification be amended. In fact, the petitioner emphasized that the recruitment process open to otherwise available U.S. workers contained no requirement for two years of college.

The petitioner, through her former representative,<sup>2</sup> had obtained a labor certification describing the certified job in Item 14 of the ETA 750A as one in which a college degree was not required, but the applicant must have two years of college.

In order to demonstrate that the beneficiary's completed two years of college as of the priority date of March 5, 2001, the petitioner provided two sets of credentials. The first consisted of a copy of a diploma from the "Far Eastern University," dated March 21, 1982, stating that [REDACTED] had been "conferred [sic] the Degree of Nursing Aide." This diploma was accompanied by a copy of a grade transcript from this institution in the name of [REDACTED] that summarized various courses completed beginning with the first semester in 1980-1981 and ending with the second semester in 1981-1982.

These two documents were forwarded to the U.S. Embassy in the Philippines for an overseas investigation. In reply, and by letter, dated February 2, 2004, [REDACTED] stated that regarding [REDACTED] "the name mentioned above does not exist in our files" and that the attached "Transcript of Record" that was submitted to your office is "spurious in form and substance."

Meanwhile, the director requested that the petitioner submit the beneficiary's original Nursing Aide degree and college transcript. In response, rather than providing the original of this degree and college transcript, the petitioner submitted a letter from the beneficiary claiming that although a request was made of Far Eastern University, Manila Philippines, for the original documents, the school stated that the documents were stored and not readily accessible. Instead, the beneficiary provided a copy of a letter from the University, dated November 10, 2004, bearing what appears to be the same signature of [REDACTED] as that which is shown on the earlier letter sent to the U.S. embassy. In the letter provided with a paid receipt, it states that the beneficiary had enrolled in a course of study leading to a degree of Bachelor Science, major in zoology, having attended the school from 1978 to 1982.

The director denied the petition based on the unexplained contradictions arising from the contents of the two grade transcripts and degree as a Nursing Aide.

On appeal, counsel provided a "certified true copy" of the beneficiary's official Far Eastern University grades transcript showing attendance between the years 1978 through 1982, in what the school states is a zoology major field of study. The name of the student on the transcript of records is "[REDACTED]." As noted by the AAO's earlier decision, this transcript (certifying attendance from 1978 through 1982) contradicts the earlier degree and diploma by disclosing a different course of study with marked differences between the courses taken and a longer course of study. As stated on appeal, and as referenced herein, despite counsel's attribution of all contradictory submissions to the beneficiary's representative, Part B of the ETA 750 signed by the beneficiary on February 17, 2001, under penalty of perjury, states on Item 11 that the beneficiary's field of study was "nursing" and that she attended the Far Eastern University from June 1980 to March 1982. It is also noted that her stated date of birth in Item 4 of Part B of the Form ETA 750 is not the same date as that given on the official grade transcript provided by counsel.

On motion, counsel makes the same assertions that the inconsistencies attributable to the petitioner and beneficiary are wholly attributable to the beneficiary's former representative acting as an immigration consultant.

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<sup>2</sup> The petitioner's former representative as previously observed by counsel on appeal, represented the petitioner as a "bonded immigration consultant," but was not an accredited representative.

Counsel also contends that the subsequently submitted letter, dated November 10, 2004, containing the signature of [REDACTED], constitutes a “retraction” of her previous statement relating to a different transcript and diploma and confirming that the beneficiary attended the University during the 1978-1982 period of time. The AAO does not find that the subsequent [REDACTED] letter is a retraction of the letter submitted to the Embassy. In no way does it reference the first letter provided to the Embassy.

As noted in the earlier AAO decision, doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the remaining evidence submitted in support of the petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Here, the AAO does not conclude, in the face of such inconsistencies, that the petition may be approved. The petitioner merely submitted a new transcript conflicting with one previously submitted. Current counsel’s imputation of responsibility for the initial transcript to an unaccredited representative is unresolved. The record of proceedings contains no evidence that the unaccredited representative was charged or found guilty of forging documents to obtain immigration benefits for her clients. There is no evidence that the unaccredited representative forged one set of transcripts. The fact remains that the university’s registrar impugned one set of transcripts and the reason those inauthentic documents were submitted as evidence to CIS has not been made clear.<sup>3</sup> The petitioner has not resolved those doubts and has failed to establish that the beneficiary has acquired the requisite two years of college as set forth on the ETA 750 pursuant to the requirements of 8 C.F.R. § 204.5(1)(3).

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 motion is granted. The prior decision of the AAO, dated September 6, 2006, is affirmed. The petition remains denied.

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<sup>3</sup> Based on the petitioner’s initial submission of a transcript and diploma, CIS initiated the overseas investigation.