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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [REDACTED]
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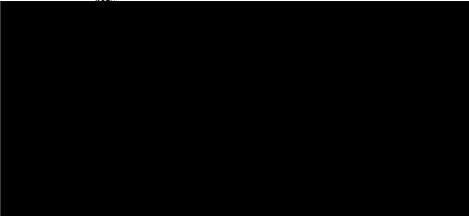
Office: CALIFORNIA SERVICE CENTER

Date: AUG 18 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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, Director
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 remanded.

The petitioner is a preschool childcare center. It seeks to employ the beneficiary permanently in the United States as a preschool teacher. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 unavailable in the United States.

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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on September 28, 2000. The labor certification states that the position requires two years experience in the proffered position with ability to speak and write the Korean language and to have completed 15 units of child development course work.

In her statement on the Form ETA 750, the beneficiary represents that she worked at a preschool center in Seoul from May 1996 to December 1999, where she taught preschool children reading, writing, hygiene, culture and how to work well with other children, also meeting with parents to discuss their child's progress. The form states she completed a yearlong child development course in California, and that she had been unemployed from May 2000 until September 2000, when she signed the form.

With the petition counsel submitted:

- A G-28 for counsel;

- An approved ETA 750;
- The Form 1040 return of the petitioner's owner for the years 2000 and 2001; and,
- A November 2, 2002 certificate of the beneficiary's prior employment in Korea.

On October 22, 2002, the director requested evidence of the beneficiary's prior job experience. Consistent with the requirements of 8 C.F.R. § 204.5(l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of 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.

In response, counsel submitted:

- Counsel's November 13, 2002 response letter; and,
- A certified English translation of a November 2, 2002 "verification of experience" certificate signed by the president of the Korean Orange Preschool program, [REDACTED] verifying that the beneficiary worked at the program as a preschool teacher from May 1996 through December 1999 (three years eight months).

On January 28, 2004, the director denied the petition, based upon an investigation conducted at the preschool in Seoul, Korea, where the beneficiary claimed to have worked. The investigation found that the Korean daycare center disclaimed ever having signed the November 2, 2002 affidavit or known the beneficiary as a preschool teacher as claimed. The preschool director Jung A YOO stated in a September 25, 2003 letter to the fraud investigator that she did not know of the beneficiary, [REDACTED]

On appeal, counsel asserts that the director erred by not issuing the petitioner a notice of intent to deny the petition without first affording the petitioner an opportunity to rebut the investigator's report.

Counsel has submitted on appeal:

- A February 11, 2004 affidavit by Jung-Yi YOO, the principal of the preschool program located in Seoul, Korea, where the petitioner claims to have acquired the requisite job experience.

[REDACTED] is the school principal who appears to have signed two earlier affidavits submitted first by the petitioner and another procured by an investigator for Citizenship and Immigration Services (CIS). In [REDACTED] affidavits she first admits and then denies knowing the beneficiary or that she worked at the school. Her most recent affidavit of February 11, 2004, she claims confusion and asserts she did not recognize the beneficiary by her legal name, [REDACTED] because she was known at the Korean school by her nickname, [REDACTED]. The principal further claims the investigator misled and intimidated her with the claim that the beneficiary's spouse was a "prominent rich man" and "conglomerate mogul." The principal now says the beneficiary's husband's income was modest and the family depended on the beneficiary's wages.

Seeking to reopen proceedings, counsel cites the regulation at 8 C.F.R. § 103.2(b)(16)(i), which provides:

(16) *Inspection of evidence.* An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

¹ While similar inked stamps appear next to each signature, we cannot verify the same person signed all the statements.

- (1) *Derogatory information unknown to petitioner or applicant.* If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [CIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

The foregoing regulation compels this office to remand to this application to the service center, which will give notice to the petitioner of the derogatory information in order to afford her a chance to rebut it before a decision is made whether to grant the petition.

Beyond the decision of the director, the petitioner, which is organized as a sole proprietor, must establish the ability to afford household monthly expenses as well as the beneficiary's wage. The director did not specifically a list of her monthly household expenses. Schedule C from the petitioner's Form 1040 tax return for 2000 reports a net profit of \$52,399 and adjusted gross income of \$48,725. For 2001, net profits increased to \$55,558 on Schedule C of Form 1040 and adjusted gross income of \$51,664.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Without establishing the amount of her monthly household expenses, the petitioner has not established her ability to pay the proffered wage above and beyond those expenses.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2^d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.