

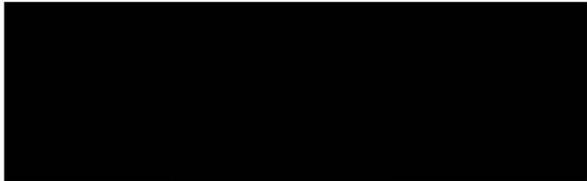
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
Washington, DC 20529-2090



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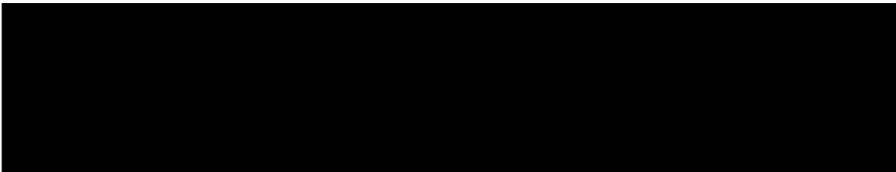
Office: NEBRASKA SERVICE CENTER

Date: MAY 07 2009

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John P. Crissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the Immigrant Petition for Alien Worker (I-140). The matter is now before the AAO on appeal. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convalescent hospital. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the DOL accompanied the petition. The director determined that the petitioner had not established that the beneficiary had acquired the two years of work experience as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petition merits approval.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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 or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3) further provides:

(ii) *Other documentation—*

- (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 that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage is set forth on the labor certification application as \$2092.10 per month or \$25,105.20 per year. On

Part B of the ETA 750, signed by the beneficiary on April 25, 2001, it is not claimed that the petitioner has employed her.

On part 5 of the Immigrant Petition for Alien Worker (I-140), filed on July 17, 2007, the petitioner claims that it was established in 1984 currently employs 125 workers, and claims a gross annual income of seven million dollars.

The beneficiary lists three previous jobs on Part B of the ETA 750:

- 1) From August 1999 to November 1999, she claims to have worked as a caregiver for in North Hills, California. She does not state whether it was full-time or part-time.
- 2) From November 1999 to May 2000, the beneficiary claims that she worked as a care provider/caregiver from Aurora's Group Home in Sylmar, California. She does not state whether this job was full-time or part time or identify the number of hours per week worked.
- 3) From May 2000 to February 2001, the beneficiary claims to have worked for ██████████ in Pasadena, California in a private home. Full-time or part-time work is not identified and the number of hours per week is not specified.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must have a 5 years of college with no specified degree or major field of study and two years of work experience in the job offered as a nursing assistant or in a related occupation as a caregiver.

Employment verification letters offered include one dated January 25, 2008, from ██████████ of ██████████. She states that the beneficiary was employed as a caregiver at that facility from August 8, 1999 to April 14, 2001. This letter does not specify full-time or part-time work and directly conflicts with the termination date given by the beneficiary on Part B of the ETA 750 and also with her claimed employment with ██████████ in Pasadena.

Another letter identified as a "Certificate of Employment" is signed by ██████████ in Laguna, Philippines who states that the beneficiary provided care to her elderly father from January 10, 1999 to June 25, 1999. No mention is made of whether the care was full-time or part-time or what kind of compensation was paid to the beneficiary. Additionally, this employment is completely omitted from Part B of the ETA 750, which instructs the beneficiary to list all jobs held within the last three years.

The director denied the petition on the basis that taking the amounts of time employed in the Philippines and at Grace Manor, the petitioner had not established that the beneficiary had acquired two years of experience as a caregiver. He observed that the caregiving duties from ██████████ in the Philippines were from June 10, 1999 to June 25, 1999 [sic] or about five months. Additionally, the employment at Grace Manor was nine months (from August 8, 1999 to April 14, 2001).

As indicated by counsel on appeal, using the dates given for Grace Manor in the employment verification letter from ██████████, the amount of time would be correctly calculated at approximately twenty months and six days. Counsel also noted that the starting date for the beneficiary's employment in the Philippines had been misstated as June 10<sup>th</sup> rather than January 10, 1999.

As noted above, the employment verification letters are inconsistent with the other evidence in the record and do not credibly establish the beneficiary's claimed two years of employment experience as a nursing assistant or two years in the related occupation as a caregiver. On Part B of the ETA 750, which was signed under penalty of perjury, the beneficiary omitted any mention of her employment as a caregiver in the Philippines for ██████████. (See also *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976) (decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible).)

Further, as mentioned above, the letter from ██████████ of Grace Manor, states that the beneficiary ended her employment on April 14, 2001. On the ETA 750, Part B, the beneficiary stated that this employment ended in November 1999. If ██████████ claim is correct, it is questionable why the beneficiary's termination date was stated as 1999 if she signed the ETA 750 on April 25, 2001, eleven days after the ██████████ letter claimed that the beneficiary's employment ended at Grace Manor. Additionally, as stated above, the ██████████ letter dates of employment conflicts with the beneficiary's claimed employment for ██████████ in Pasadena, California.

Based on these inconsistencies, omissions and obvious conflicts, the AAO does not find any of the beneficiary's claimed employment to be credible. 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. 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, 591-592 (BIA 1988).

The petitioner failed to demonstrate that the beneficiary possessed two years of employment experience as a nursing assistant or caregiver as of the April 30, 2001 priority date set forth on the ETA 750.<sup>1</sup>

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<sup>1</sup> Although not a basis for this dismissal, it is noted that the petitioner's continuing ability to pay the proffered wage, pursuant to 8 C.F.R. § 204.5(g)(2), should be addressed by the director when or if future proceedings may be sought for this or other beneficiaries in view of the fact that the petitioner has filed 227 petitions and accounted for only 63 workers in this proceeding. Moreover, the AAO takes notice of the fact that in such cases as WAC 04 178 50212 and other cases containing 2001 labor certifications that have come up on appeal, the petitioner has failed to establish that it has maintained the intent to be the beneficiary's actual employer due to its contract with Mainstay Business Solutions, a third party staffing agency, between 2003 and 2006.

Beyond the decision of the director, it is noted that the petitioner failed to provide a copy of a marks transcript indicating that she acquired five years of college as of the visa priority date of April 30, 2001, as required by the terms of the ETA 750. The labor certification does not require a degree, just five years of college. It is noted that the director's request for evidence issued on January 10, 2008, specified that the petitioner provide an "official record showing the dates of attendance, area of concentration of study, and date of degree award, if any." Instead of providing an actual grade transcript or official record from a college, the petitioner provided a credential evaluation from Academic Credentials Evaluation Institute, Inc. (ACEI), which the petitioner characterized as an "official evaluation report." Without the corresponding diploma, degree, transcript, or official school record, that such an evaluation is based upon, this kind of evidence is not acceptable and does not establish that the beneficiary attended five years of college as required by the labor certification. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). 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)).

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 at 1002 n. 9.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.