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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B6

DATE: **APR 14 2011**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]  
LIN 08 170 50721

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

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a residential care facility. It seeks to permanently employ the beneficiary in the United States as a caregiver. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is October 10, 2007, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director's denial concludes that the petitioner failed to establish that the beneficiary possessed the minimum experience requirements of the offered position as set forth in the labor certification.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. United States Citizenship and Immigration Services (USCIS) 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, Madany 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. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

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<sup>1</sup> Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying the plain language of the [labor certification]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at \*7.

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: High school degree.
- H.5. Training: None required.
- H.6. Experience in the job offered: Two (2) months required.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: None accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification, signed by the beneficiary under penalty of perjury, states that the beneficiary's highest level of education relevant to the offered position is a high school degree from The Philippines. Regarding the beneficiary's work experience, the labor certification states that she worked as a caregiver for [REDACTED] from September 1, 2005, through November 15, 2005, and as a caregiver for the petitioner since April 1, 2007.

The record contains the following evidence of the beneficiary's education and employment experience:

- The beneficiary's high school diploma from a secondary school in The Philippines.
- Certification of Dexter Rabago, attesting that the beneficiary "rendered service as a caregiver at Northridge Retirement Villa . . . for the period of September 2005-November 2005."
- Second certification of [REDACTED]. The certification is on Northridge Retirement Villa letterhead. However, the letterhead appears to have been generated by [REDACTED] and it contains a grammatical error. The second certification attests that the beneficiary was [REDACTED] Rabago's coworker for two months at Northridge Retirement Villa from "September,[ ]2005 – November, 2005."

- Declaration of the beneficiary, attesting that she was a live-in caregiver at Northridge Retirement Villa from September 1, 2005 to November 15, 2005, and that the owners of her former employer "refuse to provide me with such a letter or evidence of my employment."
- Certification from [REDACTED] Institute of Health Care, dated July 18, 2009. The letter states that the beneficiary was a graduate of the ASIAN Institute of Health Care and provided 360 hours providing elderly care from October 21, 2004 until November 21, 2004.
- Certificate of completion from the Asian Institute of Health Care for the "Caregiver Course" issued January 28, 2005.
- Transcript for the Asian Institute of Health Care for a "Caregiver Course" from March 29, 2004 to November 2004.
- Certificates of Attendance from the Asian Institute of Health Care for a standard first aid and a basic lift support (adult CPR) course.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

...

(D) *Other Workers.* If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience and other requirements of the labor certificate.

The regulation at 8 C.F.R. § 204.5(g) also states that evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. *Id.*

The statements from [REDACTED] are not from the beneficiary's prior employer, they are not on official letterhead, they do not state the specific dates of employment, they do not state whether the beneficiary was employed on a full-time basis, and do not provide a detailed description of the duties allegedly performed by the beneficiary. In addition, [REDACTED] appears to have forged the alleged former employer's letterhead in one of the statements. Therefore, the submitted letters from [REDACTED] do not meet the regulatory requirements for experience letters outlined above.

As counsel notes, USCIS may accept other documentary evidence of the beneficiary's employment experience if an experience letter from the former employer is unavailable. However, the petitioner has not provided sufficiently reliable additional evidence to establish her claimed employment with

Northridge Retirement Villa. The petitioner did not submit any paycheck stubs or Forms W-2 from the employer for the beneficiary that would corroborate a claim of employment. The petitioner only provided a letter from one coworker. There is no evidence that [REDACTED] was employed by Northridge Retirement Villa during the beneficiary's claimed dates of employment. Further, as is explained above, even if [REDACTED] letters were accepted as evidence of the beneficiary's employment, they still lack sufficient specificity to establish that the beneficiary had two months of experience in the job offered as of the priority date.

Counsel also argues that the beneficiary received two months of on the job training as a caregiver while attending the Asian Institute of Health Care. Specifically, the record contains a certification from the Asian Institute of Health Care dated July 18, 2009 which states that the beneficiary obtained "extensive experience" in "various post[s] in the medical, surgical and elderly care from October 21, 2005 up to November 21, 2004 (360 hours)." (Emphasis omitted). Importantly, the certification describes training and not experience in the offered position. Also, the claimed training is not described in detail, and at least one of the training "posts" appear to be unrelated to the offered position. As is noted above, the claimed training was for only one month; although the certification states that the beneficiary completed 360 hours of training in one month, this would constitute over 16 hours of training a day, based on a five-day workweek. Also, the claimed hours of training on the certification do not match the 260 hours of training listed on the beneficiary's transcript. In addition, the claimed education at Asian Institute of Health Care was not listed on the labor certification, which reduces the credibility of the certification. *See generally, Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). In summary, the evidence submitted from the Asian Institute of Health Care does not establish that the beneficiary had two months of experience in the job offered as of the priority date.

The AAO affirms the director's decision that the preponderance of the evidence does not establish that the beneficiary possessed two months of experience in the job offered prior to the priority date. Thus, the petitioner has not established that the beneficiary possesses the experience required to perform the proffered position as set forth on the labor certification. 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)).

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.