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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

PUBLIC COPY



B6

DATE: DEC 22 2011 Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary:

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

ON BEHALF OF PETITIONER:

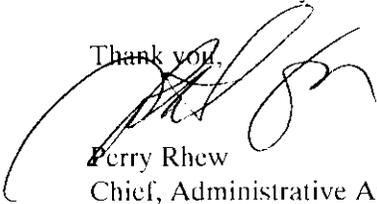


INSTRUCTIONS:

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 your 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 visa preference petition. The petitioner appealed. The AAO summarily dismissed the appeal. The AAO hereby reopens its decision pursuant to 8 C.F.R. §103.5(a)(5)(ii) to provide additional detail. The appeal remains dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the DOL, accompanied the petition.

The director determined that the petitioner failed to establish that the beneficiary meets the training, experience and any other requirements set forth in the ETA Form 9089. The director denied the petition on February 23, 2009.

On appeal, the petitioner states additional argument relevant to the beneficiary's education, training, and experience. The petitioner contends that the petition should be approved.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

In this case, counsel indicated on the notice of appeal (Form I-290B), filed on March 30, 2009, that the petitioner considered the beneficiary's Bachelor of Science degree in Physical Therapy to be a sufficient substitute for the experience and training requirements set forth on the ETA Form 9089. Counsel states on the Form I-290B that a brief and/or additional evidence will be submitted to the AAO within 30 days. Nothing further was received to the record so the AAO dismissed the appeal on October 1, 2009. The purpose of this decision is to supplement the AAO's October 1, 2009 dismissal with additional detail.

Pursuant to 8 C.F.R. 103.5(a)(5)(ii), the AAO reopened this matter on its own motion and notified the petitioner on October 28, 2011 that it was permitted a period of 30 days in which to submit a brief. On November 23, 2011, this office received notification from the petitioner's counsel that the petitioner waives the 30 day period in which to submit a brief. Therefore, the decision is rendered on the record as it currently stands.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii) 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

¹ 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).

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

(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 certification.

The petitioner must demonstrate that a beneficiary has the necessary education, training experience and other specific credentials as required on the labor certification as of the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system, which establishes the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the priority date is November 12, 2007.

Part H of the ETA Form 9089 indicates the following:

4. Education : minimum level required: High School
5. Is training required in the job opportunity? Yes
- 5-A. If Yes, number of months of training required: 6
- 5-B. Indicate the field of training: Caregiver Certificate
6. Is experience in the job offered required for the job? Yes
- 6-A. If Yes, number of months experience required: 6
7. Is there an alternate field of study that is acceptable? No
8. Is there an alternate combination of education and experience that is acceptable? No
9. Is a foreign educational equivalent acceptable? Yes
10. Is experience in an alternate occupation acceptable? No
11. Job duties –If submitting by mail, add attachment if necessary. Job duties description must begin in this space.
 - 1) Provides direct client care in the following areas & other related duties assigned by the house manager and administrator.
 - (a) Administers and documents medications; administers general first aid,
 - (b) Trains/assists clients in all personal care, dressing, bathing, oral hygiene, toileting, grooming. Provides training in self help skills as stated in individual scheduled plan.
 - 2) Provides cooking, meal planning, laundry and light housekeeping.

With the petition, the petitioner submitted a copy of the beneficiary's diploma from the [REDACTED] [REDACTED] indicating that she received a Bachelor of Science degree in Physical Therapy on March 22, 1999. An educational evaluation from the International Consultants of Delaware Inc., dated January 31, 2005, states that the beneficiary's Filipino undergraduate degree is the U.S. equivalent of "73 semester units of General Education and 97.5 semester units of Professional Education." The petitioner also provided copies of two Certificates of Attendance to seminars conducted in January 10th and September 19th 1998, respectively, and a Certificate of Attendance to a seminar conducted on an unspecified date in February 1999. The petitioner also provided a copy of a letter, dated April 2000, from [REDACTED] [REDACTED], indicating that the beneficiary was appointed as a staff physical therapist on June 1, 1999.

Noting that none of these documents demonstrated that the beneficiary's physical therapy degree established that she had six months of employment experience as a caregiver or six months of care giving training and a caregiver certificate, the director requested evidence that the beneficiary possessed the credentials required by the terms of the labor certification.

In response, the petitioner provided the same documentation as was initially submitted with the petition as noted above. The director denied the petition because the beneficiary's documentation failed to establish that she obtained six months of work experience as a caregiver and six months of training as a caregiver culminating in certification as a caregiver.

The AAO concurs with the director's decision. At the outset, as noted in the AAO's previous decision, nothing further has been submitted to the record by the petitioner to support counsel's assertion on appeal that the beneficiary's B.S. in Physical Therapy would be viewed as an acceptable substitution for the experience and training requirements set forth in the ETA Form 9089. Counsel's undocumented assertions do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is also noted that the petitioner specifically excluded the acceptance of an alternate combination of education and experience in Question 8 of Part H of the ETA Form 9089 and excluded the acceptance of experience in an alternate occupation, such as physical therapy, in Question 10 of Part H. Even if experience as a physical therapist were acceptable, an employment verification letter merely noting that the beneficiary had been appointed as a physical therapist at [REDACTED] in 1999 does not sufficiently document that she acquired six full-time months of work experience as a caregiver performing the duties outlined in Question 11 of Part H of the ETA Form 9089.² The letter does not state the exact month start date, as well as the exact month and year-end date to determine the total length of experience. The letter also fails to state a description of the experience in accordance with the regulation to determine whether the job duties are relevant to the position offered. 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

²In determining whether a beneficiary has the requisite experience, job duties of previous employment should be examined, not merely job titles. See *Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991 (en banc)).

Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that the beneficiary possessed six months of caregiver work experience as set forth in the ETA Form 9089.

With respect to six months of training as a caregiver as outlined on the ETA Form 9089, which culminates in a "certificate of care giving," we note that the regulation at 8 C.F.R. § 204.5(1)(2) permits relevant post-secondary education to be considered as training for the purpose of consideration of the *skilled worker* category. In this case, however, we note that the visa category sought is as an unskilled worker. Further, for similar reasons as is noted above relevant to the beneficiary's employment experience, very little in the documentation submitted relating to the beneficiary's degree in physical therapy or her certificates of attendance at three one-day seminars related to physical therapy issues constitutes six months of training in the job duties outlined in the Question 11 of Part H of the ETA Form 9089. Further, the record fails to indicate that the beneficiary acquired a "certificate in care giving" relevant to the job offered.

We additionally note that the job offered is located in California. We interpret the licensure or certification requirement set forth in Part H-5 to mean that the applicant must have U.S. and/or state licensing certification that are issued by the applicable U.S. federal or state authorities. No such certification is contained in the record. It is noted that California requires specific training and renewal requirements before certificates are issued or renewed by home health aides³ or certified nurse assistants. See Cal. Health & Safety Code §§ 1736.1 and 1337.6(a)(1). After an individual becomes a certified home health aide or certified nurse assistant he or she is then included on the state registry as an home health aide or certified nurse assistant. In this matter, the record fails to demonstrate that the beneficiary possessed any requisite state certification as required by the approved labor certification by the time of the priority date. It is further noted that the California Department of Health has no record that the beneficiary is included on its registry as a certified home health aide or certified nurse assistant.⁴ A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The petition is not eligible for approval because the petitioner failed to establish that the beneficiary had the training, certification, and employment experience required by the certified labor certification. The petition remains denied.

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 remains dismissed.

³It is noted that the main job title given for the DOL's SOC/O'Net occupational code designated by the petitioner in F-2 of the ETA Form 9089 is Home Health Aide. See

⁴See <http://www.apps.cdph.ca.gov/cv/ListPage.aspx>. (Accessed October 11, 2011.)