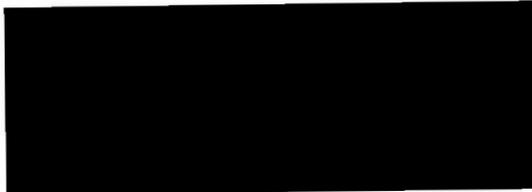




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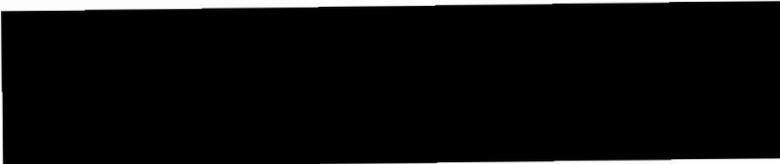
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FILE: WAC 04 035 53439 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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:



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 petitioner appealed. The appeal will be sustained.

The petitioner operates a residential care facility for the elderly. She seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

The petitioner was established in 1996. It employed two employees at the time the petition was signed and dated on November 7, 2003.

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 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 unavailable.

The regulation at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate 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).

Here, the Form ETA 750 was accepted on February 20, 2001. The proffered wage as stated on the Form ETA 750 is \$1,442.17 per month (\$17,306.04) per year.<sup>1</sup> The Form ETA 750 states that the position requires three months of experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, the petitioner submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (“USDOL”); a support letter; correspondence to the USDOL; a marriage license; two certificates of birth; and, two personal U.S. Internal Revenue Service Form tax returns for 2001 and 2002.

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<sup>1</sup> It has been five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

The issue to be discussed below is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is February 20, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, *Mandany 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. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of caregiver.

In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education .....
  - Grade School Blank
  - High School 4
  - College Blank
  - College Degree Required no
  - Major Field of Study Blank
  - Training Blank
  - Experience .....
  - Job Offered - Years/Mos. Blank/ 3 mos
  - Related Occupation Blank
  - Years/Mos. Blank

The Application for Alien Employment Certification, Form ETA-750B, item 11, stated that the beneficiary has a Bachelor of Science degree in nursing attained after a four-year program at Centro Escolar University, Manila, Philippines in October 1995.

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience for the position of caregiver:

15. WORK EXPERIENCE

(a)

NAME AND ADDRESS OF EMPLOYER  
 [REDACTED] 1510 Newslands Ave., Burlingame, CA 94010  
 NAME OF JOB  
 caregiver  
 DATE STARTED  
 Month December Year 2000  
 DATE LEFT

Present [i.e. February 12, 2001]  
KIND OF BUSINESS  
Residential - elderly  
DESCRIBE IN DETAIL DUTIES...  
Take care of elder residents. ...  
NO. OF HOURS PER WEEK  
40

(b)

NAME AND ADDRESS OF EMPLOYER  
Burlingame, CA  
NAME OF JOB  
caregiver  
DATE STARTED  
Month November Year 2000  
DATE LEFT  
Month December Year 2000  
KIND OF BUSINESS  
Residential - elderly  
DESCRIBE IN DETAIL DUTIES.  
Take care of elder residents. ...  
NO. OF HOURS PER WEEK  
40

(c)

NAME AND ADDRESS OF EMPLOYER  
[REDACTED] - Santa Cruz, Manila, Philippines  
NAME OF JOB  
Staff nurse - caregiver  
DATE STARTED  
Month January Year 2000  
DATE LEFT  
Month November Year 2000  
KIND OF BUSINESS  
Medical Hospital  
DESCRIBE IN DETAIL DUTIES...  
Provide nursing care to patients ...  
NO. OF HOURS PER WEEK  
40

Because the director determined, among other things, the evidence submitted with the petition was insufficient to show that the beneficiary has the requisite experience as stated on the labor certification petition, consistent with the regulation at 8 CFR § 204.5(1)(3)(ii) the director requested on May 17, and August 31, 2004, additional pertinent evidence.

The director requested additional evidence of the beneficiary's current and prior job experience. The director requested the beneficiary's W-2 Wage and Tax Statements for the start of employment with the petitioner (if applicable) until the present (2001-2003), and, California Employment Development Department (EDD) Form

DE-6, Quarterly Wage Reports for all employees for the last four quarters that were accepted by the State of California. The forms should include the names, social security numbers and number of weeks worked for all employees.

The director requested a job verification from [REDACTED] on its letterhead with the beneficiary's job title, duties, and dates of employment and number of hours worked.

The director requested employment that the beneficiary had attained at a prior job at [REDACTED] Manila, Philippines with letters, contracts and pay statements to support this referenced experience, and summary, the listed experience with [REDACTED]

According to the regulation above cited, the director requested evidence of the beneficiary's job training and specifically in first aid, CPR, and evidence of having to submitted to a health screening as required by the state of California.

The director requested additional documentation concerning the beneficiary's [REDACTED] Home job experience.

In response to the above requests, *inter alia*, the petitioner submitted the following documents: the State of California license to operate the [REDACTED] facility; a letter dated July 12, 2004, of the beneficiary's job experience at [REDACTED] care home; a W-3 statement for 2001; an academic secondary course certificate; (1987 to 1991); a health screening report; an E.M.S. first aid attainment statement; a support letter; a photocopy of the beneficiary's [REDACTED] nursing service department photo I.D.; and, a job verification statement from the [REDACTED] dated June 23, 2004 as well as other letters and documents.

The director denied the petition on December 15, 2004, finding that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the counsel asserted that that the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition.

Further, the petitioner has submitted a letter dated December 23, 2004, of the beneficiary's prior job experience with [REDACTED] as a caregiver in the ON BROADWAY CARE HOME from November 28, 2000 to December 28, 2000; and, a letter on the letterhead of the [REDACTED] Tondo, Manila, Philippines that the beneficiary worked as a probationary nurse from January 10, 2000 to November 7, 2000.

The above letters are according to regulation are they are credible independent objective evidence from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien to satisfy the requirement of three months job experience as a caregiver. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 met that burden.

**ORDER:** The appeal is sustained.