

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

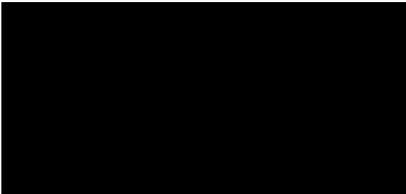


FILE: WAC-02-151-50127 Office: CALIFORNIA SERVICE CENTER Date: **MAR 18 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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 (AAO). The case will be remanded to the Director, California Service Center for entry of a decision.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 procedural history of this case is the following. The petitioner filed an ETA 750 on January 9, 2001. The Department of Labor issued a final decision certifying the ETA 750 on January 24, 2002.

On April 3, 2002 the petitioner filed an I-140 on behalf of the beneficiary. The director issued a Request for Evidence (RFE) on June 4, 2002 concerning the petitioner's ability to pay the proffered wage and concerning the beneficiary's qualifications. The deadline for the petitioner's response to the RFE was August 27, 2002, but no response was received by that date. On October 31, 2002 the director issued a decision denying the petition as abandoned.

On November 21, 2002 counsel filed a motion to reopen, stating that the response to the RFE had been sent to the director's office on August 14, 2002. Accompanying the motion was a copy of a return receipt notice showing receipt of documents by CIS on August 14, 2002. Also accompanying the motion to reopen were copies of documents which according to counsel's motion were additional copies of the documents which had been delivered to CIS on August 14, 2002.

On March 6, 2003 the director issued a decision granting the motion to reopen. On that same date the director also issued a second RFE for evidence concerning the petitioner's ability to pay the proffered wage. On March 7, 2003, according to a computer printout in the file, the file was transferred to the AAO, though the reason for this file transfer is not evident from the file.

Counsel responded to the second RFE with a letter to the director dated May 23, 2003 accompanied by additional evidence. Counsel's letter lists the enclosed documents, but states that the response does not include an Internal Revenue Service (IRS) printout of the petitioner's 2002 tax return as requested in the second RFE because that document had not yet been received from the IRS.

Counsel's submissions in response to the second RFE were transferred to the AAO on June 2, 2003, according to a computer printout which is attached to those documents, which are now in the file. However the file contains no document indicating any decision of the director following the second RFE.

The only decision in the file is the director's decision of October 31, 2002 denying the petition as abandoned. Pursuant to 8 C.F.R. § 103.2(b)(15), a decision that a petition has been abandoned may not be appealed. The AAO lacks jurisdiction over the October 31, 2002 decision. The case must therefore be remanded to the director to complete the director's decision on the motion to reopen.

ORDER: The case is remanded to the director for entry of a decision.