

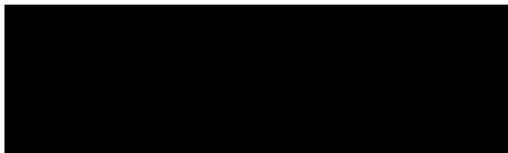
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: [Redacted]
WAC 03 166 50936

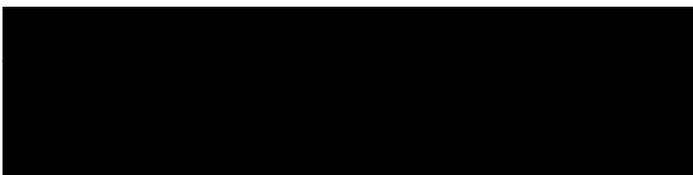
Office: CALIFORNIA SERVICE CENTER

Date: **SEP 27 2005**

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

PETITION: Immigrant 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) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner failed to provide sufficient evidence that the beneficiary had two years of requisite work experience as of the priority date of the visa petition, and denied the petition accordingly.

On appeal, counsel states that the petitioner had submitted evidence that the beneficiary had more than two years of relevant work experience. Counsel submits an affidavit from the beneficiary and other new documentation.

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

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.
- (B) *Skilled worker.* If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . The minimum requirements for this classification are at least the two years of training or experience.

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. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is March 14, 2000.

With regard to the beneficiary's work experience, Form ETA 750 indicates that the beneficiary needed two years of work experience to qualify for the position. The petitioner did not indicate any training or educational requirement beyond graduation from high school. The job description states that the applicant is required to:

Prepare[,] season[,] and cook various meals, in a private home for a family of four. Applicant will cook meals according to the recipes and to the taste of the employer. Applicant will prepare low calorie meals for a good diet and healthy meal for the employer's family. Washes, peels, trims[,] and prepares vegetables and meats prior to seasoning and cooking. Applicant will be required to cook three meals a day (breakfast, lunch, dinner). Applicant will

be responsible in purchasing food items for cooking purposes. Applicant will be required to examine and inspect foodstuffs and supplies for quantity and quality control. Applicant will be required to clean kitchen and cooking utensils.

Form ETA-750, Part B indicates that the beneficiary worked for the petitioner from March 1994 to August 1996 and performed the same duties as outlined in the job description in Form ETA 750, Part A. Form ETA 750, Part B also indicated that the beneficiary had worked for [REDACTED], as a domestic cook from January 1991 to March 1993. Her duties were listed as "planned meals, purchasing food, prepared and served the food for a family of four. Cooked organic, vegetarian diet due to [the] illness of employer who needed special foods while the rest of the family ate a broad range of foods."

Because the evidence was deemed insufficient to establish the beneficiary's qualifications, on December 18, 2003, the director requested the following documentation with regard to requisite two years of relevant work experience prior to the priority date: evidence on the previous employer's letterhead showing the name and title of the person verifying the information, and stating the beneficiary's title, duties, dates of employment/experience, and the number of hours worked per week. In addition, the director noted that the ETA 750 indicated that the beneficiary had been employed by the petitioner from March 1994 to August 1996, and by [REDACTED] from October 1991 to March 1993.¹ The director requested the beneficiary's W-2 forms from these two employers for the time periods in question.

In response, counsel submitted a letter from [REDACTED] whom the beneficiary had identified on the Form ETA 750 as a previous employer. In her letter, dated February 24, 2004, Ms. [REDACTED] stated that she employed the beneficiary from January 1991 to March 1993. Ms. [REDACTED] further explained that at the time she was receiving cancer treatments, and had a restricted vegetarian/organic diet cooked with the freshest and highest quality ingredients. Ms. [REDACTED] stated that the beneficiary had to shop for such ingredients at least once a day, as well as shop for and prepare three alternative meals a day for the rest of the family. Ms. [REDACTED] finally stated that the beneficiary's services were invaluable to her and her family, and that they felt blessed and grateful to have had the beneficiary's conscientious and caring service. Counsel also submitted Forms 1040A jointly filed by the beneficiary's husband and the beneficiary for the years 1991, 1992, 1993, and 1994. The respective adjusted gross income for both the beneficiary and her husband for these years is as follows: in 1991, \$9,010, in 1992, \$8,670, in 1993, \$9,010, and in 1994, \$8,840. The petitioner also submitted a Form W-2 for the beneficiary's husband that indicated the PMCA Corporation paid him \$9,010 in 1993.²

On March 26, 2004, the director denied the petition. In his decision, the director stated that the beneficiary's tax returns from 1991, 1992, 1993 and 1994 appeared to reflect the earnings of the beneficiary's spouse, and that none of the beneficiary's Forms W-2 were provided. The director also noted that the Forms 1040s listed the beneficiary's occupation as housewife, during the 1991 to 1994 period of time in which the beneficiary claimed to be employed by Ms. [REDACTED] and then by the petitioner as a domestic cook. The director cited *Matter of Treasure Craft of California* 14 I&N Dec. 190 (Reg. Comm. 1972) and *Matter of Ho*, 19I&N Dec. 582, 591-91 (BIA 1988), with regard to the petitioner's responsibility to provide sufficient supporting documentation and to resolve inconsistencies in the record.

¹ As noted previously, the Form ETA 750 states the beneficiary began working for [REDACTED] in January 1991, not October 1991 as stated by the director.

² This sum is the same as the adjusted gross income recorded on Form 1040A in 1993, thus, the joint 1993 tax return reflects no wages earned by the beneficiary.

On appeal, counsel states that Citizenship and Immigration Services (CIS) erred in denying the I-140 petition. Counsel states that a beneficiary with the requisite two years of experience should be approved, and that the petitioner had submitted evidence of more than two years of experience. Counsel states that the beneficiary worked as a domestic cook for Mrs. [REDACTED] from January 1991 to March 1993, as verified by Mrs. [REDACTED] and that this is a two years and two months time of employment. Counsel notes that the director stated incorrect dates of employment in his decision when he stated the work experience was October 1991 to March 1993, which is a one year and five months period of employment.

Counsel also addresses the director's statement with regard to the identification of the beneficiary's occupation on the beneficiary's jointly filed Forms 1040 for 1993 and 1994. Counsel submits a statement from the beneficiary with regard to the preparation of the 1993 and 1994 joint tax returns. The beneficiary states that her ex-husband took care of all the tax paperwork, and that at the time, the beneficiary did not speak English very well. The beneficiary states that her husband would go to a notary to prepare the tax forms, and that since the beneficiary had no work authorization, she assumes the notary simply put her down as a housewife. The beneficiary states that she was never asked if she was employed, or asked for proof of payment from her employer. According to the beneficiary, the notary also wrote down a fake social security number for her on the tax forms, since the beneficiary had no social security number at the time. The beneficiary states that she did not realize that the tax returns listed her as a housewife until recently. According to the beneficiary, since her ex-husband took care of the preparation of income tax returns, she never had the opportunity to have the forms explained to her.

The beneficiary further states that she could not provide taxes for 1995 or 1996 because she and her husband were having problems at the time and he did not file taxes with her. She also stated that in late 1996 she went to Guatemala for approximately two years and then divorced her husband in 1998. The beneficiary states that she never received W-2 forms from any employer, as she did not have work authorization, or a social security number. She states that her employers simply paid her small sums of cash on a weekly basis.

Counsel also submits the beneficiary's social security card and resubmits the two letters written by Mrs. [REDACTED] to verify the beneficiary's employment history.

On Form I-1290B, and in its appeal, counsel refers to the beneficiary never being given an opportunity to rebut a Notice of Intent to Deny the I-140 petition, or to explain the apparent confusion created by the tax forms she submitted to CIS. It is noted that it is the burden of the petitioner to resolve any inconsistencies in the record by independent objective evidence, not the burden of the beneficiary, as stated by counsel. In addition, the I-140 petition process does not require the issuance of a Notice of Intent to Deny to the petitioner, while the request for further evidence, if sent by the director to the petitioner, provides the petitioner with an opportunity to resolve any inconsistencies or omissions in the record prior to any decision being made by the director. On appeal, counsel may submit any new evidence to clarify or resolve issues addressed in the director's decision, as well as explain why such clarifying evidence was not submitted in response to the director's request for further evidence. With regard to the request for further evidence sent to the petitioner, it clearly requests proof of employment, namely, W-2 forms from either the petitioner or Mrs. [REDACTED] for the relevant periods of time. To date, the petitioner has not submitted any evidence of payment of wages from either employer. The beneficiary in her affidavit submitted on appeal, states that she was paid small sums of cash weekly.

Counsel's statements with regard to the beneficiary's claimed employment with Mrs. [REDACTED] are well founded. It is not clear why the director described the beneficiary's work experience with Mrs. [REDACTED] as being from October 1991 to March 1993, as both the ETA 750, and the two letters of employment verification

all state the beneficiary's period of employment with Mrs. [REDACTED] as January 1991 to March 1993. Furthermore, this office finds the beneficiary's statement with regard to the preparation of her joint tax returns by her ex husband to be reasonable. Nevertheless, the income tax returns submitted in response to the director's request for further evidence do not reflect any wages paid to the beneficiary during the periods of employment in question. The record also does not reflect any information as to income tax returns filed by the beneficiary, either separately or with her husband, for the years 1994 or 1996. Therefore these returns are not viewed as probative evidence of the beneficiary's previous employment.

As indicated by Form ETA 750, Part B, the beneficiary is required to have two years of work experience as a domestic cook prior to the March 2000 priority date. Although the petitioner, in response to the director's request for further evidence, submitted a much more detailed letter of employment verification from Ms. [REDACTED] the director had also requested evidence of payment of wages to the beneficiary to establish the employment of the beneficiary. While the letter from Ms. [REDACTED] describes the period of time worked by the beneficiary and her job duties, it does not list the hours per week worked by the beneficiary, or any explanation of how the beneficiary was paid, if cancelled checks, bank account statements, or Form W-2 documentation are non-existent in the record of proceedings. It is noted that the tasks performed by the beneficiary, including shopping and preparation of three meals a day, could suggest full time employment. However, without any objective supporting evidence, the petitioner has not overcome the inconsistencies created by the beneficiary's tax returns.

Counsel submitted IRS Forms 1040A for both the beneficiary and her husband from 1991 to 1994, as well as a W-2 form for the beneficiary's husband for the year 1993. However, the tax forms submitted for the time period in which the beneficiary claims to have worked for Ms. [REDACTED] namely, tax returns for 1991 to 1993, appear to document the beneficiary's husband's wages, and not those of the beneficiary. Thus, the submitted tax documentation is not sufficient to establish that Ms. [REDACTED] paid the beneficiary in a full time occupation from 1991 to 1993. Thus, the claim of full time employment is inconsistent with the beneficiary's income tax returns. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."

While the ETA Form 750, Part B, also indicates that the petitioner has employed the beneficiary from March 1994 to August 1996, the petitioner submitted no documentation as to the number of hours worked per week, any wages paid to the beneficiary during this period of time, or any explanation of how the beneficiary was paid, if Form W-2 documentation is non-existent. More substantive documentation on all these issues would be necessary to resolve the issue of whether the beneficiary worked two years of full-time employment as a domestic cook prior to the priority date. Accordingly, the petitioner has not established that the beneficiary has the two years of requisite work experience, and, thus, is qualified to perform the duties of the position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As previously stated, while the petitioner has submitted sufficient documentation to establish that the beneficiary has the requisite two years of relevant work experience, the petitioner has not established that the beneficiary received financial remuneration for such employment. Therefore the director's decision will stand. The appeal will be dismissed. The petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.