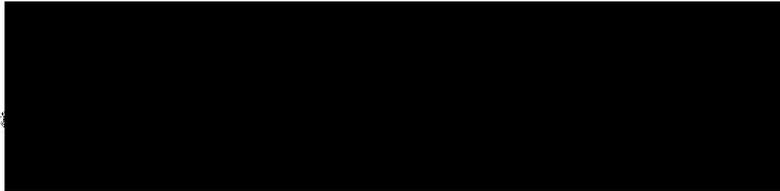


identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



B6

FILE:



Office: CALIFORNIA SERVICE CENTER

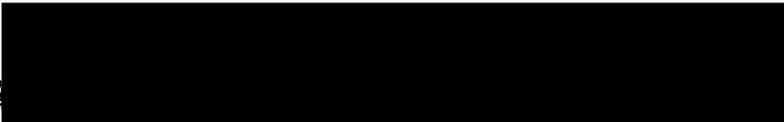
Date: AUG 21 2006

WAC 04 260 55013

IN RE:

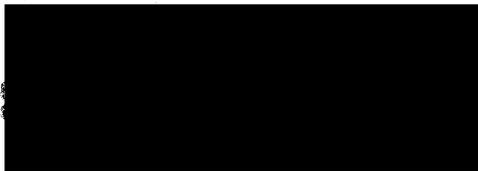
Petitioner:

Beneficiary:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a restaurant specializing in Chinese, Vietnamese and Japanese cuisine. 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 accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 unavailable in the United States.

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.

(B) *Skilled workers.* If the petition 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this matter hinges on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on March 26, 2001. The labor certification states that the position requires two years experience.

On September 22, 2004, counsel submitted the petition with the following:

- Former counsel's G-28;
- A certified ETA 750;<sup>1</sup>
- A Form G-325A (with Form I-485, filed concurrently);<sup>2</sup>

<sup>1</sup> The ETA 750 states that the beneficiary worked as a cook for [REDACTED] in Cupertino, California, from March 1998 to the "present" (March 8, 2001).

<sup>2</sup> The G-325A, signed September 20, 2004, states that the beneficiary worked at [REDACTED] from [REDACTED]

- Copies of the petitioner's Form 1065 for the years 2001–2003;
- Copies of the petitioner's Form DE 6 for the fourth quarter 2003 to the second quarter 2004; and,

On November 1, 2004, the director issued a Request for Evidence (RFE) seeking evidence pertinent to the beneficiary's job experience. Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, and title of the trainer or employer, the dates of employment/experience and number of hours worked per week, and a description of the training received or the experience of the alien.

In response, on January 10, 2005, counsel submitted:

- The beneficiary's December 23, 2004 statement of how he lost his job at the [REDACTED] when the "restaurant closed down by the end of 2002," after which he started to work for the petitioner.<sup>3</sup>
- Counsel's statement that the [REDACTED] in Cupertino, California, was no longer in business and thus unavailable to provide a job experience letter as the beneficiary's former employer; and,
- A translated letter signed March 1, 2001, from the beneficiary's former employer in China saying the beneficiary had worked there from October 3, 1993, to July 3, 1997.<sup>4</sup>

On February 7, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary had the requisite two years of salient work experience.

On appeal, counsel submitted:

- Counsel's G-28;
- A certified translated letter dated March 9, 2005, from an owner of another restaurant who used to cook at the [REDACTED] stating that the beneficiary had worked at the [REDACTED] Restaurant from June 21, 1998, to July 1, 2000; and
- The beneficiary's March 2, 2005 statement asserting that he worked for the [REDACTED] on a cash basis from June 21, 1998, to July 1, 2000.<sup>5</sup>

Counsel, adopting the beneficiary's March 2, 2005 statement as giving the correct dates when the beneficiary was a cook at the San Wang Restaurant, nonetheless asserts the beneficiary has no pay stubs or W-2 (Wage and Tax Statements) to document his employment history, noting that the San Wang's owner has since died. Counsel cites *Matter of Lendy Muller*, 00 INA 125 (BALCA 2000), *Matter of Allen Severinson*, 98 INA 99 (BALCA 2002), and *Matter of B&B Residential Facility*, 01 INA 146 (BALCA 2002) as providing "guidance" on the proper handling of aliens paid in cash wages. We note that the AAO is not bound by decisions of the Board of Alien Labor Certification Appeals. Nevertheless, these decisions generally state that unauthorized employment can count toward the requirements specified in the ETA 750 if the employment is shown to have occurred with

---

June 1998 to January 2000.

<sup>3</sup> "I help them [the petitioner] occasionally, but I did not ask for any pay. That way, I can improve my cooking skill and show my gratitude to them [for letting me work there]."

<sup>4</sup> We note that the ETA 750 does not list this employer as one for whom the beneficiary worked.

<sup>5</sup> The beneficiary asserts his former counsel put incorrect information in the ETA 750, which the beneficiary signed and but did not read because in English, which he states he could not read.

competent evidence. Counsel points to the affidavits of the former [REDACTED] workers who vouch for the beneficiary's account of his own work history. We do not find the affidavits resolve the discrepancies in the dates that the beneficiary has disavowed as errors on the part of his former counsel.<sup>6</sup> We note that the beneficiary, himself, has provided conflicting information in his own statements, aside from those appearing in the Forms G-325A and ETA 750. Therefore, we concur with the director. Moreover, we are not persuaded either that the beneficiary would have signed the Form G-325A and ETA 750 as true and correct without knowing the contents thereof, laying the blame on his former counsel for introducing errors in the information given by the beneficiary. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b) *see also Anetekhat v. INS*, 876 F.2d 1218, 1220 (5<sup>th</sup> cir. 1989), *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C.1988), *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001). Furthermore, *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.

Finally, we note that the petitioner submitted the translated letter, dated March 1, 2001, from the beneficiary's former employer in China, only in response to the RFE instead of with the petition. The ETA 750 makes no mention of such employment. Without competent, objective evidence confirming this prior employment, we cannot accord it sufficient weight to find that the beneficiary meets the job experience requirements of the ETA 750.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not 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 not met that burden.

**ORDER:** The appeal is dismissed.

---

<sup>6</sup> Any appeal or motion based upon a claim of ineffective assistance of counsel requires that (1) the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the appeal reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.