U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 0 3 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive business. It seeks to employ the beneficiary permanently in the United States as a foreign automotive specialist supervisor. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is February 19, 2001. The beneficiary's salary as stated on the labor certification is $27.20 per hour or $56,576 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's two (2) years of experience in the job offered, as set forth on Form ETA 750. Also, the petitioner omitted responses to all but one item of Part 5 of the Immigrant Petition for Alien Worker (Form I-140). In a request for evidence (RFE) dated March 26, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present and exacted the petitioner's 2001 federal income tax return. The RFE specified the necessity to complete the I-140 and the format of the letter to document two (2) years of experience.

In response to the RFE, counsel provided the 2000 Form 1120S, U.S. Income Tax Return for an S Corporation, and advised that the petitioner might file its 2001 Form 1120S as late as December 2002. Schedule L reflected current assets of $99,588 minus current liabilities of $1,005, with a remainder for net current assets of $98,533, equal to, or greater than, the proffered wage.[1]

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[1] Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. *See Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

The petitioner presented a letter, dated April 25, 2002, of , the owner of Koky Automotive Works of Montreal, Quebec, Canada concerning the beneficiary's work experience (Koky experience letter). It reflected that the beneficiary worked there from June 1995 through December 2000, full-time, at $4,800 gross per month, as a foreign automotive specialist supervisor.

The director weighed contradictions in the petitioner's evidence. When previously requested by CIS, the beneficiary had never listed the employment that the Koky experience letter related. Instead, the beneficiary acknowledged employment with three (3) other concerns in Montreal. Two (2) of them occurred concurrently with the Koky experience, i.e., with Master Ship Chandlers from May 1994 to April 1997 (MSC) and with Genova Foods, from May 1, 1997 until at least December 11, 1998 (Genova). A third position with Caribbean Auto Services, Inc. (CAS), from July 1987 through at least July 1992, related to representation of CAS for the purchase and import of automobiles to Canada. None of these three (3) other positions involved duties as an automotive repair specialist or as a first line supervisor or manager, the ones detailed for the beneficiary in Form ETA 750.

The director noted inconsistencies and misrepresentations, doubted the veracity of the Koky experience letter, consequently, and denied the petition.

On appeal, counsel submits a brief and three (3) letters. Another one from Koky adds only that the beneficiary worked the afternoon shift from 1 to 9 P.M. (Koky-2). MSC now stated that the beneficiary worked part-time for 12 hours, at various times, four (4) days weekly (MSC appeal letter). Genova stated that the beneficiary worked part-time "an average of 10 to 12 hours a week" (Genova appeal letter).

Counsel's brief on appeal stipulates that the positions with MSC, Genova, and CAS did not constitute experience in the job offered, as described in Form ETA 750. Counsel, further, contends that the jobs with MSC and Genova were "side jobs" and, thus, prove that the Koky Automotive Imports, Inc experience is *bona fide*. Counsel offers no evidence, such as the salary paid to the beneficiary, either in the "side jobs" or the asserted Koky employment, to verify any characterization of any of them. Counsel simply concludes that the four (4) letters are consistent with each other and with the record.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The case does not turn on any number of employment letters avowedly consistent with each other. Records of CIS reflect that the beneficiary made an Application for Travel Document (I-131) to CIS on December 11, 1998. The beneficiary used a letter from Genova, dated December 3, 1998 (Genova I-131 letter), stating that the beneficiary was without peer in its project to establish Genova in the State of Ohio in the United States. The Genova I-131 letter describes the beneficiary's undertaking in grandiose terms, inconsistent with the short work schedule, hours, and the infrequency of the "side job" stated in the Genova appeal letter. Further, the beneficiary executed a Biographic Information form (G-325A) on December 2, 1998 in support of an Application for Advance Permission to Enter as a Non-Immigrant (I-192). The G-325A exacts a list of employers, the duration of employment, and the occupation for the last five (5) years. The beneficiary listed Genova and MSC, but not Koky, the petitioner, said to have employed him since June 1995. The G-325A even prompts, "*Show below last occupation abroad if not shown above. (Include all information requested above*). Nothing follows.[2] On the G-

[2] No credible explanation accounts for the omission of the Koky employment. The petitioner now describes as "side jobs" those that the beneficiary once listed to the exclusion of Koky.

325A, the beneficiary concedes that he is an import/export or a purchasing agent, but he avers no employment as a foreign automotive specialist supervisor in the I-131 and I-192 proceedings.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

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 Anetekhai v. I.N.S.,* 876 F.2d 1218, 1220 (5th 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).

The Form ETA 750, Part A, block 14, indicated that the position of foreign automotive specialist supervisor required two (2) years of experience in the job offered. The petitioner has failed to qualify the beneficiary under Form ETA 750 because the evidence does not credibly establish either that beneficiary worked for Koky or in the capacity of a foreign automotive specialist supervisor.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner did not establish that the beneficiary met all of the requirements stated by the petitioner in Part A, block 14 of the labor certification as of the day it was filed with the Department of Labor. Consequently, the petitioner has not overcome the basis of the director's decision, and the petition is denied.

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.