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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 09 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.

Michael Valde
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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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. [1] The priority date 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 April 24, 2001. The beneficiary's salary as stated on the labor certification is $17.80 per hour or $37,024 per year.

The director doubted the evidence of four (4) years of the beneficiary's experience in the proffered job that the petitioner had specified in Form ETA 750, Part A, block 14. In a request for evidence (RFE), dated April 25, 2003, the director requested additional verification of the job experience, such as the Wage and Tax Statement (Form W-2) of Nilesh Patel (the beneficiary).

In response to the RFE and pertinent to the prior experience of the beneficiary, counsel stated that petitioner paid the beneficiary, since December 2000, in cash and, thus, could produce no W-2. [2] Counsel, further, contended that a W-2 would not verify the beneficiary's position or job experience. Instead, counsel urged his belief that no doubt touched on the credibility of the letter for qualifying employment. *See* undated letter of Raju J. Patel, President of Whiskey City Package Shop of Wrightsville, Georgia (Georgia President's letter). It replicated the Form ETA 750 for the beneficiary's duties and stated that the beneficiary was the store manager from November

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[1] The director and the petitioner dealt with the issue of the petitioner's ability to pay the proffered wage. The AAO discusses, at the end of this decision, the few determinative facts bearing on the ability to pay. The AAO concludes that the petitioner established the ability to pay the proffered wage.

[2] The record contains only this assertion of counsel limited to the petitioner. The petitioner offered neither Forms W-2, nor documentation of any payment of cash to the beneficiary, of personnel records, or of any additional verification of experience in response to the RFE.

1996 through November 2000. The petitioner and counsel relied on the Georgia President's letter and offered no more documentation of the beneficiary's experience in the job offered. [3]

The director contacted the writer of the letter to verify this employment. A memorandum of August 5, 2003 (telephone memorandum) records that, in a telephone call of August 5, 2003, the officer, acting for the director, twice asked o verify if [name spelled out] ever worked for him, but twice said "No." The director noted that no documentation supported the assertion of the payment of cash to the beneficiary from 1996 to 2000 and concluded that the petitioner had not responded to the RFE with evidence to verify beneficiary's employment. *See* 8 C.F.R. § 103.2(14). Consequently, the director denied the petition in a decision issued August 14, 2003.

On appeal, counsel submits a brief and an affidavit of dated March 1, 2004, as the owner of the Whiskey City Package Shop (Georgia owner's affidavit). The affiant asserts that he employed the beneficiary from October 1996 to February 1999, when presumably the bought the business. The affiant, further, claims that the beneficiary worked for the after the sale, through November 2000, and for the petitioner from December 2000 to August 2003, as a manager. owner's affidavit recites, with blanks to fill in, the 's letter. [4]

Counsel asserts that the director failed to put the petitioner on notice that the credibility of the Georgia President's letter was being questioned, before entering the decision. On the contrary, the RFE stated that the director sought additional verification of the job experience. Counsel's very response to the RFE acknowledged the question of credibility in attempting to deny that one existed. Counsel, notwithstanding, withheld any credible verification of the employment, and the director based the denial of the petition on the withholding of requested evidence. *See* 8 C.F.R. § 103.2(14). The AAO concurs in the denial.

Employment is defined as permanent, full time work. 20 C.F.R. § 656.3, *Employment*. Evidence must relate to qualifying experience. *See* 8 C.F.R. § 204.5(g)(1). The record, including federal tax returns, the Georgia President's letter, and the Georgia owner's affidavit, establishes no component of full-time experience or of wages paid.

The Georgia President's letter simply avers the experience of the beneficiary from November 1996 through November 2000, but he did not own the business until February 1999, according to the Georgia owner's affidavit on appeal. The letter makes no representation of the payment of the beneficiary in cash, of the existence, or not, of any Form W-2, of hours, days, or frequency of work, or of wages paid.

Provisions of 20 C.F.R. § 656.21(a)(3)(iii) specify the proof for the experience set forth in the Form ETA-750, viz.:

> (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of

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[3] The petitioner submitted the Georgia President's letter with the petition, and it appears to be the cogent reason for the demand, in the RFE, for additional verification of job experience.

[4] The affiant, speaking in 2004, does not state the basis of his knowledge of periods of employment, either during or after his ownership, though this information might have materially assisted the additional verification of the beneficiary's experience.

> duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. . . .

The Georgia owner's affidavit claims knowledge of the beneficiary's employment until August 2003, but he did not own the business and does not allege the basis of his knowledge of it, except for 29 months from November 1996 to February 1999. The Georgia owner's affidavit, also, makes no representation of the payment of the beneficiary in cash, of the existence, or not, of any Form W-2, of hours, days, or frequency of work, or of wages paid. The letter and the Georgia owner's affidavit fail to establish the beneficiary's experience in the job offered in line with 20 C.F.R. § 656.21(a)(3)(iii)(A).

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 Citizenship and Immigration Services (CIS), formerly the Service or the INS, 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); *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).

In respect to these doubts, the telephone memorandum reflects an attempt to resolve them. The Georgia President twice answered "No" to the CIS's question to verify the beneficiary's employment. Counsel does not deny the contact, but discounts the "No" answers since the Georgia President may have panicked upon receiving an unexpected telephone call from a government official, feared trouble for hiring aliens without work authorization, and, thus, denied the employment of the beneficiary.

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

In any event, the petitioner's evidence in response to the RFE already failed to establish cash payments, as claimed, knowledge of the businesses and personnel records, Forms W-2, hours, days, or frequency of work, and wages paid.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel stipulates that the August 5, 2003 memorandum must be weighed against the President's letter and the owner's affidavit. The August 5, 2003 memorandum was made in the course of business. The letter and affidavit, on the other hand, each claim knowledge of periods for which the writers do not establish their access to appropriate records or other basis of their knowledge. The evidence does not comply with the regulations for proof of prior experience as full-time employment in permanent positions.

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.

The RFE put the petitioner on notice of insufficient evidence as to the need for verification of experience in addition to the Georgia President's letter. Further, the RFE provided the opportunity to respond to the deficiency with evidence of periods of experience in the job offered, as stated in the Form ETA 750. *See* 8 C.F.R. § 204.5(g)(2). The RFE serves the purpose to elicit further information that clarifies whether the petitioner has established eligibility for the benefit at the priority date. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. §§ 103.2(b)(14).

Since the director put the petitioner on notice of the deficiency and gave the opportunity to satisfy it, the AAO will not accept evidence offered for the first time on appeal. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner desired the consideration of the documents, it should have submitted them in response to the RFE. *Id.* The Georgia owner's affidavit appears to lack the same regulatory elements as the virtually identical Georgia President's letter, though the AAO need not weigh the sufficiency of the Georgia owner's affidavit, first presented on appeal.

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 Form ETA 750 indicated that the position of night manager required four (4) years of experience in the job offered, as set forth in the Form ETA 750, Part A, block 14. The evidence was not competent or persuasive to establish the qualifications that the petitioner stated in the Form ETA 750. Therefore, the petitioner has not overcome this portion of the director's decision.

Since the petitioner did not establish the qualifications of the beneficiary, the issue of the petitioner's ability to pay the proffered wage at the priority date is moot. Although not determinative for this decision, the petitioner's 2001 and 2002 Income Tax Returns for an S Corporation (Forms 1120S), if true, overcame the director's decision in regard to the ability to pay the proffered wage. [5] Balance sheets (Schedules L of these federal tax returns) each reported net current assets that were equal to, or greater than, the proffered wage, thus: [6]

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[5] The petitioner did not sign or date exemplars of federal tax returns found in the record.

[6] Net current assets are the difference of current assets minus current liabilities. 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 given period.

	2001	2002
Current assets	$115,884	$117,451
Current liabilities	$ 14,189	$ 11,427
Net current assets	$101,695	$106,104

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.