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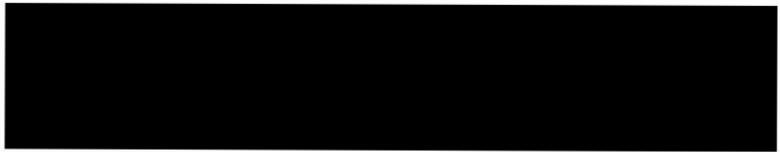
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WAC-04-015-52801

Office: CALIFORNIA SERVICE CENTER Date: DEC 26 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is in the business of general construction, and installs marble and granite. The petitioner seeks to employ the beneficiary permanently in the United States as a stone cutter and carver (“Stone Cutter”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s denial, the case was denied based on the petitioner’s failure to document that the beneficiary met the qualifications of the certified ETA 750.

The AAO takes a *de novo* look at issues raised in the revocation of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$12.00 per hour, for an annual salary of \$24,960 based on a 40-hour work week. The Form ETA 750 was certified on September 16, 2003, and the petitioner filed the I-140 on the beneficiary’s behalf on October 22, 2003. Counsel listed the following information on the I-140 Petition related the petitioning entity: date established: January 20, 1994; gross annual income: \$765,813; net annual income: \$119,440; and current number of employees: six.

The director issued a Request for Evidence (“RFE”) on September 27, 2004, requesting that the petitioner provide: evidence of the petitioner’s ability to pay the proffered wage, including its 2001 and 2003 tax returns, and the petitioner’s quarterly state tax filings for the last four quarters; clarification as to whether the petitioner currently employed the beneficiary; information related to the petitioner’s business, including licenses, and leases; proof of the beneficiary’s work experience, including addresses and phone numbers; pay stubs and contracts to verify that the beneficiary worked for Aqustice & Hageves D.M. in Israel; and clarification as to how the beneficiary was supporting himself.

In response to the RFE, the petitioner provided: its 2001 and 2003 tax returns; the petitioner’s quarterly wage reports for the last four quarters; its city business license; pay stubs to exhibit the beneficiary’s employment since July 2004; a second letter from Aqustice & Hageves D.M, and a statement from the beneficiary regarding his means of support.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

As the petitioner did not provide separate confirmatory evidence of the beneficiary's employment with Aqustice & Hageves D.M, Citizenship & Immigration Services ("CIS") requested that the U.S. Embassy, Consular Section, Tel Aviv, Israel, conduct an overseas investigation related to the beneficiary's foreign work experience. Based on conflicting information obtained as a result of the Consular investigation, on May 23, 2005, the director issued a Notice of Intent to Deny ("NOID"), which questioned the validity of the beneficiary's experience letter.

Specifically, the NOID noted that the overseas investigator phoned the number on the Aqustice & Hageves D.M experience letter provided, and reached the owner's mother. The mother provided that the author of the Aqustice & Hageves D.M letter was the beneficiary's brother, and indicated that the beneficiary had been in the U.S. for the past seventeen years. The beneficiary's length of time in the U.S. would be inconsistent with the experience letter provided, which lists that the beneficiary was employed in Israel from 1988 to 2002.

In response to the NOID, the petitioner contended that Aqustice & Hageves D.M. was and remains a legitimate business that the beneficiary's brother owns. Further, the business generally contracts for the installment of doors, but when the beneficiary was employed, the business was focused on stone cutting. Counsel additionally provided that the owner's mother, who answered the phone when the investigator contacted the business, had previously suffered from a head injury as a result of a car accident, which resulted in her confused statement. Counsel provided an additional statement from Yehuda Granite regarding the author's knowledge of the beneficiary's work experience in Israel, and provided copies of pictures and photographs on a CD, which he stated represented work that the beneficiary completed.

On July 12, 2005, the director denied the petition on the basis that the information obtained during the overseas investigation conflicted with the information provided in the letter to confirm the beneficiary's experience. As a result, the petitioner failed to demonstrate that the beneficiary met the qualifications as set forth in the certified ETA 750.

The petitioner appealed and the matter is now before the AAO. On appeal, counsel raises the same points raised in response to the NOID: that Aqustice and Hageves D.M. Ltd. employed the beneficiary abroad; that Aqustice and Hageves is still in business, but completes door installation rather than stone carving; that the beneficiary and the owner of Aqustice and Hageves are brothers; that the woman who answered the phone in connection with the overseas investigation had suffered a head injury and the information she conveyed was incorrect based on her head injury. Counsel resubmitted the pictures and CD, which he contended represented samples of the beneficiary's work while employed abroad. Counsel resubmitted a medical report and doctor's report indicating that the beneficiary's mother was in a car accident in October 2002, in which she suffered broken bones, injured her head, and complained of serious memory problems as a result.

First, we will examine the evidence submitted to document the beneficiary's qualifications, and then address counsel's additional arguments. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). 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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katighak*, 14 I. & N. Dec. 45, 49 (Reg.

Comm. 1971). The priority date is the date the Form ETA 750 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 petitioner must also demonstrate 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 beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years of experience in the job offered, as a stone cutter with job duties partially including: "carve designs in full and bas-relief on stone using knowledge of stone carving techniques to produce carving consistent with designer's plans (according to models, sketches, blueprints)." The petitioner listed education requirements of high school in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, the beneficiary listed his prior experience as: Aqustice & Hageves D.M. Ltd., Naharia, Israel, stone carver, from January 1988 to present (date of signature, March 27, 2001).

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(I)(3):

(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 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.

As evidence to document the beneficiary's qualifications, the petitioner initially submitted the following letter:

1. Letter from [REDACTED], Owner, Aqustice & Hageves D.M. Ltd., Hahaluz 220/5, Naharia, Israel, dated September 26, 2003
Dates of employment: January 1988 to February 2002;
Title: Stone Carver;
Job Duties: "responsible for all duties related to the carve of designs in full and bas-relief on stone using knowledge of stone carving techniques to produce carvings. Also, his duties includes [sic] the shape and trim of roughed out designs with tools to finish carving, etc. Work on all kinds of stone including marble, granite, and ony, [sic] etc."

Following an RFE request, the petitioner obtained and submitted a second letter:

2. Letter from [REDACTED] Owner, Aqustice & Hageves D.M. Ltd., Hahaluz 220/5, Naharia, Israel, dated November 3, 2004
Dates of employment: January 1988 to February 2002;
“We, the undersigned, hereby certify that [the beneficiary] was employed by this company, on full-time basis, in the position of a “Stone Carver,” and has been on the payroll of the company from January 1988 till February 2002.”

In response to the NOID, the petitioner submitted a third letter:

3. Letter from [REDACTED], Yehuda Marble, dated May 5, 2005. The letter provided:

“I . . . work, manage, and own a factory that makes marble for kitchens, bathrooms, and tombstones. I have owned it for the last 30 years. I know and have worked with [the beneficiary] beginning in the year 1988 and until 2002. [The beneficiary] is knowledgeable and professional in the field of marble. He has a lot of experience in cutting, processing, and installing marble.”

The overseas investigation discredited all three letters as the beneficiary’s mother indicated that the beneficiary had been in the United States for the last seventeen years. Therefore, the director found that the beneficiary could not have been employed by Aqustice & Hageves D.M. Ltd., during the time frame specified in the letter to document the beneficiary’s experience.

On appeal, counsel contends that the information provided by the beneficiary’s mother in response to the investigator was not credible as she suffered from a head injury in October 2002 and suffered memory problems as a result. Further, counsel provides that “there are no inconsistency [sic] in any of the information submitted with regard to the viability of the company in Israel and past experience of beneficiary. The prior employer is a legitimate business and is present operating in business.”

The petitioner has not provided any definitive evidence to confirm the beneficiary’s employment for Aqustice & Hageves D.M. Ltd in Israel during the specified time period of 1988 to 2002. The petitioner provided photos of work that the beneficiary reportedly completed. The photos display construction work completed utilizing marble and other features in kitchens and hallways. However, no information was provided to demonstrate where these projects were completed, or to definitively show that the work was the beneficiary’s work. The additional letter that [REDACTED] provided does not negate or explain away the conflict in the statement from the beneficiary’s mother that the beneficiary had been in the United States for the past seventeen years. The petitioner did not submit any evidence to concretely establish through any official records, affidavits, or other means that the beneficiary was not in the U.S., but rather in Israel during the time period in question.

Further, we note that the beneficiary’s passport identification page submitted with his I-485 Adjustment of Status filing lists that the issuing authority for the passport was “Los Angeles,” date of issue June 25, 1993. This would indicate that the beneficiary was in the United States at or around the time his prior passport was expiring and had the passport reissued by the Israeli Consulate in the U.S. in Los Angeles, California. This would lend further credibility to the beneficiary’s mother’s statement that the beneficiary was in the U.S. before 2002. Another conflicting piece of evidence is the information contained on Form ETA 750B, signed by the beneficiary in March 2001, which under “3. Type of Visa (if in the U.S.)” lists “Visitor” and provides the alien’s present U.S. address as [REDACTED]. The ETA 750 could have been filed on the beneficiary’s behalf even if he were outside the country in Israel. Based on the information contained

on the completed form, the beneficiary was present and residing in the U.S. in 2001, again during part of the time period referenced in the Aqustice & Hageves D.M. Ltd letter.

The conflict in evidence raises significant doubts regarding the accuracy of the letters, which confirm the beneficiary's experience. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), which states: "Doubt raised 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." Further, "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." *Matter of Ho*, 19 I&N Dec. at 591-592.

The petitioner has provided no further evidence on appeal. Based on the evidence submitted in the record of proceeding, the petitioner has failed to overcome the reasons for denial and demonstrate that the beneficiary meets the qualifications as set forth in the certified ETA 750.

Further, although not raised in the director's denial, we find that the petitioner also failed to establish its ability to pay the beneficiary the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d).

If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 27, 2001, the beneficiary did not list that he has been employed with the petitioner. The petitioner did indicate that it hired the beneficiary in July 2004, and submitted state quarterly wage reports to demonstrate wages paid. The quarterly reports demonstrate that the petitioner paid the following wages: \$4,800 for the quarter ended September 30, 2004 (paid to the beneficiary); wages paid to one other employee for the quarter ended June 30, 2004; no wages paid to any employee for the quarter ended March 31, 2004; and only wages paid to the owner in the quarter for December 31, 2003. Based on the foregoing, the petitioner cannot demonstrate its ability to pay the proffered wage based on prior wage payment alone.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner lists income from other sources so that the petitioner's net income reflected on Schedule K is as follows:

<u>Tax year</u>	<u>Net income or (loss)</u>
2003	-\$21,005
2002	\$120,421
2001	-\$86,670

The petitioner's net income would allow for payment of the beneficiary's proffered wage only in 2002, but not in any other year.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<u>Tax year</u>	<u>Net current assets</u>
2003	\$14,347
2002	\$92,592
2001	\$62,409

Following this analysis, the petitioner's federal tax returns show that the petitioner could pay the proffered wage 2001, and 2002, but not in 2003.

Further, we note that the petitioner's tax returns show the following gross receipts:

<u>Tax year</u>	<u>Gross Receipts</u>
2003	\$16,368
2002	\$765,813
2001	\$80,988

The petitioner's tax returns display significant disparity in gross receipts between the tax returns for the three years submitted. In 2003, the petitioner's business barely generated any revenue.

The petitioner can establish its ability to pay the proffered wage in 2001, and 2002, but not in 2003. We cannot conclude that based on the information submitted that the petitioner has the continuing ability to pay the beneficiary the proffered wage.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.