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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 11 2006

WAC 02 234 50025

IN RE: Petitioner:
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:

SELF-REPRESENTED

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DISCUSSION: The preference visa petition approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.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

The petitioner is a distributor and installer of marble, granite and ceramic. It seeks to employ the beneficiary[1] permanently in the United States as a marble setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not submitted evidence in rebuttal to the director's notices of intent to revoke, and, therefore has not overcome the grounds for revocation of the approval of the petition. The director found that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director revoked the petition approval accordingly.

On appeal, the petitioner submits 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 not available in the United States.

The regulation at 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 regulation at 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.

The petitioner must 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).

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[1] The beneficiary is a substituted beneficiary.

Here, the Form ETA 750 was accepted on September 29, 2000.[2] The proffered wage as stated on the Form ETA 750 is $26.89 per hour ($55,931.20 per year). The Form ETA 750 states that the position requires three years experience.

Consistent with the regulations at 8 C.F.R. § 204.5(g)(2), and, 8 CFR § 204.5(l)(3)(ii), the director issued a request for evidence on December 26, 2001. The petitioner responded to the request for evidence on March 11, 2002, and submitted a Form ETA 750 Part B indicating that that the petitioner desired to substitute an alien for the original beneficiary. The director issued a second request for evidence consistent with the regulation at 8 CFR § 204.5(l)(3)(ii) on May 3, 2002. In the request the director requested a withdrawal of the original petition, the filing of another Form I-140 petition with filing fee. The petitioner responded to the request for evidence on July 3, 2002. The director issued a third request for evidence on November 8, 2002. The petitioner responded to the request on December 9, 2002. The director issued a decision on April 7, 2003 denying the petition according to the regulation at 8 C.F.R. § 204.5(g)(2) (inability of the petitioner employer to pay the proffered wage). The petitioner appealed the director's decision. Upon review, the director approved the petition on May 16, 2003. The director issued a notice of intent to revoke on October 7, 2004. The petitioner responded to the notice on November 4, 2004. The purpose of the Notice of the Intent to Revoke is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *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. 8 C.F.R. § 103.2(b)(14). The director issued a notice of revocation on January 25, 2005.

The petitioner appealed the revocation on February 9, 2005. The petitioner contends that an inconsistency in the dates of employment as initially submitted (an employer stated the beneficiary was employed by [redacted] Israel as a full time marble setter from November 1998 to December 2001, January 1994 to March 1997) was harmless error and not indicative of fraud. This assertion is not the petitioner's prerogative to make in this matter. The facts and evidence are in the record to review.

The petitioner further asserts that there is no inconsistency in the beneficiary's statement that an Israeli employer, [redacted] employed him when he was residing in the United States. The petitioner ventures to explain this stating "... [the beneficiary] ... continued to physically engage in employment with [redacted] during the times he would be in Israel." would be in Israel."[3] According to the beneficiary's CIS Form I-94 in the record of proceeding, the beneficiary entered the United States on December 11, 1999 with duration of stay to June 10, 2000. There is no evidence submitted that the beneficiary ever left the United States after December 11, 1999. It is unclear why the petitioner believes there is inconsistency with the [redacted] employment when there does

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[2] It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

[3] According to the CIS Form G-325A prepared by the beneficiary signed on May 26, 2003, found in the record of proceeding, the beneficiary stated the following employment experience: the beneficiary was self-employed and the owner of an enterprise indicating a business name '[redacted] from June 2000 to present (i.e. May 26, 2003); from November 1999 through June 2000, the beneficiary stated he was self-employed as a business partner in [redacted] and, from May 1998 through 1999 employed in the occupation designated as "Cassette Duplication" by [redacted] Israel.

not appear to be any, at least physically, other then the below mentioned employment dates and occupations inconsistencies. Again, (taking the petitioner's statement on its face) the petitioner is stating that this was harmless error and not indicative of fraud.

The petitioner states that although the beneficiary is a trained executive/computer consultant both in the United States after his arrival, and before in Israel during the dates he stated he was a marble setter, that this was not indicative of fraud and the adjudicator should disregard these established facts in his review. The facts and evidence are in the record to review, and, the beneficiary's work history is part and parcel of the evidence to be reviewed in the determination of the beneficiary's qualifications under 8 CFR § 204.5(l)(3)(ii).

The petitioner questions the CIS interviewer's determination that the beneficiary was not a marble setter by his responses at the I-485 adjustment interview. The AAO will review the evidence in the record of proceeding without respect to the I-485 interview.

The petitioner submitted additional evidence as noted below including a rebuttal to an adverse CIS investigation report discussed more fully below.

As already noted above, the director issued a notice of revocation of the petition approval on January 25, 2005. The petitioner appealed the revocation on February 9, 2005. The petitioner submitted copies of the following additional evidence on appeal: an explanatory statement; the notice of revocation dated January 25, 2005; a copy of the original labor certification before the substitution of the present beneficiary; a cover letter dated January 31, 2002 indicating that the beneficiary is the beneficiary of a family based immigrant petition by his mother, [redacted], a legal permanent resident with a translated copy of the beneficiary's birth certificate; a request for evidence dated December 26, 2001; a copy letter dated March 11, 2002; a request for evidence sent by fax on May 3, 2002; a cover letter dated July 3, 2002; a request for evidence dated November 8, 2003; a cover letter dated December 9, 2002; a notice of decision dated April 7, 2003; a notice of appeal receipt document dated May 8, 2003; an approval notice dated May 16, 2003 for immigrant petition; an intent to revoke processing dated October 7, 2004; a response to the CIS notice of action dated October 7, 2004; a notice of intent to revoke dated November 18, 2004; a response to notice of action dated November 18, 2004 and a request for a time extension; a letter from the petitioner dated September 17, 2004; three photocopies of 8 pay statements from the petitioner to the beneficiary; three translated undated letters from [redacted] of Jerusalem, Israel, [redacted], of Jerusalem, Israel, and [redacted] of Ramat-Gan, Israel dated with photocopied photos that the beneficiary did marble or title work for them in May, 1995, "at the end of 1995," and, during November and December 1996 in Israel; and, 39 cancelled checks and invoices on Galilee [redacted] stationary.[4]

In the present case, there have been three requests for evidence and two notices of intent to revoke the processing of the petition, all of the above concerned in whole or in part with the beneficiary's qualifications. As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency by the Service Center, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have

[4] The director points out that the telephone number noted on the computer generated letterhead for the letter of experience dated from [redacted] Rosh Pinna, Israel is 1 (416) 791-9798, a Canadian number. The telephone number evident on the invoices is 972-4-6931333. This discrepancy was not explained in the record. We note the company name on the invoices mentioned above is [redacted] not [redacted]

submitted it in response to the director's requests for evidence. *Id.* Under the circumstances, the AAO need not, consider the sufficiency of the evidence submitted on appeal. Further as stated in the pertinent regulation, 8 CFR § 204.5(l)(3)(ii), "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."

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, item 14, set forth the minimum education, training, and experience that an applicant must have for the position of a marble setter.

In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank
	Training	Blank
	Experience	
	Years/Months	3
	Training	
	Years	Blank

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of marble setter.

15. WORK EXPERIENCE[5]

[5] There is another work experience letter found in the record of proceeding that is not found in the labor certification but recounts the beneficiary's work experience as a marble setter. [redacted] of Ofakim [redacted], Petach-Tikva, Israel stated in a letter dated that the beneficiary worked as a marble setter from November 1992 to December 1993. There was no substantiation such as pay statements or wage statements to support this letter and it is not mentioned in the labor certification.

a. NAME AND ADDRESS OF EMPLOYER
SELF-EMPLOYED
NAME OF JOB
INDEPENDENT CONTRACTOR
DATE STARTED
Month – 12 [December] Year - 2001
DATE LEFT
Month – Present (i.e. 3/11/2002)
KIND OF BUSINESS
Internet Advertising Agency
DESCRIBE IN DETAIL DUTIES…
Sends traffic (surfers) to different companies' web sites that sells products or services.
NO. OF HOURS PER WEEK
40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER
[redacted], Rosh Pinna, Israel
NAME OF JOB
Marble Setter
DATE STARTED
Month – 11 [November] Year - 1998
DATE LEFT
Month – 12 [December] Year - 2001
KIND OF BUSINESS
Importation of natural stone
DESCRIBE IN DETAIL DUTIES …
Has cut, tool and set marble slabs in floors and walls of buildings …
NO. OF HOURS PER WEEK
Blank

In this case the employment information in a document that the beneficiary submitted to CIS conflicted with the Form ETA 750, Part B. According to the CIS Form G-325A prepared by the beneficiary signed on May 26, 2003, found in the record of proceeding, the beneficiary stated the following employment experience: the beneficiary was self-employed and the owner of an enterprise indicating a business name [redacted] from June 2000 to present (i.e. May 26, 2003); from November 1999 through June 2000, the beneficiary stated he was self-employed as a business partner in [redacted] and, from May 1998 through 1999 employed in the occupation designated as "Cassette Duplication" by [redacted] Israel.

According to these two sources of employment submitted by the beneficiary for the period he was employed by [redacted] Rosh Pinna, Israel as a full time marble setter from November 1998 to December 2001 (according to a letter, later refuted by the company, from [redacted] found in the record of proceeding dated June 7, 2002)[6], and also stated he working in Israel from May 1998 in cassette duplication, self-employed as a business partner in [redacted], and self employed as the owner of [redacted]

[6] According to the record of proceeding, a second letter from [redacted] dated September 15, 2004, again on computer generated paper with a Canadian telephone number, corrected the employment dates by stating

According to the beneficiary's I-94 Departure Record attached to a Form I-485 in the record of proceeding, the beneficiary arrived in the United States on December 11, 1999. Since that date according to the beneficiary CIS Form G-325A prepared by the beneficiary signed on May 26, 2003, he has maintained residences at West Hollywood (Orange Grove), California from December 1999 to February 2000,[7] at [redacted] West Hollywood, California from February 2000 to the date of signing, May 26, 2003. Prior arriving in the United States, the beneficiary resided at [redacted] Givataaim, Israel from May 1998 to December 1999. There are inconsistencies apparent from the Form G-325A and labor certification as to the beneficiary's prior employment, employers and residences during the periods above stated.

According to a letter from the petitioner dated September 17, 2004, the beneficiary has been employed as a marble setter since May 2004. Ten pay statements were submitted from the petitioner to the beneficiary evidencing year to date wage payments of $23,663.20 to September 8, 2004 with bi-weekly wage payments of $2,151.00. This indicates an annual wage of $55,926.00.

However, the petitioner has submitted three personal U.S. personal tax returns for the beneficiary for the years 2001, 2002, and 2003, that state adjusted taxable income earned in the amounts of $37,593.00, $55,097.00 and $69,734.00 respectively in the United States by the beneficiary derived from a business named in the return as [redacted] The beneficiary lists his occupation as executive, not marble setter.

The problem that arises in this case is the multiple inconsistencies in information as recited above provided by the beneficiary concerning his occupations, and, the lack of independent objective evidence of the occupation of marble setter from prior employers. *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." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

Even if the record of proceeding did not contain multiple inconsistencies, the AAO concurs with the director's determination that no probative evidence establishes that the beneficiary has three years of experience as a marble setter. No pay stub or wage record contained in the record of proceeding establishes that the beneficiary was employed for three years in an employment capacity with duties similar to the duties of the proffered position as of the priority date, but there is evidence that the beneficiary has worked as an executive with [redacted] in from June 2000 earning compensation as stated in tax years 2001, 2002 and 2003 based upon his personal tax returns submitted.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner had not established that by the preponderance of the evidence the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has not met that burden.

ORDER: The petition is dismissed.

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that he was in fact "employed full-time from January 1994 to March 1997." There was no explanation given for the discrepancy.

[7] This information was written in red ink on the form.