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]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 20 2007

EAC 06 062 51202

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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a marble and granite company. It seeks to employ the beneficiary permanently in the United States as a marble setter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with he has two years of qualifying employment experience. Therefore, the director denied the petition.

The record shows that the appeal is properly filed and 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.

As set forth in the director's June 10, 2006 denial, the single issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director noted inconsistencies in information pertaining to the beneficiary's employment experience as marble setter as listed on the ETA Form 9089 as compared to the information in the experience letter submitted by [redacted] Stone Ltd. of Jerusalem, Israel.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted on August 10, 2005.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

On appeal, counsel submits an English translation of an employment experience letter dated August 8, 2002. The original experience letter in Hebrew was not provided. This translation indicates that the beneficiary worked as a marble setter at [redacted] of Jerusalem, Israel from April 1996 through August 1998. An additional employment experience letter also dated August 8, 2002 which was provided in the original Hebrew and in English translation indicates that the beneficiary worked for [redacted] as an assembler and manager of the assembly staff beginning in 1998 and continuing through 2002. The record does not contain any other evidence relevant to the beneficiary's qualifications for the proffered position.

[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 this 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).

On appeal, counsel indicates that the petitioner has demonstrated that the beneficiary has the employment experience required by the ETA Form 9089 as certified.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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*, *Madany 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 this case, the ETA Form 9089, Part H Items 4 through 14 set forth the minimum education, training, and experience that an applicant must have for the position of marble setter. In this case, there are no specific educational requirements. Part H Items 6 and 6A indicate that an applicant for the proffered position must have twenty-four months or two years of experience as a marble setter. Part H Item 11 indicates that the duties of the proffered position include cutting marble and granite for fabrication. Part H Item 14 indicates that there are no other specific skills or other requirements for the proffered position.

The beneficiary set forth his credentials on the ETA Form 9089 and signed his name on December 15, 2005 under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part K(a), which elicits information of the beneficiary's work experience, he represented that he acquired four years of experience, January 1998 through January 2002, as a marble setter while working for [redacted] of Jerusalem, Israel. The beneficiary also specified that his duties at [redacted] during this period entailed cutting marble and granite for fabrication, forty hours per week. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (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.

The notarized statement from [redacted] Ltd. dated August 8, 2002 asserts that the beneficiary worked as an assembler and manager of the assembly staff from 1998 through 2002.[2] This is not consistent with the statement provided by the beneficiary on the ETA Form 9089 which indicates that he worked as a marble setter at Verona Stone Ltd. during this period. These inconsistencies in the record cast doubt on the reliability of the petitioner's evidence.

In *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), the Board 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.

It is incumbent upon 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. *See Id.*

Because the petitioner had failed to provide competent, objective evidence that the beneficiary had the two years of qualifying experience as a marble setter by the priority date as required by the ETA Form 9089, the director denied the petition.

On appeal, the petitioner again failed to provide any competent, objective evidence to reconcile the inconsistencies in the record regarding the beneficiary's assertion that he acquired over two years of qualifying experience as a marble setter while employed by [redacted] in Jerusalem, Israel during 1998 through 2002. The petitioner did provide a translation of a statement from [redacted] on appeal which indicates that the beneficiary worked full-time for this company as a marble cutter during a different period (April 1996 through August 1998) than that to which the first employment experience letter refers. However, these assertions by [redacted] contradict statements made by the beneficiary on the ETA Form 9089 which indicate that he acquired his experience as a marble cutter during January 1998 through January 2002. It also contradicts the first employment experience letter submitted by [redacted] which indicates that the beneficiary first began working for [redacted] during 1998. Thus, on appeal, the petitioner also failed to provide competent, objective evidence that the beneficiary gained two years of qualifying experience as a marble setter before the priority date while employed by [redacted] of Jerusalem, Israel.

In sum, the petitioner has failed to demonstrate that the beneficiary acquired two years of qualifying experience in the proffered position before the priority date as required by the ETA Form 9089 as certified. *See* Section 203(b)(3)(A)(i) of the Act. *See also Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

This office would also note that the beneficiary and the petitioner's owner in this case have the same last name. If the beneficiary and the petitioner's owner are members of the same family, it is questionable that a *bona fide* job opportunity was made available and continues to be available to U.S. workers in this case.

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[2] This statement provided no description of the beneficiary's duties, nor did it provide the number of hours each week that the beneficiary worked as an assembler and the number of hours each week that he worked as a manager.

Under 20 CFR §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating an otherwise *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or the relationship may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992)(denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business; however, if the true nature of the alien beneficiary's relationship to the petitioning business is not apparent in the labor certification proceedings, this is problematic in that it causes the certifying officer to fail to examine more carefully: whether the alien was given preference over U.S. workers because of his or her relationship to the petitioner; whether the position was clearly open to qualified U.S. workers; and whether U.S. workers were rejected solely for lawful job-related reasons In that case, the commissioner invalidated the labor certification.[3]

If the beneficiary is a family member of the petitioner's owner, further investigation may be warranted, in order to determine whether in this case a familial relationship between the petitioner's owner and the beneficiary represents an impediment to the approval of any employment-based visa petition. Because the decision of denial did not discuss this issue, and the petitioner has not been accorded an opportunity to address whether a familial relationship even exists, today's decision is not based on this issue, even in part. However, if the petitioner attempts to overcome today's decision on motion it should address this issue.

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.

[3] The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.