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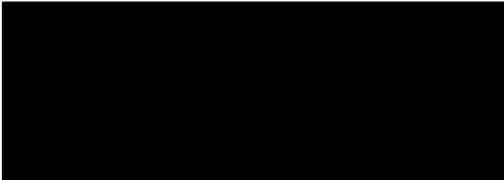
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20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: WAC-05-001-51040 Office: CALIFORNIA SERVICE CENTER Date: **OCT 24 2008**

IN RE: Petitioner:  
Beneficiary:



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 was denied by the Director, California Service Center. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a custom stone fabrication and installation company. It seeks to employ the beneficiary permanently in the United States as a stone carver (marble fabricator). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or the Form ETA 750), approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification application. The director denied the petition accordingly.

On appeal, the petitioner submits a letter and additional evidence.<sup>1</sup>

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.

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 Katigbak*, 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 priority date in the instant petition is June 30, 1998.

Citizenship and Immigration Services (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).

The certified Form ETA 750 in the instant case states that the position of stone carver (marble fabricator) requires two (2) years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on June 4, 1998, he set forth his work experience. He listed his experience as a full time "Marble Fabricator" at the petitioner from February 1996 to the present. In a letter dated June 19, 2000, he added the following experience to the Form ETA 750B: for [REDACTED] Laguna Beach, CA from April 1995 to February 1996; for [REDACTED] in Lake Forest, CA from January 1994 to April 1995; and for Carretera Vieja a Tecate in La Presa, Tijuana, B.C. Mexico from 1990 to December 1993. He provided no

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<sup>1</sup> 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

further information concerning his work experience on the forms and letter, the latter of which was signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

The instant I-140 petition was submitted on September 30, 2004 with the petitioner's tax returns for its fiscal years 2000 through 2002 but without any documents to corroborate the information represented on the Form ETA-750B pertinent to the beneficiary's qualifications as required by the regulation.

The director issued a request for additional evidence (RFE) on April 1, 2005 requesting evidence to establish the petitioner's ability to pay as well as the beneficiary's qualifications for the proffered position. The director stated in pertinent part the following:

Submit evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750 (Application for Alien Employment Certification). Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. **This verification should state the beneficiary's title, duties, and dates of employment/experience and number of hours worked per week.**

(Emphasis on original).

In response to the director's RFE, the petitioner submitted a letter from the president of the petitioner and the beneficiary's W-2 forms and tax returns for 1995 and 1996.

On July 9, 2005, the director denied the petition finding that the petitioner failed to establish that the beneficiary had met the minimum requirements at the time the request for labor certification was filed with its letter listing the beneficiary's employment and asserting the previous employers were out of business, and W-2 forms with a name different from the beneficiary.

On appeal the petitioner asserts that [REDACTED] and the beneficiary are the same person and submits new documents to support that assertion.

The issue in the instant case is whether the petitioner established the beneficiary's requisite two years of experience with proper evidence as required by the regulation.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The Form ETA 750B shows that the beneficiary has been working as a full time marble fabricator for the petitioner since February 1996, and worked for [REDACTED] from April 1995 to February 1996, for [REDACTED] from January 1994 to April 1995 and for [REDACTED] in La Presa, Tijuana, B.C. Mexico from 1990 to December 1993. However, the record of proceeding does not contain a regulatory-prescribed letter from either the current employer or any former employers. The petitioner's letter does not

verify the beneficiary's employment experience with it since February 1996 as required by the above regulation. Therefore, the petitioner failed to establish the beneficiary's prior two years of employment experience as a full time marble fabricator with the petitioner from February 1996 to June 30, 1998, the priority date in the instant case. The petitioner should address this issue and submit regulatory-prescribed evidence in any future proceedings.

The petitioner did not submit any regulatory-prescribed letter from any previous employers. The regulation only allows CIS to consider other documentation relating to the alien's experience or training when a regulatory-prescribed letter is unavailable. The petitioner's letter claims that the previous employers were out of business. However, the record does not contain any objective evidence to support the petitioner's assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, it seems unlikely and coincidental that all three previous employers were out of business. That casts doubt on the reliability of the contents of the petitioner's letter. "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. 582, 591 (BIA 1988).

The petitioner submitted W-2 forms and tax returns for 1995 and 1996 for a person named [REDACTED] allegedly the same person as the beneficiary. First of all, none of [REDACTED] W-2 forms indicate that he worked as a stone carver (marble fabricator) in the years 1995 and 1996. Second [REDACTED] filed his tax returns for 1995 and 1996 as a laborer, which cannot be used to establish his qualifying work experience as a stone carver (marble fabricator). Third, [REDACTED] reported \$13,131 and \$23,712 as his annual income for 1995 and 1996 respectively on his tax returns. Comparing the proffered wage of \$35,360 in the instant case, it is unlikely that his work experience as a full time marble fabricator for 1995 or 1996 can be proven with only one-third or two-thirds of the prevailing annual wage rate for stone carvers. Finally, the W-2 forms provide inconsistent information with the Form ETA 750B. According to the Form ETA 750B, in 1995 the beneficiary worked for less than four months for [REDACTED] and more than eight months for [REDACTED]. However, the W-2 forms for 1995 show that [REDACTED] was paid \$7,534.63 from [REDACTED] for the four months while [REDACTED] paid him \$5,595.75 for the eight months work. The beneficiary claimed that he worked for [REDACTED] until April 1995 and worked for the petitioner from February 1996; however, the 1996 W-2 forms for [REDACTED] show that he worked for and was paid by [REDACTED] in 1996, but no W-2 forms show that he worked for and received compensation from the petitioner. "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. On appeal, the petitioner submits evidence to establish that [REDACTED] and the beneficiary is the same person and the W-2 forms submitted are for the beneficiary. However, even though [REDACTED] is proved to be the beneficiary, the W-2 forms and tax returns submitted cannot be considered sufficient evidence to establish that the beneficiary possessed the requisite two years of experience as a stone carver (marble fabricator) prior to the priority date of June 30, 1998.

Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, it still requires other documentation meet certain evidentiary standards. The evidence in the record including the letter from the president of the petitioner does not verify the beneficiary's titles, number of hours worked per week and

job descriptions at each of the three previous employers.<sup>2</sup> The petitioner's letter does not meet the requirement set forth at the regulation. Therefore, the petitioner failed to submitted regulatory-prescribed letters which cannot be considered as primary evidence to establish the beneficiary's prior two years of experience in the job offered in the instant case.

For the reasons discussed above, the AAO finds that the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a stone carver (marble fabricator), and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions and new evidence submitted on appeal fail to overcome the ground of denial in the director's decision.

Beyond the director's decision and the petitioner's assertion on appeal, the AAO notes that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date. 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*, 299 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). Here, the Form ETA 750 was accepted on June 30, 1998. Therefore, the petitioner must demonstrate its ability to pay the proffered wage from its fiscal year of 1997 (from December 1, 1997 to November 30, 1998), which covers the priority date of June 30, 1998 in the instant case.

The record of proceeding contains copies of the petitioner's tax returns for its fiscal years 2000 through 2003 covering a period from December 1, 2000 to November 30, 2004. However, the petitioner did not submit its tax returns or any other regulatory-prescribed evidence to establish its ability to pay the proffered wage during the period from June 30, 1998 to November 30, 2000. 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. The petitioner failed to establish its ability to pay the proffered wage for a period from the priority date to November 30, 2000 because it failed to submit the required evidence. The petitioner should address this issue and submit updated regulatory-prescribed evidence to establish its ability to pay during this period in any future proceedings.

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<sup>2</sup> The petitioner would not be in a position to verify the beneficiary's employment with employers unrelated to the petitioner.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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.