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FILE: [REDACTED]  
WAC-03-093-34172

Office: CALIFORNIA SERVICE CENTER

Date: JUL 26 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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:

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, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied 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 gem cutting and repair company. It seeks to employ the beneficiary permanently in the United States as a gem cutter. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which 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 April 12, 2000. The proffered wage as stated on the Form ETA 750 is \$10.04 per hour, which amounts to \$20,883.20 annually. On the Form ETA 750B, signed by the beneficiary on January 5, 1999, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on February 3, 2003. On the petition, the petitioner claimed to have been established in 1997, to currently have ten employees, to have a gross annual income of \$3 million, and to have a net annual income of \$110,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated March 14, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, additional evidence pertinent to the experience required for the offered job, and additional evidence concerning whether the petitioner is a successor in interest to one or more of several companies named in the RFE. The names the companies inquired about by the director were names which appeared on various documents in the record, include Form W-2 Wage and Tax Statements of the beneficiary submitted in evidence.

In response to the RFE, the petitioner submitted additional evidence. On the issue of the beneficiary's previous experience, the petitioner provided some information. In a cover letter dated June 5, 2003 which was submitted with the evidence, counsel stated that for some of the beneficiary's prior employers counsel had been unable to obtain telephone numbers.

In a second RFE, dated June 16, 2003, the director requested additional evidence concerning the beneficiary's education and experience and concerning whether the petitioner is a successor in interest to another company.

In response to the second RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the second RFE were received by CIS on September 8, 2003.

In a decision dated November 18, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the beneficiary was employed by the petitioner during the relevant years of 2000, 2001 and 2002, and that the director acknowledged that the petitioner had established its ability to pay the proffered wage in the year 2002. Counsel states that the amounts needed to raise the beneficiary's actual compensation to the proffered wage would have been \$6,043.20 in 2000 and \$2,583.20 in 2001. Finally, counsel states that the petitioner's owner has been willing and able to pay from his own personal financial resources any amounts needed to raise the beneficiary's actual compensation to the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). In the instant petition, none of the documents submitted for the first time on appeal were specifically requested by the director in the proceedings before the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The petitioner is not the company which filed the ETA 750. The ETA 750 was filed by [REDACTED], dba JMS Lapidary, a company with the same address as that of the petitioner as shown on the I-140 petition. The evidence in the record indicates that [REDACTED] was sold to Hubert Gesser, who dissolved that corporation and continued the business as a sole proprietorship, dba [REDACTED]. The business was then organized as an S corporation wholly owned by [REDACTED], using the same business name, [REDACTED]. The evidence establishes that the petitioner is a successor in interest to Pro Gem Inc. and to the sole proprietorship Hubert Gem Design. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The evidence relevant to the foregoing matters consists of originals or copies of the documents which are described below.

An agreement dated September 8, 1998 between the [REDACTED] and the petitioner's owner, [REDACTED] states that [REDACTED] had previously jointly operated the business of [REDACTED] and states that by the agreement [REDACTED] transfers all of his shares in the business to [REDACTED] along with all property of the business [REDACTED], in exchange for \$25,000.00. The trade name Hubert Gem Design is also stated in the agreement as the recipient of the shares and property.

Two business licenses issued by the City of Los Angeles to the petitioner's owner dated April 15, 2000, each state the name Hubert Gem Designs as part of the address block for the owner, thereby indicating that Hubert Gem Designs was at that time a trade name of the petitioner's owner. A copy of a certificate of dissolution dated January 23, 2001 states that the corporation Pro Gem, Inc. has been completely wound up. That certificate is stamped by the California Office of the Secretary of State as filed on April 12, 2001. A letter dated June 19, 2001 from the Tax Clearance Unit, Franchise Tax Board, State of California, certifies that all state taxes of Pro Gem, Inc. had been paid or were secured. A California seller's permit dated November 1, 2001 issued to the petitioner states the name Hubert Gem Designs as the first line of the petitioner's address block, with the petitioner's legal corporate name, Hubert Inc., on the second line, thus indicating that as of November 1, 2001 Hubert Gem Designs was a trade name for the petitioner. It may be noted that on the business licenses the word "Designs" is spelled with a final "s," while on the owner's tax returns the word "Design" is spelled without a final "s."

A letter dated January 6, 2003 from the petitioner's owner states that the petitioner had acquired the stock, assets, rights, liabilities and obligations of Pro Gem Inc. on November 1, 2001. A letter dated June 5, 2003 from the petitioner's owner states that he is the sole shareholder and director of the petitioner and that the petitioner has taken on all the immigration-related liabilities of Pro Gem, Inc.

Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner and his wife for 2000 and 2001, submitted for the first time on appeal, show that the business Hubert Gem Designs was operated as a sole proprietorship in those years. The net income from the business shown on the Schedule C's attached to those returns was \$90,894.00 in 2000 and \$95,482.00 in 2001.

A Form 1120S U.S. Income Tax Return for an S Corporation for 2000 in the record is under the name "Nouveau Antiques, Inc.," and has the same employer identification number as is shown for the petitioner on the I-140 petition. The record contains a copy of a certificate of amendment to the articles of incorporation of Nouveau Antiques, Inc. dated August 13, 2001 changing the name of the corporation to "Hubert Inc.," which is the current name of the petitioner. The petitioner's tax returns for 2001 and 2002 are under the name "██████████ Inc." and they have the same employer identification number as appears on the Form 1120S filed under the name "██████████." The record before the director closed on September 8, 2003 with the petitioner's submissions in response to the second RFE. As of that date, the petitioner's tax return for 2002 was its most recent return available.

Form W-2 Wage and Tax Statements show compensation to the beneficiary for the relevant years as follows:

2000	\$11,790.00 from Pro Gems, Inc.;
	\$3,050.00 from the petitioner's owner dba ██████████
	\$5,497.72 from BTS Payroll Services, Burbank, California;
2001	\$14,487.50 from the petitioner's owner dba ██████████
	\$3,812.50 from the petitioner;
	\$14,732.82 from Axiom International Services Corp, New York, New York;
	\$14,088.74 from ██████████, California;
	\$497.00 from P██████████, Birmingham, Alabama
2002	\$4,337.50 from the petitioner;
	\$3,598.43 from ██████████, Birmingham, Alabama; and
	\$2,583.92 from ██████████, Phoenix, Arizona.

Payroll records of the beneficiary and an annotated list of the beneficiary's employers attached to those records indicate that of the employers listed above, the only ones related to the petitioner are Pro Gems, Inc., the petitioner's owner, and the petitioner itself. The other employers of the beneficiary are not related in any way to the petitioner, and therefore are not relevant to the analysis of a successor in interest. On the Form W-2's the name "Pro Gems, Inc." includes the letter "s" at the end of the word "Gems," but this fact does not appear to indicate a separate corporation from "Pro Gem, Inc.," which filed the ETA 750. A California corporation record in evidence shows the name of the corporation as "Pro Gem, Inc."

The address of Pro Gem, Inc. on the ETA 750, submitted on April 12, 2000 was 631 S. Olive Street, #920, Los Angeles, California. An amendment to the ETA 750 prior to its certification by the Department of Labor changed the room number to Suite 120. A lease amendment dated September 25, 2000 changes the premises rented from the owner of the building at 631 S. Olive Street from a location on the ninth floor to suite 120 on the ground floor. The lease amendment identifies the tenant as [REDACTED] dba Progressive Gem Design and [REDACTED] dba JMS Lapidary.

The foregoing documents indicate the following. Prior to September 1998 Hubert Gesser and Jaoao M. Silva each owned half of the shares of Pro Gem Inc. In September 1998 Mr. Silva sold his shares and all his interests in the business to [REDACTED] c. continued to operate as a corporate entity through the year 2000. [REDACTED] operated the business Hubert Gem Design as a sole proprietorship from 1998 through 2001. The beneficiary was employed by Pro Gem Inc. for most of 2000, and then was employed by Mr. [REDACTED] in his individual capacity as sole proprietor for part of that year. In early 2001 the corporation [REDACTED] was dissolved. In the second half of 2001 the name of a previously existing company owned by Mr. [REDACTED], Nouveau Antiques, Inc., was changed to Hubert Inc. The operations of the sole proprietorship business were transferred to Hubert Inc. by November 2001.

In summary, the company which filed the ETA 750 was Pro Gem Inc. The sole proprietorship Hubert Gem Design, owned by Hubert Gesser, was a successor in interest to that company in late 2000 and for most of 2001. The petitioner, Hubert Inc. is a second successor in interest to the sole proprietorship. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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 January 5, 1999, the beneficiary did not claim

to have worked for the petitioner, but the beneficiary claimed to have worked for Pro Gem Inc. dba JMS Lapidary since January 1995 until the date of the ETA 750B.

The record establishes successor in interest relationships only among Pro Gem, Inc., the petitioner's owner and the petitioner. Therefore only compensation paid by Pro Gem, Inc. by the petitioner's owner or by the petitioner itself will be considered as payments credited to the petitioner in evaluating the petitioner's ability to pay the proffered wage. Form W-2's in the record show compensation to the beneficiary from the petitioner and its predecessors in interest as follows:

2000	\$11,790.00 from Pro Gems, Inc.;
	\$3,050.00 from the petitioner's owner dba Hubert Gem Design;
2001	\$14,487.50 from the petitioner's owner dba Hubert Gem Design;
	\$3,812.50 from the petitioner;
2002	\$4,337.50 from the petitioner;

The totals paid to the beneficiary from one or more of those three sources were as follows: \$14,840.00 in 2000; \$18,300.00 in 2001; and \$4,337.50 in 2002. Each of those figures is less than the proffered wage. Therefore those figures fail to establish the petitioner's ability to pay the proffered wage in any of those years. The amounts which would have been needed to raise the beneficiary's actual compensation to the proffered wage are \$6,043.20 in 2000; \$2,583.20 in 2001; and \$16,545.70 in 2002.

The record contains copies of pay statements for the beneficiary, but those statements contain no additional relevant information beyond the information shown on the beneficiary's Form W-2's which are analyzed above.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. As noted above, the petitioner's tax return for 2000 was filed under the petitioner's previous name, Nouveau Antiques, Inc. Its returns for 2001 and for 2002 were filed under its current name, Hubert Inc.

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. In the instant petition, the petitioner's tax returns show no income from sources other than from a trade or business. Therefore the figures for ordinary income will be considered as the petitioner's net income. The petitioner's tax returns show the following amounts for ordinary income: -\$3,265.00 for 2000; -\$64,516.00 for 2001; and \$81,649.00 for 2002. Since the figures for 2000 and 2001 are negative, those figures fail to establish the ability of the petitioner to pay the proffered wage in those years. For 2002, the petitioner's net income exceeded the amount of \$16,545.70 needed to raise the beneficiary's actual compensation to the proffered wage that 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 a corporate taxpayer's current assets less its current liabilities. 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. 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. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the following amounts for net current assets: -\$7,917.00 for the beginning of 2000; -\$21,727.00 for the end of 2000; -\$12,000.00 for the end of 2001; and \$84,014.00 for the end of 2002. Since the figures for the beginning and end of 2000 and for the end of 2001 are negative, they also fail to establish the ability of the petitioner to pay the proffered wage in 2000 and in 2001. The petitioner's net current assets for the end of 2002 exceeded the amount of \$16,545.70 needed to raise the beneficiary's actual compensation to the proffered wage.

The record also includes copies of Form 1040 U.S. Individual Income Tax Returns for the petitioner's owner and his wife for 2000 and 2001, submitted for the first time on appeal. Counsel asserts that the petitioner's owner has been willing to use his own personal resources if necessary to pay the beneficiary the full proffered wage.

CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Nonetheless, under the principles of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may consider the totality of the circumstances affecting the petitioner's ability to pay the proffered wage. Since the record establishes two predecessors in interest to the petitioner, it is appropriate to consider the resources of those predecessors in evaluating the petitioner's ability to pay the proffered wage.

No evidence was submitted concerning the financial resources of Pro Gem, Inc. However, the record does contain evidence pertaining to the sole proprietorship Hubert Gem Design, in the Schedule C's attached to the

Form 1040 U.S. Individual Income Tax Return's of the Hubert Gasser and his wife for 2000 and 2001. For 2000, the Schedule C shows business income of \$90,894.00. The Form 1040 of [REDACTED] and his wife shows a loss on line 17 of -\$3,265.00, the line for income or losses from S corporations and other sources. That amount reflects the negative ordinary income of -\$3,265.00 as shown on the Form 1120S U.S. Income Tax Return for an S Corporation of the petitioner, Hubert Inc., for 2000, which is discussed above. Notwithstanding that loss, the Form 1040 tax return of [REDACTED] and his wife for 2000 shows sufficient income from all sources to result in adjusted gross income of \$92,055.00. As noted above, the amount which would have been needed to raise the beneficiary's actual compensation to the proffered wage in 2000 was \$6,043.20. The business income on the Schedule C, and the adjusted gross income of [REDACTED] and his wife on the form 1040 for 2000 are sufficient to establish the petitioner's ability to pay the additional \$6,043.20 in the year 2000.

For the year 2001, the Schedule C for the sole proprietorship Hubert Gem Design shows business income of \$95,482.00. The form 1040 of [REDACTED] and his wife for 2001 shows a loss on line 17 in the amount of -\$64,516.00. That amount reflects the negative ordinary income of -\$64,516.00 shown on the Form 1120S U.S. Income Tax Return for an S Corporation of the petitioner, Hubert Inc. for 2001, which is also discussed above. Although the loss from Hubert Inc. in 2001 was much greater than in 2000, the Form 1040 tax return of Mr. [REDACTED] and his wife shows sufficient income from all sources to result in adjusted gross income of \$49,633.00 for 2000. That Form 1040 shows two dependents of [REDACTED] and his wife, so that the household size was four persons. As noted above, the amount which would have been needed to raise the beneficiary's actual compensation to the proffered wage in 2001 was \$2,583.20. Payment of that additional amount to the beneficiary would have left the sole proprietorship Hubert Gem Design with business income of \$92,898.00, and would have left [REDACTED] and his wife with \$47,049.80 as adjusted gross income. That amount is considered sufficient for the reasonable household expenses of a four-person household. Therefore the Schedule C business income of Hubert Gem Design and the adjusted gross income of Hubert Gasser and his wife for 2001 are sufficient to establish the ability of Hubert Gem Design to pay the proffered wage in 2001.

As discussed above, the net income of the petitioner alone in 2002 was sufficient to establish the petitioner's ability to pay the proffered wage in that year. Moreover, by the year 2002 the business had been completely incorporated into the petitioner. Therefore no justification would exist for considering the financial resources of predecessors in interest to the petitioner for the year 2002.

For the foregoing reasons, in considering the totality of the circumstances, the evidence in the record is sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, under the principles described in *Matter of Sonegawa*, 12 I&N Dec. 612.

In his decision, the director correctly analyzed the petitioner's tax returns and correctly concluded that the petitioner's net income and its net current assets failed to establish the petitioner's ability to pay the proffered wage during the relevant period. The record before the director did not include copies of the Form 1040 U.S. Individual Income Tax Returns of the petitioner's owner and his wife. Therefore, an insufficient basis existed to conduct an analysis of the petitioner's predecessors in interest based on the principles in *Matter of Sonegawa*. Nonetheless, since additional evidence has been submitted on appeal, the petitioner's evidence on appeal is sufficient to support such an analysis and to establish the petitioner's ability to pay the proffered wage during the relevant period, for the reasons discussed above. The evidence submitted on appeal therefore overcomes the director's finding concerning the petitioner's ability to pay the proffered wage.

Although the evidence on appeal establishes the petitioner's ability to pay the proffered wage during the relevant period, the record also raises the issue of 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. 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).

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 Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the priority date in the instant petition is April 12, 2000.

A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. See *Matter of Katigbak*, 14 INA Dec. 45, 49 (Comm. 1971). Thus, the petitioner must illustrate that the beneficiary alien met the requirements for the position at the time it filed the alien labor certification application.

In this case, the Form ETA 750 states that the position of gem cutter requires completion of four years of high school education, one year of training, consisting of "cutting and polishing stones," and one year of experience in the offered position or in the related occupation of "stone cutter, shape design and repair." (ETA 750, block 14).

The record contains a copy of the beneficiary's high school completion certificate dated August 13, 2003 in Portuguese, with certified English translation. That document is sufficient to establish that the beneficiary has the education required by the ETA 750.

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) of 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.

On the Form ETA 750B, signed by the beneficiary on January 5, 1999, the beneficiary claimed to have worked for a gem cutting and repair firm in Sao Bernardo do Campo, Brazil from July 1992 until January 1995. No documentary evidence was submitted for the record to corroborate the beneficiary's claimed experience with that firm.

On the Form ETA 750B the beneficiary also claimed to have worked for the employer Pro Gem, Inc. beginning in January 1995 and continuing until the date of the ETA 750B. The petitioner submitted a letter

from the petitioner's office manager stating that the beneficiary worked for 40 hours per week February 1999 until January 2001 for Pro Gem, Inc. Since the petitioner is a successor in interest to Pro Gem, Inc., as described above, the letter from the petitioner's office manager is sufficient evidence to corroborate the beneficiary's claim of employment with Pro Gem, Inc. However, since Pro Gem, Inc. is a predecessor in interest to the petitioner, it cannot be considered as a separate employer from the petitioner when evaluating the beneficiary's experience.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect in March 2005, but the instant petition is governed by the prior regulations. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The citations below are to the Department of Labor regulations as in effect prior to the 2005 amendments.

Pursuant to 20 C.F.R. § 656.21(b)(5), a petitioning employer is required to document that its requirements for the proffered position are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for the petitioner to hire workers with less training and/or experience. Furthermore, the regulation at 20 C.F.R. § 656.21(b)(5) addresses the situation of a petitioning employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the petitioner is not allowed to treat the beneficiary alien more favorably than it would a U.S. worker. See *ERF Inc., d/b/a Bayside Motor Inn*, 1989 INA 105 (U.S. Dept. Labor, BALCA, Feb. 14, 1990). According to the Department of Labor's interpretation of 20 C.F.R. § 656.21(b)(5)], the beneficiary alien must have obtained his or her qualifying employment experience with an employer different than the petitioning employer. See *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200 (U.S. Dept. Labor, BALCA, May 23, 1991). The AAO will defer to the Department of Labor's interpretation of its own regulation.

As noted above, Pro Gem, Inc., was the employer which submitted the ETA 750. If the beneficiary's experience with Pro Gem, Inc., had been the only relevant experience claimed by the beneficiary on the ETA 750B, the Department of Labor would have had grounds to question whether the job qualifications stated on the ETA 750, part A, block 14, truly represented the minimum qualifications for the job. If the employer had hired the beneficiary without those qualifications, the employer could not now require U.S. workers applying for the job to have those qualifications. Certain exceptions to the general rule on minimum qualifications exist, but no exception is relevant to the facts of the instant case. See 20 C.F.R. § 656.21(b)(5).

As noted above, the required qualifications for the offered position included one year of training in cutting and polishing stones and one year of work experience in the offered job or in a related occupation. In the instant case, on the ETA 750B the beneficiary claimed to have worked for a gem cutting and repair firm in Brazil from July 1992 until January 1995, experience which would satisfy both the training and the work experience requirements on the ETA 750, part A, block 14. Therefore the Department of Labor did not have reason to question whether the job qualifications stated in block 14 represented the actual minimum qualifications for the offered job.

The Department of Labor's certification of an ETA 750 does not include any finding on whether the beneficiary is qualified for the offered position. See INA § 212(a)(5)(A). The responsibility for such a determination lies with CIS. See INA §§ 203(b)(3), 204(a)(1)(F); 8 C.F.R. § 204.5(g)(1).

In the instant petition, no documentary evidence corroborates the beneficiary's claimed experience as a gem cutter and repairer with a firm in Brazil. The record corroborates only the beneficiary's claimed experience with Pro Gem, Inc., which was the employer which submitted the ETA 750, and which is a predecessor

company to the petitioner. Accordingly, the beneficiary does not meet the requirements of the labor certification because the beneficiary's only documented employment experience was acquired with the petitioning employer's predecessor in interest. *See Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 1990 INA 200.

In his decision, the director did not discuss the beneficiary's qualifications, apparently because the director found that the petitioner had not established its ability to pay the proffered wage, a finding which would be sufficient grounds to deny the petition. As shown above, evidence submitted on appeal is sufficient to overcome that portion of the director's decision. Although the director's decision does not discuss the beneficiary's qualifications, the record contains evidence sufficient to show that the director did consider that issue.

In the first RFE, the director made the following request:

**Evidence of Experience:** Submit proof of the beneficiary's employment history. Provide letters, contracts, and pay statements to verify that the beneficiary worked for the listed employer(s). Provide a name, address and telephone number at which [CIS] or other U.S. Government agency can contact ALL previous and/or current employers.

(RFE, March 14, 2003, at 4).

Despite the breadth of the director's request, the petitioner's response to that RFE included no evidence about the beneficiary's employment in Brazil which had been stated on the ETA 750B, but included information only about the beneficiary's relevant employment in the United States. Counsel's letter in response to the first RFE discussed the beneficiary's employment in the United States, but made no mention of the beneficiary's claimed experience in Brazil. As noted above, counsel stated that for some of the beneficiary's prior employers counsel had been unable to obtain telephone numbers. (Letter from counsel, June 5, 2003, at 4-5).

The present record still lacks any documentation of the beneficiary's claimed experience in Brazil. Therefore, the record lacks documentation that the beneficiary had the training and experience required by the ETA 750 with an employer other than the employer which filed the ETA 750, Pro Gem, Inc., and which is a predecessor in interest to the petitioner.

Although the record indicates that the director considered the issue of the beneficiary's experience, the record does not contain any conclusory statements from the director as to the bona fides of that the beneficiary's claimed experience. The director did not articulate a determination that the explanation of the petitioner's counsel's that the previous employer could not be located was or was not sufficient. Although this office does not find counsel's explanation compelling, the director did not include this as a ground in his decision denying the petition and therefore the petitioner did not have a chance to contest such a finding of ineligibility or supplement the record. As noted above, the AAO has de novo authority to deny a petition for grounds that were not mentioned in the director's decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043, *aff'd*. 345 F.3d 683; *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9. Nonetheless, the AAO is remanding this petition to the director so that he may make a determination on this issue.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of

time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.