

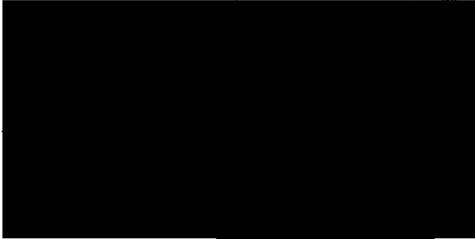
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC-06-033-51435

Office: TEXAS SERVICE CENTER

Date: AUG 24 2006

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:



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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jeweler that seeks to employ the beneficiary permanently in the United States as a mold maker II ("Mold Maker/Designer Jewelry"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director denied the petition based on a determination that the petitioner had not established that the petitioner listed on the I-140 was the successor-in-interest to the petitioner listed on the labor certification.

The petitioner filed to obtain permanent residence and classify the beneficiary as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

The record shows that the appeal is properly and timely filed, 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

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

The history of the case is quite lengthy and complicated, but pertinent to the case, and in order to fully understand its progression, is summarized in a chronology as follows:

- January 17, 2001 - Gold N Fashion Inc. files a labor certification for beneficiary, [REDACTED]
- November 23, 2001 – labor certification approved for Gold N Fashion Inc. on behalf of [REDACTED]
- December 10, 2001 – Gold N Fashion Inc. files an I-140 on behalf of [REDACTED]
- April 10, 2002 – Gold N Fashion Inc.'s I-140 is approved for beneficiary [REDACTED]
- September 2002 – common stock issued for Ark Jewelers;
- October 2002 – Ark Jewelers incorporates;
- July 10, 2003 - notice of removal hearing issued for [REDACTED] for hearing date of December 8, 2003;
- December 8, 2003 – Ark Jewelers files an I-140 for [REDACTED] based on the Gold N Fashion labor certification approved for [REDACTED]. Ark Jewelers seeks to substitute [REDACTED] into the approved labor certification initially filed by Gold N Fashion Inc.^{2,3} (information contained on the I-140 shows that [REDACTED] is the spouse of Nooruddin Lalani);
- October 25, 2004 – the Texas Service Center issues a Notice of Intent to Deny (NOID) the I-140 filed by Ark Jewelers on behalf of [REDACTED] as the labor certification has been used in another approved I-140 (on behalf of [REDACTED] and therefore cannot support the I-140 filed for [REDACTED]. Further, the NOID requested documentation to show that Gold N Fashion and Ark Jewelers are the same company, or that Ark Jewelers is the successor in interest to Gold N Fashion;
- November 4, 2004 – the petitioner seeks to withdraw the approved I-140 on behalf of Rehana Nooruddin, which the Service Center revoked by letter of June 27, 2005;
- September 30, 2005 – I-140 filed by Ark Jewelers on behalf of [REDACTED] is denied for failure to demonstrate the successor-in-interest relationship between Gold N Fashion and Ark Jewelers;
- November 10, 2005 – Ark Jewelers refiles an I-140 on behalf of [REDACTED] again based on the

² Substitution of a beneficiary on the labor certification is permitted by the DOL. DOL had published an interim final rule, October 23, 1991, which limited the validity of an approved labor certification to the specific alien named on the labor certification application (See 56 FR 54925, 54930). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to the Service based on a Memorandum of Understanding. Procedures for the Service were then set forth in a memorandum from Louis Crocetti, INS Associate Commissioner, Substitution of Labor Certification Beneficiaries, File No. HQ 204.25P (March 7, 1996).

³ The ETA 750B was signed by the present beneficiary on December 1, 2003. Based on 8 CFR 245.10 (j), the labor certification in the instant petition would not render the beneficiary eligible to adjust under 245(i) as: “an alien who was substituted for the previous beneficiary of the application for the labor certification after April 30, 2001, will not be considered to be a grandfathered alien.” As the beneficiary’s Form ETA 750B was signed on December 10, 2003, he would not be “grandfathered” on the basis of that document, and receive the benefit of adjustment under 245(i).

initial Gold N Fashion labor certification;

- November 18, 2005 – The Service Center issues a NOID on the second I-140 filed;
- January 6, 2006 – the second I-140 filed by Ark Jewelers on behalf of [REDACTED] is denied based on failure to document the successor-in-interest relationship between Gold N Fashion and Ark Jewelers;
- The petitioner appeals.

The petitioner listed on Form ETA 750, filed on January 17, 2001, is “Gold N Fashion” located at [REDACTED] with the alien to be employed at: Gold Italia, Eastland Mall, Charlotte, North Carolina. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. The Form ETA 750 states that the position requires three years of experience in the job offered, as a mold maker. The I-140 petition filed on behalf of the present beneficiary listed the petitioner as “Ark Jeweler’s Inc.,” located at: ET 8 Eastland Mall [REDACTED] with the alien to work at: Eastland Mall, Charlotte, North Carolina. Ark Jewelers listed that it was established in 1999, had eight current employees, and that it generated a gross annual income of \$2,510,620.

For the substituted beneficiary, [REDACTED] to be able to continue processing based on the initially approved labor certification for Gold N Fashion, the petitioner, Ark Jewelers, would need to demonstrate that the new business is a successor-in-interest company to the initial petitioner. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).⁴ Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).⁵

At the time of filing the first I-140 petition on behalf of [REDACTED] the petitioner submitted copies of Ark Jewelers Articles of Incorporation, a request to revoke the I-140 for the prior beneficiary,⁶ and tax returns for the years 2001, 2002, and 2003. The petition was denied for failure to demonstrate that Ark Jewelers was the successor in interest to Gold N Fashion.

⁴ See also letter dated October 17, 2001, from [REDACTED], Business and Trade Services, to Mr. J. Douglas Donenfield, which refers to Policy Memorandum from [REDACTED] Acting Exec. Assoc. Comm., reprinted in 70 Interpreter Releases 1692-93 (Dec. 20, 1993)(Attachment I) that a “new employing entity that is a successor in interest must file a new I-140 petition and submit documentation to establish that it has assumed the rights, duties, obligations and assets of the original employer and that it continues to operate the same type of business.”

⁵ For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return. The federal tax returns submitted reflect that the petitioner had net incomes of: 2001 net income of \$65,143 (Gold N Fashion); 2002 net income of \$117,342 (Ark Jewelers); 2003 net income of \$128,688 (Ark Jewelers); 2004 net income of \$137,621 (Ark Jewelers, filed April 21, 2005). The petitioner’s 2005 tax return would have been unavailable at the time of filing the I-140. If Ark demonstrates that is a successor in interest to Gold N Fashion, the foregoing would demonstrate the petitioner’s ability to pay the proffered wage. However, if Ark Jewelers cannot demonstrate successorship, the documentation regarding the petitioner’s ability to pay would be insufficient to establish this aspect of the case.

⁶ The petitioner submitted the request to revoke after receipt of the Service Center NOID.

With the second I-140 petition filed, the petitioner submitted more extensive documentation, including: October 26, 2005 AILA- California Service Center Liaison Minutes; a letter regarding the transaction from a CPA explaining the "tax free exchange in reorganization transfer;" a Mutual Agreement between Ark Jewelers and Gold N Fashion; business checking statements for Gold N Fashion for the time period October 1 to October 31, 2002; a balance sheet for both Gold N Fashion and Ark Jewelers dated December 31, 2002; a Consolidated Income Statement for Ark Jewelers for the year ended December 31, 2002; Common Stock Certificates for both companies reflecting stocks held by two people: Amirali Boghani, and Karam Ali for each company respectively; By-Laws for both companies; Certificate of Incorporation for Gold N Fashion; Articles of Incorporation for Ark Jewelers; Corporate Minutes for Gold N Fashion; a Corporate Resolution for Gold N Fashion; Unanimous Consent for Gold N Fashion; compiled balance sheet for Ark Jewelers for the year ending December 31, 2002; Affidavit regarding the corporate resolution signed by a certified public accountant; Affidavit regarding the reorganization from an attorney concluding that Gold N Fashion "made an effective election for "Tax Free Reorganization under Internal Revenue Code 368;" the beneficiary's I-94 card and passport identification page.

Following review, the Service Center concluded that Ark Jewelers did not clearly establish that the petitioner was the successor in interest to Gold N Fashion. The denial notes that the balance sheets submitted and other statements were not audited. Further, the denial notes that the bank statements show that Gold N Fashion received large deposits in October 2002, but nothing verifies that this money came from Ark Jewelers Inc. to pay Gold N Fashion for its assets and liabilities. The Service Center determined that since a successor in interest relationship had not been definitively established, that, therefore, Ark Jewelers would not be able to utilize the labor certification certified for Gold N Fashion. Further, since the company was not the successor in interest company, that the tax returns for Ark Jewelers could not be used to show that the petitioner can pay the proffered wage.

On appeal, the petitioner submitted the same set of exhibit documents as it did with the second I-140 filing, referenced at length above, and contends that the Service Center erred in its determination that the petitioner was not the successor in interest to Gold N Fashion. We will review the documentation submitted and must determine whether the documents that the petitioner submitted demonstrate that the petitioner is the successor in interest and has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).⁷

Following an extensive review, one of the documents that we find to be key to determining what the parties agreed to is the "Mutual Agreement." Parts of the agreement provide:

⁷ The petitioner notes that the successor in interest concept has been defined through a series of "letters" and responses from CIS. The AAO views *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) as controlling. *See* Letter from [REDACTED] INS Director of Business and Trade Services in response to a query from J. Douglass Donenefeld (Oct. 17, 2001) (discussing the [former] INS position that a "company is a successor in interest when it has taken on all of the immigration-related liabilities of the company it has acquired, merged, etc.); *See* Letter from [REDACTED], INS Director of Business and Trade Services in response to a query from [REDACTED] (June 7, 2001); *see also* Letter from Efrén Hernández III, INS Director of Business and Trade Services in response to a query from [REDACTED] (March 22, 2001); *see also* Letter from [REDACTED] INS Director of Business and Trade Services in response to a query from [REDACTED] (Feb. 4, 2000); *see also* Letter from [REDACTED] INS Chief of Adjudications, Nonimmigrant Branch in response to query from [REDACTED] (Sept. 10, 1993); *see also* Memorandum from James A. Puleo, INS Acting Executive Commissioner, "Amendments of Labor Certifications in I-140 Petitions" (Dec. 1993).

"Ark is interested in acquiring the personal property and locations owned and managed by Gold . . . the parties hereto agree as follows:

1. Both parties agree that the Ark [sic] shall acquire the personal property owned and managed by Gold.
2. Both parties agree that the total value of the personal property owned and managed by Gold including all assets and liabilities settle at \$52,446.
3. Upon execution of this agreement, Gold shall release its interest on the security deposits, if any, paid for its retail locations and all ownership interest on it's [sic] kiosk equipment and fixtures.
4. Both parties agree that Ark shall be liable for the entire operation of the Gold retail operation from November 1, 2002. These operational duties shall include, but are not limited to, rent payments, hiring and firing employees, salaries of employees, management of the operations, purchasing of inventory, payment of taxes etc.
5.
6. Both parties agree that all profits and losses of the operation shall be borne solely by Ark and Gold shall not have any interest and/or liability on the operation.
7. ...
8. ...
9. This agreement shall be terminated at the occurrence of one of the following:
 - a. Upon successful transfer of the \$52,446.20 to Gold as stated in section 2
 - b. Upon breach of any term or condition of this agreement by either party....
 - c. Upon either party making an assignment for the benefit of creditors
 - d. Upon either party entering an order for relief or has such an order filed against it under Title II of the United States Bankruptcy Code, or either party has a trustee or receiver of any substantial part of its assets appointed by any court.

The agreement as written in sections one through six would provide for Ark assuming the assets, or what the parties state to be the assets, liabilities, and control over employees, which would likely establish a successor in interest situation. However, provision nine would appear to negate the entire agreement, that Ark is responsible for items one through six, until the \$52,446.20 is transferred to Gold, at which point, the agreement "terminates." Terminates would be read to mean "end" rather than "commence," or begin. Which as written, if the money were transferred, which the petitioner contends that it was, then the Mutual Agreement terminates, and Ark would no longer be in control of Gold N Fashion, its assets, or its employees, thus negating any successorship.

Further, we note that the Gold N Fashion December 31, 2002 balance sheet provides end of the year total assets as \$547,343.63. The agreement above would appear to only provide for the assumption of partial assets, and not all, or substantially all of the assets as required to demonstrate successorship. If the transaction occurred in the last quarter of the year, an unaudited consolidated 2003 statement might have been more persuasive to show that Gold N Fashion had no assets remaining.

In other documentation submitted, the Minutes of Gold N Fashion's Directors Meeting provide that the company wanted to execute a corporate reorganization under IRS Code 368 to incorporate a new company under North Carolina law, where Gold N Fashion's three retail sites were located to avoid the need to file Texas Franchise and Annual Reports in Texas that Gold N Fashion, as a Texas corporation was responsible for completing. The minutes provide:

1. Gold N Fashion will make a new corporation (Ark Jewelers) in the state of North Carolina.

2. The shareholders of Gold N Fashion will surrender all their shares to Ark Jewelers, Inc. This transaction will make Ark Jewelers, Inc. the owner of all assets and liabilities of Gold N Fashion, Inc. and will assume all the rights, duties, and obligations of Gold N Fashion, Inc. and carry on the jewelry business.
3. Then, Ark Jewelers will issue his own stocks to the Shareholders of Gold N Fashion Inc. (this transaction statutorily terminates Gold N Fashion's existence and transfer control back to the shareholders in the new corporation.

..... RESOLVED that the proposed reorganization plan be carried out after getting the written consent to such election from all shareholders of the corporation.

Provision three above implies that following the transaction, Gold N Fashion will no longer exist. We note that states frequently require corporations to dissolve. No evidence was provided to show that Gold N Fashion dissolved, has taken steps to dissolve, or that it was not bound by such a requirement, which would help demonstrate that the prior company has taken steps in accordance with the resolution, and further that all the assets and liabilities were acquired so that Gold N Fashion no longer exists. Further, according to a search of Texas state records, Gold N Fashion shows that under state law, the company's status is: "not in good standing," as opposed to dissolved. This suggests that: (1) Gold N Fashion is still in existence; and (2) Gold N Fashion has outstanding liabilities, which Ark Jewelers has not assumed.

Additionally, we note that the director found no evidence that Ark Jewelers paid the required \$52,446.20 to Gold N Fashion to obtain the assets and liabilities in accordance with the mutual agreement. The petitioner has failed to address this point on appeal, and has not demonstrated in any of the documentation submitted that Ark Jewelers actually transferred the agreement's required sum to Gold N Fashion.

Reviewing all the elements above, taken together, we cannot conclude that Ark Jewelers has demonstrated that it is the successor in interest to Gold N Fashion. On motion, should the petitioner make any future motions, the petitioner must: 1. document Gold N Fashion's current status, whether it is still in existence or retains any assets or liabilities; 2. document the actual transfer of assets, and that the number arrived at represents all, or substantially all of the assets, and 3. address the question of the "termination" language in provision 9 of the Mutual Agreement.

Further, the petition should also be denied based on the petitioner's failure to properly document that the beneficiary had the required work experience for the position offered in the certified Form ETA 750. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's

priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" states that the position requires three years of experience in the job offered, as a mold maker, with duties including: "Fabricate plaster molds of jewelry articles and trophy figurines, preparatory to casting metal molds. Mix plaster powder with water and pour around exposed half of model to form mold. Allow plaster to set, remove clay and model from plaster mold. Brush loose particles from mold, apply shellac to preserve mold and prevention of absorption of moisture, carving wax for model for casting the metal. Design, adjust the shape gold jewelry, engrave design into jewelry." The petitioner listed no educational requirements in Section 14, and listed no other special requirements for the position in Section 15.

On the Form ETA 750B, signed on November 4, 2005, the beneficiary listed that he worked as a Mold Maker for Agha Jewelers in Karachi, Pakistan from January 1987 to March 1990. The beneficiary additionally listed other experience as a mold maker in the U.S. for two other companies, and that his most recent position was as a Purchasing Manager for a wireless communications company in Missouri since the year 2000.

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 petitioner submitted a letter to document the beneficiary's work experience. The letter, signed by the "Managing Director" of Agha Jewelers, Karachi, Pakistan, provides that the beneficiary worked for the company from January 1987 to March 1990 as a mold makers [sic]. The letter is vague in that it does not state whether the position was full or part time. If the position were part time, the letter would be insufficient to document the required experience. The petitioner did not submit any other letters.

Accordingly, the petitioner has failed to meet the regulatory requirements, which state that the beneficiary must have met the requirements for 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). The petition should have been denied on this basis as well.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the record. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.



ORDER: The appeal is denied.