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

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 14 2007

SRC 05 056 50264

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

The petitioner is a jewelry and perfume retailer. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's June 28, 2005 denial, the director determined that the petitioner was not a successor-in-interest to the employer listed on the Form ETA 750, Application for Alien Employment Certification, submitted with the petition in the instant case and 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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.

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

The regulation 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 DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is $34,185.00 per year. The Form ETA 750 states that the position requires four years of experience in the job offered.

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 upon appeal.[1] On appeal, counsel submits a brief, a Mississippi Application for Privilege License for Parfum & Gift Inc., lease documents[2] for Metrocenter Mall in Jackson, Mississippi, a Bill of Sale, an asset purchase agreement between Fragrance N' Gift, Inc. and Perfum N Gift, Inc., Articles of Incorporation for Fragrance & Gift, Inc., Mississippi business licenses for Parfum & Gift Inc and Fragrance N Gift Inc, the previously submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for Parfum N Gift, Inc. for 2001, IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for Fragrance N Gift, Inc. for 2002, and the previously submitted IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for Fragrance N Gift, Inc. for 2003 and 2004. Other relevant evidence in the record includes a letter dated June 14, 2005 from [redacted], a letter dated November 10, 2004 from Parfum N Gifts, Inc. and excerpts from the Mississippi Secretary of State's website concerning the corporate filing status of Parfum N Gift, Inc. and the petitioner. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in January 1998, to have a gross annual income of $386,000.00 and to currently employ three workers. On the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that Fragrance N Gift, Inc. became the successor-in-interest to Parfum N Gift, Inc. in January 2002. Counsel asserts that the new business operates at the same location as the petitioner, that it is majority owned by the same owner and that it has assumed all of the assets and liabilities of the petitioner. Counsel further asserts that the petitioner's tax returns show net current assets in excess of the proffered wage in 2001, 2002, 2003 and 2004 and, therefore, the petitioner has established that it has the ability to pay the proffered wage.

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 determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it

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[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).

[2] This office notes that the Shopping Center lease dated December 20, 1999 lists Parfum and Gift, Inc., a Texas corporation, as the tenant. A search of the State of Texas business filings indicates that Parfum and Gift, Inc. is not incorporated in Texas. Further, the applicant on the Form ETA 750, Parfum N Gift, Inc., indicated in a letter dated November 10, 2004 submitted with the petition that it was incorporated in the State of Mississippi in 1998. The petitioner has not established that the tenant of the lease submitted for Parfum and Gift, Inc. is the applicant listed on the Form ETA 750.

employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 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 (7th Cir. 1983).

The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The petitioner on the I-140 submitted in this case is Fragrance 'N Gift, Inc. dba Parfume 'N Fashion. The applicant on the Form ETA 750 submitted in this case is Perfum N' Gift Inc dba Perfume N' Fashion.[3] On appeal, counsel asserts that Fragrance N Gift, Inc. became the successor-in-interest to Parfum N Gift, Inc. in January 2002. Counsel asserts that the new business operates at the same location as the petitioner, that it is majority owned by the same owner and that it has assumed all of the assets and liabilities of the petitioner. While the Asset Purchase Agreement and Bill of Sale indicate that the corporation Fragrance N Gift, Inc. purchased all of the assets and liabilities of the corporation Parfum N Gift, Inc. on January 1, 2002, the record is not clear as to whether the corporations listed on the Asset Purchase Agreement and Bill of Sale are the same corporations for which a successor-in-interest relationship is claimed in the instant matter. Therefore, the matter will be remanded to the director to determine the

[3] A search of the State of Mississippi business filings and a review of the excerpts submitted by the petitioner on appeal indicate that the petitioner was incorporated in Mississippi on January 24, 2002. The petitioner asserts that a successor-in-interest relationship was formed between the petitioner and Parfum N Gift, Inc. on January 1, 2002. However, a review of the State of Mississippi's corporate records indicates that the petitioner was not incorporated in Mississippi on January 1, 2002. *See* http://www.sos.state.ms.us/busserv/corp/soskb/csearch.asp (accessed February 2, 2007). Further, the petitioner's corporate status was dissolved in Mississippi on December 30, 2003 and its corporate status was not reinstated until May 11, 2005. Therefore, it appears that the petitioner was not incorporated in Mississippi at the time the Form I-140 was filed in this case. Additionally, a review of the State of Mississippi's corporate records indicates Parfum N Gift, Inc. was not incorporated in Mississippi until April 15, 2005. Therefore, it appears that the applicant on the Form ETA 750 was not incorporated in Mississippi at the time the Form ETA 750 was filed in this case. Parfum N Gift, Inc. indicated in a letter dated November 10, 2004 submitted with the petition that it was incorporated in the State of Mississippi in 1998. The tax return for Parfum N Gift, Inc. states it was incorporated on January 1, 1998. 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. 582, 591-592 (BIA 1988).

corporate identity and status of the applicant on the Form ETA 750 and the petitioner on the Form I-140,[4] to determine if the petitioner listed on the Form I-140 is the true successor-in-interest to the applicant listed on the Form ETA 750 and to determine if the tax returns submitted by the petitioner are the tax returns of the petitioner on the Form I-140 and the applicant on the Form ETA 750.[5]

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.[6] To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank

[4] For example, to the extent not already provided, the petitioner and the applicant may provide their certificates of incorporation, articles of incorporation, certificates of corporate good standing, corporate annual reports, business licenses, local and state tax filings, IRS Forms SS-4, Application for Employer Identification Number, IRS Forms 2553, Election by a Small Business Corporation, and any other evidence deemed relevant to the issue.

[5] For an S corporation, net income is generally the corporation's ordinary income (loss) from trade or business activities as reported on Line 21 of IRS Form 1120S. As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. This office notes that the 2001 tax return of Parfum N Gift, Inc. and the 2002, 2003 and 2004 tax returns of Fragrance N Gift, Inc. establish the ability to pay the proffered wage in the instant case based on the net current assets listed on the 2001, 2002 and 2003 tax returns and the net income listed on the 2004 tax return.

[6] 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).

High School	X
College	blank
College Degree Required	blank
Major Field of Study	blank

The applicant must also have four years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he received a high school certificate in Pakistan after two years of study from May 1988 to May 1990. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as a manager for [redacted] in Pakistan from July 1989 to July 1996. He also represented that he had been self-employed as a manager at Gold Creations in Alabama from August 1996 to the date he signed the Form ETA 750B on March 29, 2001. He does not provide any additional information concerning his employment background on that form.

Relevant evidence in the record includes a letter dated April 23, 2000 from [redacted] indicating that the beneficiary was employed as a store manager from July 1989 to July 1996. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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 letter fro does not indicate if the beneficiary worked full-time as a store manager from July 1989 to July 1996. If so, it is unclear how the beneficiary managed a retail store on a full-time basis and attended high school from July 1989 to May 1990. Further, the record does not contain evidence that the beneficiary completed high school. The matter will be remanded to the director to determine whether the beneficiary is qualified to perform the duties of the proffered position.

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 issues 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, which is to be certified to the AAO for review.