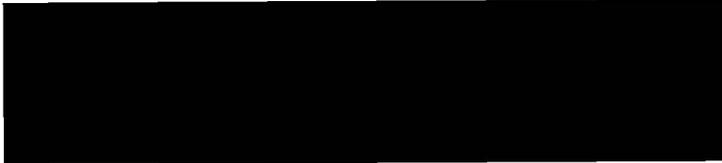




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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **NOV 19 2007**
SRC 05 237 51259

IN RE: Petitioner: [REDACTED]
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:



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 director, Texas Service Center, denied a previous employment-based preference visa petition (SRC 05 237 51259) for the beneficiary on August 10, 2005. The Administrative Appeals Office rejected the appeal for lack of jurisdiction since the petitioner lacked a valid labor certification. On August 25, 2005, the petitioner then submitted a motion to reopen/reconsider and also filed a new I-140 petition. The director granted the motion to reconsider and then subsequently denied it on April 11, 2006. On August 29, 2006, the director denied the instant petition. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a wholesale and retail jewelry company. It seeks to employ the beneficiary permanently in the United States as a jeweler. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The AAO will describe below the procedural history of this matter.

On June 9, 2003, the director denied the petitioner's initial I-140 petition because the Form ETA 750, Part A, that accompanied the petition, indicated a Laurel, Maryland address for the place of work, while the I-140 petition indicated that the beneficiary would work for the petitioner in Atlanta, Georgia. The director concluded that if the beneficiary worked in Maryland, the beneficiary would be outside the work area stipulated on the Form ETA 750. The director cited *Matter of Sunoco Energy Development Company*, 17 I&N Dec. 283, (BIA 1979) for the proposition that the petitioner may not change the area of intended employment. The director stated that, pursuant to 20 C.F.R. § 656.30 (c)(2), a labor certification is only valid for the particular job opportunity for the area of intended employment stated on the Form ETA 750, and that the term "area of intended employment" means within the normal commuting distance of the address of intended employment. The director then determined that the Form ETA 750 accompanying the petition was not valid and denied the petition accordingly.

On June 16, 2005, the petitioner then submitted a motion to reopen and reconsider the petition, and stated it had amended the I-140 petition to reflect the Laurel, Maryland work address. The director did not consider the motion, but rather submitted the matter to the Administrative Appeals Office (AAO) as an appeal. On August 10, 2005, the AAO subsequently rejected the matter on appeal for lack of jurisdiction. The AAO stated that the director had erroneously determined that an appeal was available for the prior denial, but that when the denial of a petition was based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act, no appeal was available. The AAO cited 8 C.F. R. § 203.1(f)(3)(iii)(B). The AAO also noted that authority to invalidate labor certifications was delegated to CIS by DHS Delegation Number 0150.1(X), Pub. L. 107-296 (effective March 1, 2003).

On August 29, 2005, the petitioner filed a motion to reopen and reconsider the petition, submitting its tax return for the year 2003 and financial statement for tax year 2004. The petitioner also submitted copies of the petitioner's business licenses for the years 2004 and 2004 for the Laurel, Maryland work place. On April 11, 2006, the director granted the motion and then dismissed the motion, stating that the petitioner had filed an amended I-140 to show the petitioner's work location as Laurel, Maryland, along with its copies of state of Maryland business licenses. The director stated that the petitioner must establish eligibility at the time of filing and that the petitioner may not make a material change to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. The director noted that changing the beneficiary's work location listed on the I-140 petition constituted a material change. In her decision, the director stated that there was no appeal from this decision; however, the petitioner could file a motion to reopen or reconsider under 8 C.F.R. §103.5.

The petitioner also submitted a new I-140 petition to the director on August 29, 2005 with copies of the petitioner's Form 1120 for tax years 2001 and 2003; the petitioner's unaudited financial statement for January through December 2004; Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return for its 2004 tax return; and copies of state of Maryland business license for Gold Country Inc. Waldin Jewelers, Atlanta, Georgia and Gold Country Inc. Waldin Jewelers, Laurel, Maryland for the years 2004 and 2005. On the new I-140, the petitioner indicated that the beneficiary's work place was located at Waldin Jewelers, 14714 Baltimore-Washington Boulevard, Laurel, Maryland.

The director then issued a request for further evidence dated April 11, 2006. The director asked that the petitioner clarify if it owned stores located both in Atlanta, Georgia, and Laurel, Maryland, and requested copies of the petitioner's trader's licenses for the Maryland store for the years 2001, 2002, and 2003. The director also requested evidence of payment to employees by the Maryland store from the priority date to the present; a copy of the petitioner's 2004 and 2005 tax returns; copies of all W-2 forms issued by the petitioner from 2001 to 2005; and copies of the beneficiary W-2 Wage and Tax Statements for tax years 2001 to 2005.

The director also asked that the petitioner submit evidence that definitively established the beneficiary intended to work in Laurel, Maryland if the beneficiary has worked for the petitioner in Atlanta, Georgia and lived in Georgia. The director also noted that the Form ETA 750, Part B, signed by the beneficiary in 2003, indicates he would live in Atlanta, Georgia¹ and that the proffered job was in Atlanta, Georgia. Finally the director asked with regard to the corporate structure of the petitioner and whether there was an familial relationship between the owners, stockholders, partners, corporate officers, incorporators and the beneficiary. The director also asked whether the person identified on the Form ETA 750, namely [REDACTED] had an ownership interest in the petitioner, and whether there was a familial relationship between the petitioner's owners, stockholders, partners, corporate officers, incorporators and [REDACTED]

In response, counsel stated that the petitioner owned several jewelry stores, both in Laurel, Maryland, and in Atlanta. Counsel submitted business trader licenses for the Laurel store for the years 2001 to 2005.³ Counsel also submits two Business Tax Registration Certificate from the City of Atlanta, Georgia for a business named Gold-N-Diamonds, Inc. located at 250 Spring Street, NW 6E, 320, Atlanta, Georgia, for 2005 and 2006.

With regard to W-2 forms, the petitioner submitted W-3 Transmittal of Wage and Tax Statement for 2001 for Gold Country, Inc. located at 250 Spring Street N.E., Suite 6E320, Atlanta, Georgia. This form indicates that Gold Country, Inc. has an Employer Identification Number (EIN) of [REDACTED]. Seven employees were identified, as follows: [REDACTED] with residence in Landover, Maryland; [REDACTED] Adelphi, [REDACTED] Greenbelt, Maryland; [REDACTED], [REDACTED], [REDACTED]

¹ The Form ETA 750, Part B, identifies the beneficiary's place of residence as Lawrenceville, Georgia.
² Mr. Baja was the original beneficiary noted on the Form ETA 705. The current beneficiary was substituted for the original beneficiary. The record contains a Form ETA 750, Part B with the beneficiary's biographic and educational information. Part B does indicate that the beneficiary's work site will be Gold-N-Diamonds d/b/a Gold Country, Inc., 250 Spring Street, Suite 6E-320, Atlanta, Georgia.
³ All the business licenses are in the name Gold Country, Inc, although the licenses for 2001 and 2002 simply identified the Laurel store and address. The 2003 and 2004 trading licenses identify both the [REDACTED] name and address, as well as the Atlanta address for Waldin Jewelers Gold Country, Inc. at 250 Spring Street, N.W. Suite 6G 320. The 2005 trader license identifies the Atlanta office as Gold Country, Inc., Waldin Jewelers, Atlanta, Georgia, 250 Spring Street, N.W. 6E 320, Atlanta, Georgia.

Riverdale, Maryland; [REDACTED] Gaithersburg, Maryland, and [REDACTED], Landover, Maryland. The W-3 Form for tax years 2002, 2003, 2004 and 2005 predominately listed employees with residences in Maryland, although the W-2 Forms for tax years 2001, 2001, 2002, 2004, and 2005 listed at least one person residing in South Carolina or Georgia.

Counsel also submitted a copy of the Gold-N-Diamonds, Inc. unaudited profit and loss account for January to December 2005, and a Form 1120 tax return for Gold-N-Diamond, Inc. for tax year 2004. Counsel also submitted a letter from Gold-N-Diamond, Inc. president, [REDACTED]. In his letter dated May 15, 2006, [REDACTED] stated that the beneficiary would be employed in the Laurel, Maryland store and that his address there would be 1902 Fox Street, Apt. 204, Adelphi, Maryland. [REDACTED] then requested that the beneficiary's address on Form ETA 750, Part B be amended to read [REDACTED] Adelphi, Maryland. [REDACTED] stated that the reason for not showing a definitive address in the Form ETA 750 was that it took several years to process the application and that the petitioner wanted to make sure that the beneficiary will be available to take the job and until then the beneficiary would not be assigned to a specific location. [REDACTED] stated that with regard to the original beneficiary identified on the Form ETA 750, he decided to leave the United States and return to his home country, and that another employee for whom the petitioner had obtained an approved I-140 petition, decided to leave the petitioner's employment.

On June 8, 2006, the director issued a second RFE, stating that the labor certification on which the petition was based was invalidated in a decision issued by CIS on June 8, 2003 and thus the instant petition was not supported by a valid labor certification. The director requested that the petitioner submit a valid original, certified Form ETA 750 or Form ETA 9089.

Counsel responded to the director's RFE on June 13, 2006. In response counsel stated that the director's decision dated June 9, 2003 did not invalidate the labor certification, but rather merely determined that the beneficiary was not going to be employed in the area of intended employment as certified by the DOL. Counsel states that the June 2003 decision stated "Therefore, it must be adjudged that the individual labor certification accompanying this petition (emphasis added by counsel) is not valid."

Counsel described the petitioner as a Georgia corporation with locations in several states, and that the petitioner failed to show the address on the Form I-140 petition, Part 6, of its Laurel, Maryland store. Counsel noted that since CIS would not allow the petitioner, by a motion to reopen or reconsider, to correct the discrepancy in the employment addresses, the petitioner filed the instant petition. Counsel also asked the director to note that the AAO rejected the petitioner's appeal, rather than denied it because it determined that the AAO does not have jurisdiction over the matter except when the denial of the petition is based upon lack of a certification.⁴ Counsel also noted that 20 C.F.R. § 656.30, in pertinent part, states that after issuance of a labor certification, the labor certification is subject to invalidation by the DHS upon a determination of fraud or willful misrepresentation of a material fact involving the labor certification application. Counsel states that no such determination had been made with the instant petition. Counsel further stated that the labor certification submitted with the instant petition remained valid for the intended area of employment, which the petitioner had shown on Part 6, #4, on the new Form I-140.

⁴ Counsel misquoted this part of the prior AAO decision to reject the appeal of the initial I-140 petition filed for the beneficiary. Contrary to counsel's assertion, the AAO has jurisdiction over appeals for denial of employment-based immigrant visa classifications except for appeals that are denied for lack of a valid certification. (Emphasis added.)

As previously stated, on August 29, 2006, the director denied the petition. In his decision, the director cited *Matter of Sunoco Energy Development Co.*,¹⁷ I&N Dec. 283 (BIA 1979) that states a labor certification involving a specific job offer is valid only for the particular job opportunity and for the area of intended employment stated on the labor certification form. The director stated that when an alien's admissibility is based in part on issuance of a labor certification under 29 C.F.R. 60.2 and 60.7, Schedule A,⁵ the alien's intention to pursue the certified job or profession at the time of entry controls the validity of the labor certification. The director noted that such an alien professional must have a bona fide intention of engaging in the practice of the profession at least in the foreseeable future, and cited *Matter of Kuo*, 15 I&N Dec. 650, Int. Dec. 2487(1976).

As set forth in the director's August 29, 2006 denial, the primary issue in this case is whether or not the petitioner has established that the ETA 750 submitted to the record is valid for the place of employment identified on both the second I-140 and on the original Form ETA 750. The director determined that the Form ETA 750, Part B, filed for the substituted beneficiary with the original petition and also with the instant petition, indicated that the beneficiary would live in Lawrenceville, Georgia and work in Atlanta, Georgia, although the newly submitted I-140 petition indicated that the beneficiary would work in Laurel, Maryland. The director determined that the workplace identified on the I-140 petition as where the beneficiary would perform skilled labor was not within the area of intended employment certified by the Department of Labor (DOL) on the Form ETA 750. Therefore the director determined that the individual labor certification document was not valid for purposes of the instant petition.

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 for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). It seems that the petitioner intends to employ the beneficiary as a jeweler, in Atlanta, Georgia, outside the terms of the Form ETA 750. See *Sunoco Energy Development Company*, 17 I &N Dec. 283 (BIA 1979).

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 appeal⁶. On appeal, counsel submits

⁵ The AAO is not clear as to why the director included these regulatory cites in his decision.

⁶ 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).

a brief. Beyond the materials described above, the record does not contain any other evidence relevant to the validity of the Form ETA 750 submitted to the record for the instant petition.

On appeal, counsel states that the sole issue in the matter is whether the petition before CIS can be denied on the basis of information in a previously denied petition. Counsel states that CIS is in error in disregarding the documentation submitted with the I-140 petition, the responses to two requests for evidence, and the statement made by the petitioner.

The AAO notes that counsel is correct in his assertion that the Form ETA 750 submitted to the record has not been invalidated. The record does not contain any invalidated Form ETA 750 document, nor has the director explicitly invalidated the labor certification in either the decision made in the original I-140 petition or in the instant petition. Nonetheless, the information contained on the Form ETA 750 which includes the Part B filled in by the substituted beneficiary is part of the Form ETA 750. As the director correctly notes the substituted beneficiary indicated that he would be working in the petitioner's Atlanta office. Thus, the record still remains inconsistent with regard to the Laurel, Maryland job location identified on the instant I-140 and the beneficiary's statement on the Form ETA 750, with regard to the proffered job being located in Atlanta, Georgia. Although the AAO notes that the director could have pointed this fact out to the petitioner at the time the initial I-140 petition was adjudicated, it is the burden of the petitioner to submit both a I-140 petition and a Form ETA 750 that contain consistent information with the actual place of employment.

This necessary consistency goes to the principal purpose of the labor certification. As previously stated, a labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Although the petitioner has provided further documentation as to the petitioner's financial circumstances and has responded to the director's request for further evidence as to its ability to pay the proffered wage, it seems that the petitioner intends to employ the beneficiary as a jeweler, in Atlanta, Georgia, outside the terms of the Form ETA 750. To date, the beneficiary's intended place of employment as indicated on Part B, of the Form ETA 750 is Atlanta, Georgia, and his intended place of residence is Lawrenceville, Georgia. While the petitioner's owner asserts that the beneficiary will work in Laurel, Maryland, at the time of the filing of the original Form ETA 750, the documentary evidence submitted to the record indicated that the beneficiary would work in Atlanta, Georgia. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (BIA 1979).

While the AAO concurs with counsel that the Labor Certification has not been invalidated, it notes that the Form ETA 750, Part B, still does not fully correspond to the job location now presently indicated on the new I-140 petition, and on Form 750, Part A. Thus, the Form ETA 750 remains not valid for the position presently being sought by the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the record with regard to the variance between employment locations as indicated on the Form ETA 750, Parts A and B. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.