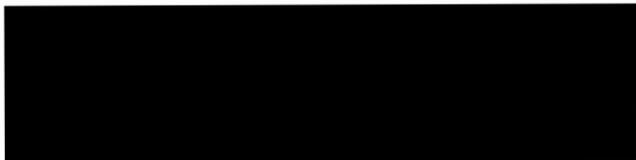


identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



B6

FILE: [REDACTED]
LIN 04 063 51170

Office: NEBRASKA SERVICE CENTER

Date: JUN 25 2007

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 preference visa petition was initially denied by the Director, Nebraska Service Center. Upon further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The matter is now before the AAO on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is an automotive mechanics firm. It seeks to employ the beneficiary permanently in the United States as an automotive mechanic assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that the beneficiary met the minimum requirements for the visa classification sought, and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that the petitioner has demonstrated that the beneficiary has met the requirements of the visa classification sought and that the director should have issued a request for additional evidence.

The record indicates that this Immigrant Petition for Alien Worker (I-140) was filed on January 2, 2004. It is the second I-140 filed by the petitioner for this beneficiary.

The first I-140 (LIN 02 022 54835) was denied by the director following the petitioner's response to the director's motion to reopen and notice of intent to deny. Upon subsequent appeal, the AAO has remanded that case to the director for further investigation. That decision is incorporated herein for further reference because this case will be remanded based on the same reasons. A copy of that (LIN 02 022 54835) decision will be provided with this one.

The petitioner, through counsel, has requested oral argument. Counsel asserts that the director has denied the petition in bad faith and that oral argument may provide necessary answers. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, as this case will be remanded as well as the petitioner's earlier case (LIN 02 022 54835), the question of oral argument is premature. Consequently, the request for oral argument is denied.

Section 203(b)(3)(A)(i) of 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(l)(3) further 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 regulation at 8 C.F.R. § 204.5(g)(2) also 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 that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also establish that it has had a continuing financial ability to pay the proffered wage beginning at the priority date and continuing until the present. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 16, 2001. The proffered wage is stated as \$12.00 per hour or \$24,960 per year. The ETA 750B, signed by the beneficiary on April 10, 2001, does not indicate that he has worked for the petitioner.

Part 5 of this I-140, indicates that the petitioner was established October 7, 1998, has a gross annual income of \$174,436 (2002), a net annual income of \$6,030(2002) and currently employs "3+" workers.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that two years of training in auto mechanics and two years of experience as an automotive mechanic assistant is required for the certified job.

In support of the beneficiary's qualifying two years of training, the petitioner provided a copy of a "Graduation Certificate" with a corresponding translation, issued by "The Higher Industrial Technology Institute" of Tripoli, Libya. The certificate's date is "12 27 2003." It is unclear why the translation is dated November 11, 2003. It states that the beneficiary, [REDACTED], of Libyan nationality has finalized his studies in the field of Mechanical Engineering/Car mechanics, and has obtained the Higher Diploma from the Higher Industrial Technology Institute during Fall Semester for the studious year 1993." The petitioner has also provided copies of English translations of grade transcripts for [REDACTED], student no [REDACTED]. These grade transcripts indicate that the beneficiary attended this school in 1991, 1992 and the spring of 1993. Along with these

documents, the petitioner has submitted a credential evaluation report, dated April 5, 2001, from World Education Services (WES). The author of the report is not shown. The credential evaluation indicates that the beneficiary obtained a "Higher Diploma" in 1993 in Automotive Mechanics at the Higher Industrial Technology Institute in Libya that is the U.S. equivalent to an associate's degree.

In support of its continuing ability to pay the proffered wage of \$24,960 per year, the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 and 2003, as well as the beneficiary's Wage and Tax Statement (W-2) for 2002 issued by the petitioner, copies of the first three quarters of its Employer's Quarterly Federal Tax Return(s) (Form 941) for 2003, and copies of its bank statements for April 30, 2001 through November 28, 2003.

On March 1, 2005, the director denied the petition. The director noted that on part 14 and 15 of the labor certification, that the prospective employee was to have at a minimum, "2 years of experience in the job offered." The director noted that a previous petition had been denied on August 26, 2003, because the U.S. Department of State had determined that The Higher Industrial Technology Institute did not appear on an official list of Libyan schools and did not appear to exist.

On appeal, counsel asserts that the director should have issued a request for evidence in accordance with guidelines set forth in a *Memorandum by William R. Yates, Associate Director of Operations*, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)" (February 16, 2005), (hereinafter "Yates Memorandum"), which had rescinded an earlier memo from May 4, 2004. Counsel contends that if the evidence raised an issue of underlying eligibility, then the director should have issued a request for additional evidence or a notice of intent to deny.

The AAO concurs that the director should have issued either a request for additional evidence pursuant to 8 C.F.R. § 103.2(b)(8) or a notice of intent to deny, but for different reasons. At the outset, it is noted that the director mischaracterized the basis of the beneficiary's disqualification as failing to obtain two years of qualifying experience rather than failing to demonstrate two years of training. This case will be remanded because, as subsequently determined in LIN 02 022 54835, the school's existence was acknowledged, but the authenticity of the beneficiary's documents have been questioned. Further, it is noted that this case lacked development of the evidence necessary to establish the petitioner's continuing ability to pay the proffered wage relevant to the period subsequent to 2002 and an articulation of the director's decision on this issue. The additional reasons for remand presented in the AAO's decision in LIN 02 022 54835 also apply in this case. They were stated as follows:

That said, we find that the director's overseas inquiry into the quality of the beneficiary's evidence, relating to his attendance at The Higher Industrial Technology Institute, was justified. Although there is no documentation that supports the beneficiary's theory presented in his affidavit as to the possible reason why his brother's alleged efforts to obtain proof of the beneficiary's attendance were not fruitful, we also note that, as counsel points out, the DOS investigation did not establish what method of inquiry was used, who was contacted, title of person contacted, or what records were examined to determine that the beneficiary's documents were likely counterfeit. Given the initial error of

doubting the existence of the institution, it is concluded that the case will be remanded in order to solicit a DOS reassessment of the authenticity of the beneficiary's educational documents and provide a more complete description of the investigation conducted.¹

* * *

Finally, it is observed that the record indicates that the petitioner's sole shareholder is the uncle of the beneficiary (as well as the brother, "Emad"). Because this raises a question as to the underlying validity of the labor certification, the case will be remanded for the purpose of soliciting an advisory opinion from the Department of Labor. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).²

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation consistent with this opinion and request any additional evidence from the petitioner pursuant to the requirements of section 203(b)(3)(A)(i) of the Act. 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 consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

¹ The petitioner's information as the address and official to be contacted should also be provided to the DOS.

² In *Matter of Silver Dragon Chinese Restaurant*, the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful, job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [CIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.