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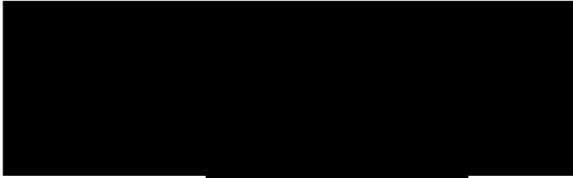
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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**MAR 18 2010**

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER  
LIN 07 006 51998

Date:

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)

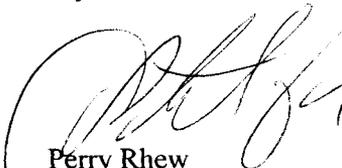
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a container servicer. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by Form ETA 750, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish that the beneficiary had the requisite experience as of the date the labor certification was filed. 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.

As set forth in the director's October 27, 2007 denial, the issue in this case is whether or not the beneficiary had the required experience as of the date that the labor certification was filed.

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. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification, filed on October 27, 2003, as of the petition's filing date, which is October 5, 2006.<sup>1</sup> *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

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<sup>1</sup> The beneficiary shares the same surname as the petitioner's owner. While the name may be common, the prospective employee's relationship to the shareholder is a material fact to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her familial relationship constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 CFR § 656.30(d). *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

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 Summart 374*, 00-INA-93 (BALCA May 15, 2000). The petitioner must address this point in any further filings.

(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

(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 regulations for the skilled worker classification contain a minimum requirement that the position require two years training or experience. The Form ETA 750 requires two years of experience in the job offered and does not provide for experience in any related occupation. Specifically, the Form ETA 750 states that the worker must be able “[t]o service and repair engines in forklifts and 2 ½ ton trucks which are used for transporting bulk containers. Diagnoses and troubleshoots engines. Repairs using technical manuals and experience. Maintains engine for peak performance.” Section 15 states the special requirements as “metric/standard wrenches, screwdrivers and ratchets/sockets” required.

Initially, the petitioner submitted an undated letter from [REDACTED] stating that the beneficiary worked for him from February 19, 1995 to May 17, 1997 “service[ing] and repair[ing] engines in forklifts and 2 ½ ton trucks which are used for transporting bulk containers. Diagnoses and troubleshoots engines. Repairs using technical manuals and experience. Maintains engine for peak performance.” As the language in [REDACTED]’s letter was exactly the same as the requirements contained on the ETA Form 750, the director requested additional evidence. See 8 C.F.R. § 103.2(b)(8) (allowing the director to request additional evidence in instances “where there is no evidence of ineligibility, and initial evidence or eligibility information is missing.”). The Request for Evidence (“RFE”) dated July 16, 2007 requested verification for the information contained in [REDACTED]’s letter including “payroll records, tax returns . . . tax withholding documents or any other official government or personnel documentation.” In response, the petitioner submitted a second letter from [REDACTED], dated July 20, 2007 re-affirming the dates of the beneficiary’s employment; this letter was notarized. The letter stated that the beneficiary was paid in cash and was not accompanied by any documentation. In a Notice of Intent to Deny (“NOID”) dated August 17, 2007, the director acknowledged the receipt of [REDACTED]’s second letter and again stated the need for the additional corroborating evidence as listed in the RFE. In response, the petitioner submitted an affidavit from the beneficiary and an affidavit from [REDACTED]. The beneficiary’s affidavit, dated September 7, 2007, states that he worked for [REDACTED] from February 19, 1995 to May 17, 1997 and that [REDACTED] has since gone out of business and that he has no contact information for the former owner of the Shop.<sup>2</sup> The affidavit from [REDACTED] states that the beneficiary worked at [REDACTED]

<sup>2</sup> On appeal, counsel cites the BIA decision of *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989), for

Mechanic Shop from February 1995 to May 1997 and that the beneficiary was a co-worker of the now defunct shop. 8 C.F.R. § 204.5(l)(3)(ii)(A) specifies that letters verifying experience must come from trainers or employers, not co-workers such as [REDACTED] or from the beneficiary himself. Counsel explained in the accompanying letter that no official documentation was available because the shop went out of business. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The beneficiary's affidavit states that he is unable to make contact with anyone from [REDACTED], however, his affidavit is dated September 7, 2007, which is dated seven weeks after the last correspondence from [REDACTED]. Based on the short time period between the two dates, this raises doubts in the evidence submitted. In addition, although the beneficiary stated that he worked with [REDACTED] from 1995 to 1997, he provided a receipt dated June 20, 2006 as proof of his employment. [REDACTED] cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. "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 (BIA 1988). The evidence submitted is insufficient to establish the beneficiary's experience at [REDACTED]. The evidence submitted from [REDACTED] is otherwise lacking in that it does not specify whether the beneficiary was employed in a full-time or part-time position so that we are unable to determine whether the beneficiary has a full two years of experience. Additionally, nothing confirms that the beneficiary had prior experience using the tools specified in block 15 of the labor certification.

The petitioner also submitted a letter from [REDACTED] which states that the beneficiary worked as a mechanic for the company from December 11, 1992 to

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the proposition that the beneficiary's affidavit establishes by a preponderance of the evidence the truth to his having worked for [REDACTED]. In evaluating the evidence, *Matter of E-M* stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition. In this case, the director articulated specific doubts concerning the evidence twice to the petitioner, allowing for the petitioner to submit additional evidence. The evidence from the petitioner did not overcome the director's stated concerns.

January 23, 1995. This letter does not state whether the beneficiary was employed in a full-time or part-time capacity as required by 8 C.F.R. § 204.5(l)(3)(ii)(B). The AAO further notes, as the director did, that the beneficiary did not indicate on the Form ETA 750 that he worked for Wayside Industries. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). As a result, we are unable to conclude that the beneficiary had the requisite experience in the job offered at the time that the labor certification was filed.

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.