

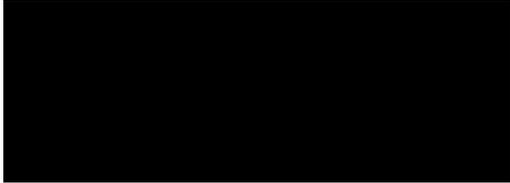
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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 043 55078 Office: CALIFORNIA SERVICE CENTER Date: JAN 05 2005

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a business engaged in the sale and servicing of air conditioning and heating systems. It seeks to employ the beneficiary as an electrical/electronics engineer and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the proffered position is not a specialty occupation and, even if it were, the beneficiary is not qualified to perform the services of a specialty occupation. On appeal the petitioner notes that a previous nonimmigrant visa position for the same position was approved and asserts that the beneficiary has the requisite experience and educational degrees to perform the job.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), provides that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such

licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's notice of appeal (Form I-290B) and supporting letter. The AAO reviewed the record in its entirety before issuing its decision.

As listed in the Form I-129 and the petitioner's response to the RFE, the duties of the proffered position are to install, service, repair, and maintain heating and air conditioning equipment, to conduct estimates in the plant and at job sites, to sell the subject equipment, to drive a service truck, and to train assistants on the job. The record shows that the beneficiary has received a number of vocational certificates in his native Mexico from industry and educational organizations, as well as private businesses, attesting to his completion of various engineering and technical training courses.

The director found that the duties of the proffered position reflected the duties of electrical and electronic installers and repairers, as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, for which a baccalaureate degree, according to the *Handbook*, is not required. The director determined that the position did not meet any of the regulatory criteria for classification as a specialty occupation. The director also found that the beneficiary was not qualified to perform the services of a specialty occupation because he possessed neither a baccalaureate or higher degree in a specialty occupation, nor training or experience equivalent thereto, nor a state license authorizing him to practice a particular specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered by CIS are whether the *Handbook* indicates a degree is required by the industry; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal the petitioner did not submit any additional evidence on the issue of specialty occupation. Upon review, the AAO determines that the proffered position is more precisely described in the *Handbook* entry for heating, air-conditioning, and refrigeration mechanics and installers. Like electrical and electronic installers and repairers, heating and air conditioning mechanics and installers do not require a bachelor's degree for entry into the occupation. According to the *Handbook*, 2004-05 edition, at page 552, employers prefer to hire individuals with technical school or apprenticeship training, though many employees learn their trade through on-the-job experience. In any event, a baccalaureate or higher degree in the specialty area is not required. Therefore, the proffered position does not meet the first alternative criterion of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner does not normally require a specialty degree or its equivalent for the position because the beneficiary, who has no degree, was previously hired. Thus, the proffered position does not qualify as a specialty occupation under the alternative criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has provided no evidence that the proffered position is so complex or unique, or that the specific duties described by the petitioner are so specialized or complex, as to require the knowledge and services of an individual with a baccalaureate or higher degree in the specialty area. Thus, the position does not meet the alternative criteria of a specialty occupation in 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4). Nor has the petitioner demonstrated that a specialty degree is common to the industry in parallel positions among similar organizations, which is another prong under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) to establish a specialty occupation.

Thus, the record does not establish that the proffered position is a specialty occupation.

With respect to the beneficiary's qualifications to perform the services of a specialty occupation, the petitioner asserts on appeal that the beneficiary "has vast experience as well as educational degrees to fulfill [the services of the proffered] position." The beneficiary's educational degrees, however, are not baccalaureate or higher degrees from an academic institution. Rather, they are a series of vocational training certificates. That sort of educational background does not qualify the beneficiary to perform the services of a specialty occupation. More specifically, they do not meet the criteria of a baccalaureate or higher degree in a specific specialty, set forth 8 C.F.R. § 214.2(h)(4)(iii)(C)(1) and (2), to qualify the beneficiary to perform the services of a specialty occupation.

Nor does the beneficiary meet the alternative criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(3) because there is no evidence that he holds a license from the State of California to practice a specialty

occupation, or that his line of work demands any such license. Finally, the beneficiary does not meet the alternative criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) because the record does not demonstrate that the beneficiary has education, specialized training, and/or progressively responsible experience equivalent to the completion of a U.S. baccalaureate degree in the specialty.

Thus, the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation.

The petitioner points out in the appeal that a previous H-1B petition for the beneficiary was approved for the same position. Notwithstanding the prior approval, the current petition to continue the beneficiary's H-1B classification cannot be approved unless the record establishes current eligibility. If the previous petition was approved based on the same evidence as that contained in the current record, the approval would constitute clear error on the part of the director. The AAO is not required to approve applications or petitions in which eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). CIS is not obliged to treat acknowledged errors as binding precedent. *See Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if the service center director approved the H-1B petition on behalf of the beneficiary, the AAO would not be bound to follow that decision. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b), and 8 C.F.R. § 214.2(h)(1)(ii)(B). For the reasons discussed above, the petitioner has not established that the beneficiary will be performing services in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.