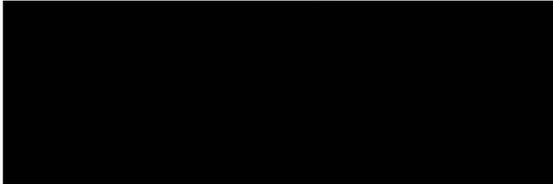




U.S. Citizenship
and Immigration
Services

U

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



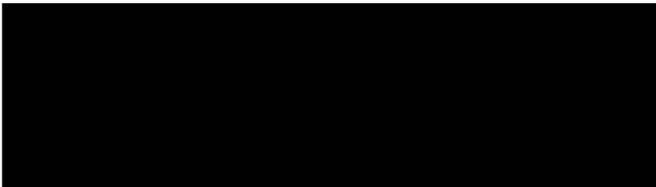
FILE: WAC 03 008 52600 Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2006**

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:



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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner provides commercial refrigeration and installation services. It seeks to employ the beneficiary as a mechanical engineer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

Pursuant to 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.

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

The petitioner is seeking the beneficiary's services as a mechanical engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 23, 2002 letter in support of the petition; and the

petitioner's response to the director's request for evidence. According to the petitioner's September 23, 2002 letter, the beneficiary would perform duties that entail: overseeing installation to ensure that machines and equipment are installed and functioning according to the client's specifications; inspecting, evaluating, and arranging field installations and recommending design modifications to eliminate machine and system malfunctions; investigating equipment failures and difficulties, diagnosing faulty operation, and making recommendations to maintenance crew; conferring with company personnel and engineers to implement operating procedures, resolve system malfunctions, and provide technical information; "select[ing] tools to meet client's specifications, using manuals, drafting tools, and computer and specialized computer programs"; conducting experiments to test and analyze existing designs and equipment in order to obtain performance data on products; preparing reports of test results; testing the ability of machines; and altering and modifying machine design to obtain specified functional and operational performance. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in mechanical engineering.

The director found that the proffered position was not a specialty occupation because the job is not a mechanical engineering position; it is a technician who installs air-conditioning and refrigeration systems. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of a mechanical engineer, and is not a technician position. Counsel states further that the proposed duties, which entail developing, designing, and testing systems, are so complex as to require a person with training in mechanical engineering. Counsel also states that the proffered position is a request for an extension of status for the same position with the same duties and, therefore, the director should not have "re-adjudicated" the petition.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a mechanical engineer, a position that is found primarily in the manufacturing industry, and whose duties entail researching, developing, designing, manufacturing, and testing tools, engines, machines, and other mechanical devices. The petitioner has not demonstrated that the proposed job duties entail the level of responsibility of this occupation. It is noted that the business information the petitioner filed with the State of California describes the nature of the petitioner's business as "refrigeration repair." Although counsel and the petitioner assert that the proposed duties

entail building and design duties, the record contains no evidence that the petitioning entity engages in the design and building of air-conditioning systems. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A review of the Heating, Air-Conditioning, and Refrigeration Mechanics and Installers job description in the *Handbook*, 2006-2007 edition, confirms the accuracy of the director's assessment to the effect that the job duties parallel the responsibilities of a technician.

The *Handbook* states:

Technicians must be able to maintain, diagnose, and correct problems throughout the entire system. To do this, they adjust system controls to recommended settings and test the performance of the entire systems using special tools and test equipment.

Advancement usually takes the form of higher wages. Some technicians, however, may advance to positions as supervisor or service manager.

No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for heating, air-conditioning, and refrigeration mechanics and installers jobs.

Counsel's comment that the proffered position is a request for an extension of status for the same position with the same duties and, therefore, the director should not have "re-adjudicated" the petition is noted. A review of the record, however, finds that the instant petition is a request for new employment and that the beneficiary's current nonimmigrant status is B-2 visitor for pleasure. Again, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, it must be emphasized that that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is not required to approve applications or petitions where 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for mechanical engineers. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements are for mechanical engineers in the manufacturing, amusement park, and hearing aid industries. Further, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties

described for the advertised positions, such as: designing and drafting customized mechanical products using AutoCAD; performing concepts, mock-ups, design, ergonomics, layout, and stress analysis; and managing the design processes for implanted medical device products. Thus, the advertisements have no relevance.

The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As the proffered position is newly created, the petitioner, therefore, has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 sustained that burden.

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