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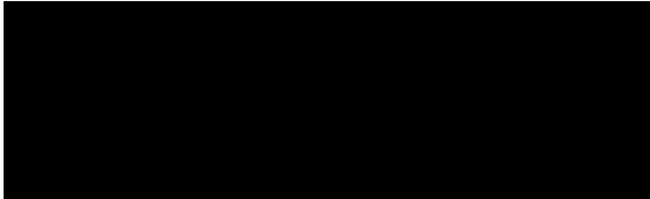
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U.S. Citizenship
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FILE: WAC 04 137 54185 Office: CALIFORNIA SERVICE CENTER Date: AUG 20 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center 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 is a helicopter business that offers a variety of services including flight training, charter tours, and aerial photography. It seeks to employ the beneficiary as a “mechanical engineer/aviation.” The petitioner, therefore, endeavors to classify the beneficiary 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 because the proffered position is not a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a 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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary’s services as a “mechanical engineer/aviation.” Evidence of the beneficiary’s duties includes: the petitioner’s April 9, 2004 letter in support of the petition and counsel’s April 30, 2004 response to the director’s request for evidence. As stated by counsel, the proposed duties are as follows:

Mechanical Design (40%) – [The beneficiary] will perform mechanical design and generate drawings for the modification of flight test aircraft. His designs will include the installation of transducers, data system components, and special instrumentation for a variety of flight test requirements. The position requires experience with both aircraft structural and mechanical systems modifications;

Application of Engineering Principles (20%) – [The beneficiary] will apply his diversified knowledge of engineering principles and practices in specific technical areas of assignments and related fields. He will make decisions independently on engineering problems and methods, and represent the organization to customers and suppliers to resolve important issues and to plan and coordinate work. [The beneficiary] will require the use of advanced techniques and the

modification and extension of theories, precepts, and practices of a specified field and related sciences and disciplines;

Planning, Developing & Coordinating (20%) – [The beneficiary] will plan, develop, coordinate, and direct a large and important engineering project or number of small projects with many complex features. He will provide technical guidance to other engineers. He will develop and evaluate plans and criteria for a variety of projects and activities to be carried out by others. [The beneficiary] will assess the feasibility and soundness of proposed engineering evaluation tests, products, or equipment when necessary data are insufficient or confirmation by testing is advisable. He will actively work to improve daily processes and ensure that all work meet customer requirements;

Maintenance of Aircraft Innovation (20%) – [The beneficiary] will maintain a current knowledge of developments in the field of specialty and/or other related aircraft fields in order to recommend innovations to improve the quality, economy, and effectiveness of the company product;

[The beneficiary] will review STC data packages prior to submission to the FAA (Federal Aviation Administration). He will make decisions and recommendations that are recognized as authoritative to ensure STC documentation is prepared and processed in accordance with approved procedures; and

[The beneficiary] will assist DAS (Design Alteration Station) Administrator in providing training and guidance to FAA Designees concerning DAS procedures. He will demonstrate creativity, foresight, and mature engineering judgment in anticipating and solving procedural issues that may impact the schedule of STC issuance. He will maintain a current and up-to-date knowledge in the field in order to recommend process changes or innovations that will improve the quality, economy, and effectiveness of the company products.

The director found that the proffered position falls under the Aircraft and Avionics Equipment Mechanics and Service Technicians category in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Citing the *Handbook*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded 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 contends that the proffered position is that of a mechanical engineer, not an aircraft and avionics equipment mechanic and service technician. Counsel also contends that the petitioner has satisfied more than one of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that the degree requirement is common to the industry in parallel positions among similar organizations; that the duties and responsibilities of the particular position are so complex or unique that it can be performed only by an individual with a degree; and that 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.

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 *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. Although a review of the *Handbook* finds that mechanical engineers may qualify as a specialty occupation, the AAO does not concur with the petitioner that the proffered position is that of a mechanical engineer. In this matter, the petitioner offers a variety of helicopter-related services such as flight training, charter tours, and aerial photography. Counsel asserts on appeal that the petitioner is also "actively identifying numerous upgrade procedures for their aviation machineries and equipment" and thus needs the services of a mechanical engineer. Counsel contends that the beneficiary has been performing mechanical engineering duties since 2004, including designing, engineering, and developing a "Heli-borne Washing System" to be marketed to electrical companies domestically and internationally. For supporting evidence, counsel submits a project description and an FAA application form completed by the beneficiary. A review of the record of evidence, however, finds no evidence to support the petitioner and counsel's claim that the petitioner requires the services of a mechanical engineer. It is noted that information in the record indicates that the beneficiary is a trained helicopter mechanic. The FAA Form 8110-12, Application for Type Certificate, Production Certificate, or Supplemental Type Certificate, signed by the beneficiary on April 4, 2004, is noted. On this application, the beneficiary applied for a Supplemental Type Certificate¹ and specified on the form as follows: "This application is for a 'One Only' Installation of Heliborne spray system for cleaning electrical power line equipment." The beneficiary left blank parts C and D of this application, which questioned whether the data will be available for sale or release to other persons and whether the parts will be manufactured for sale. The information reflected on this form does not support counsel's claim that the beneficiary has designed a product, namely the Heli-borne Washing System, which will be marketed to electrical companies domestically and internationally. Further, although counsel asserts that the petitioner and the beneficiary "have already lined up future projects in support of their expansion plans and programs," there is no documentation of record that current expansion plans are underway or any of the specific requirements of those plans. Nor does the record contain evidence in support of the information reflected on the petition that the petitioner has 12 employees and an approximate gross annual income of \$1 million. In addition, although the proposed duties include providing technical guidance to other engineers, the petitioner has not

¹ The website at <http://www.airweb.faa.gov> finds that a supplemental type certificate is issued by the FAA for approving a product (aircraft, engine, or propeller) modification.

demonstrated that it has an engineering staff or that its operations involve guidance to engineers outside the company. Without documentary evidence to support these claims, 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). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). The AAO cannot discern from the evidence of record that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge attained through the completion of a bachelor's or higher degree in a specific specialty. The petitioner has failed to establish the necessity of a bachelor's or higher degree for the proffered position.

Counsel states on appeal: “[A]s can be seen from the various internet printouts from well-recognized universities in the United States, it is a common practice for companies in the aviation industry to seek the services of Mechanical Engineers.” The AAO cannot assume, however, that the utilization of mechanical engineers in the aviation and aerospace industries is solely related to the alleged complexity of the proffered position. This information reveals nothing about the proffered position and the actual work that the beneficiary would perform within the context of this particular petitioner’s business. Thus, the AAO cannot determine from this information that the proffered position is a specialty occupation. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding parallel positions in the petitioner’s industry, counsel submits a job posting from a world-class provider of aviation and information technology for various engineering positions, including a senior mechanical engineer. The petitioner has not demonstrated that the proposed duties of the proffered position are as complex as those duties described in the job posting, such as designing and developing Fly-By-Wire pilot controls equipment, interfacing with suppliers/customers, participating in proposal writing, and handling multiple projects. Further, information on the job posting does not indicate that the business that published the posting is similar to the petitioner in size, number of employees, or level of revenue, as it is described as having \$2.5 billion in annual sales and approximately 14,500 employees worldwide. Counsel also submits a letter from a business “engaged in the development of aircraft assisting system as well as aircraft maintenance,” certifying that from its 1993 founding date, a bachelor’s degree in aviation and engineering, or an equivalent thereof, “is sufficient” for its mechanical engineer/aviation positions. As the record does not contain sufficient evidence of this business’s past hiring practices, however, the writer has not met its burden of proof in this regard. 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)). The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the petitioner has not satisfied any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (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. On appeal, counsel submits the petitioner’s job announcement for the proffered position reflecting the requirement of a bachelor’s degree in mechanical engineering or its equivalent. Counsel also submits a letter from the petitioner’s secretary/CFO, certifying that from its founding date, a bachelor’s degree in aviation and engineering, or an equivalent thereof, “is sufficient” for its mechanical engineer/aviation positions. It is noted that counsel’s April 30, 2004 letter indicates that the petitioner “has never employed a ‘Mechanical Engineer/Aviation’ since [its] establishment.” The letter from the petitioner’s secretary/CFO and the petitioner’s job announcement are noted. The text of the letter from the petitioner’s secretary/CFO is almost identical to the letter, dated September 30, 2004, from the business “engaged in the development of aircraft assisting system as well as aircraft maintenance,” discussed above. Thus, the AAO must question whether the information conveyed in each letter originates from each author. Further, regardless of any degree requirement imposed by the petitioner, the evidence of record does not substantiate a need for at least a bachelor’s degree in a specific specialty for the proffered position. CIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner’s past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner’s self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. In this regard, the petitioner fails to establish that the proffered position entails the theoretical and practical application of a body of highly specialized knowledge attained by a bachelor's degree, or the equivalent, in a specific specialty.

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.

The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding lacks evidence of

specific duties that would establish such specialization and complexity. 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 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.

Beyond the decision of the director, the AAO does not find that the beneficiary is qualified to perform the duties of a specialty occupation because the credentials evaluation service based its findings on the beneficiary's education, training and work experience. A credentials evaluation service, however, may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's training and work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

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.