

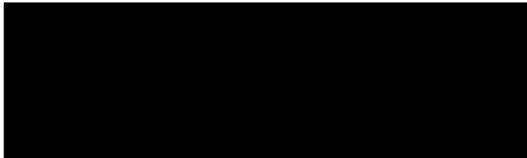
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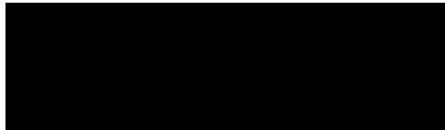
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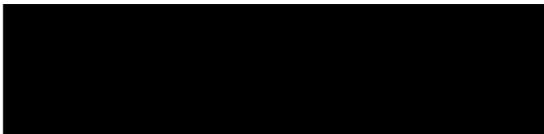
FILE: WAC 05 158 55354 Office: CALIFORNIA SERVICE CENTER Date: FEB 26 2007

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner distributes alloy wheels, employs four personnel, and claims a projected gross annual income of \$500,000. It seeks to employ the beneficiary as a sales engineer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the May 16, 2005 Form I-129 with supporting documentation; (2) the director's July 5, 2005 request for further evidence (RFE); (3) counsel for the petitioner's September 23, 2005 response to the director's RFE; (4) the director's October 21, 2005 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's 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) 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 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.

In a January 18, 2005 letter appended to the petition, the petitioner explained that the beneficiary had previously been employed in L-1B status with the petitioner's predecessor; and that although the petitioner maintained close ties with its predecessor's parent company, [REDACTED] the petitioner did not have a corporate relationship with [REDACTED] and could not petition for the beneficiary to continue in an L-1B classification, even though the beneficiary's duties remained nearly unchanged. The petitioner provided the following description of the beneficiary's responsibilities:

1. Review and identify customers' specifications and requirements (approximately 15% of daily work time);
2. Interact with suppliers to make sure that all products comply with customers' specifications and requirement (approximately 15% of daily work time);
3. Inspect product quality and ensure that all products meet or exceed industry standard and government requirements in every aspect including requirement of safety and environment protection (approximately 15% of daily work time);
4. Responsible for inventory control, planning of the products to meet the current market demand (approximately 15% of daily work time);
5. Conduct market research, ascertain new technology and market development (approximately 10% of daily work time);
6. Provide after market services (approximately 10% of daily work time);
7. Implement program to calculate budget, forecast market trend, process sales/purchase orders (approximately 10% of daily work time);

8. Develop customized specifications by applying specialized knowledge gained while working for Dooray (approximately 10% of daily work time).

The petitioner noted that the usual minimum requirement for performance of the job is a bachelor's degree in mechanical engineering or industrial engineering or any other related field and that "[t]his degree provides the candidate with the requisite knowledge and sophistication to comprehend the complex computer applications and scientific theoretical principles involved in the evaluation and analysis of computer software and software systems."

In a September 23, 2005 response to the director's July 5, 2005 RFE, counsel for the petitioner: provided an excerpt from the Department of Labor's *Occupational Outlook Handbook (Handbook)* regarding sales engineers; submitted a newspaper advertisement from another company showing that the company requires an "MS" degree with experience for its sales engineer; noted that the petitioner had acquired the "beneficiary's current employer," demonstrating that the employer normally required at least a BS degree; and restated the same job duties previously provided as evidence that the job duties are complex.

The newspaper advertisement provided is for a service/sales engineer designing robot setups, buyoff process, and "electrical control built" and requires a master's of science in mechanical engineering with experience using specific equipment and computer programs. The record also includes two organizational charts. One organizational chart is accompanied by a list of employees and their duties. This organizational chart identifies the beneficiary's position as "business executive" and indicates that in this position, the beneficiary:

Will be responsible for Inventory, Planning, Control, coordinate and work with the Manufacturers in India and China to design, develop Alloy wheels required for General Motors of North America. Job responsibilities also includes EDI (Electronic Data Interface) with customer, Logistics Interface with General Motors to provide daily updates on products being shipped from the manufacturing bases in India and China to General Motors assembly plants in North America. Will work specifically for the Hummer Alloy Wheels for General Motors.

The second organizational chart shows that the beneficiary's position is "sales engineer" and that an H-1 petition is being filed on behalf of the beneficiary.

On October 21, 2005, the director denied the petition determining: that the *Handbook* in its discussion of advertising, marketing, promotions, public relations, and sales manager occupations did not indicate that a baccalaureate level of education in a specific specialty is the normal minimum for entry into the occupation; that the petitioner had not submitted any job listings that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations; that the petitioner's description of the duties of the proffered position did not include detail demonstrating that the duties are complex or unique from that of a marketing manager; that the petitioner had not shown that it had required that the services of individuals with baccalaureate or higher degrees in a specific specialty such as marketing or sales engineer in the past; that the ultimate employment of the beneficiary is the determining factor, not the petitioner's self-imposed standards; and that the evidence presented failed to distinguish the difference between the duties to be performed by the beneficiary and those normally performed by marketing managers or sales engineers and how the duties of the proffered position

are more complex or specialized. The director concluded that the petitioner had not established that the position satisfied any of the criteria of a specialty occupation.

On appeal, counsel for the petitioner asserts the proffered position is for a "sales engineer" and takes issue with the director's analysis of the position as a marketing specialist or marketing manager. Counsel contends that the *Handbook* reports that a bachelor's degree is the normal minimum requirement for employment as a sales engineer. Counsel references the Department of Labor's online website *O*NET* and its discussion of a sales engineer's JobZone as 5, which requires at least a bachelor's of science degree. Counsel also submits two additional job announcements: (1) for the position of pre-sales engineer for an expanding technology company that lists the skills required for the position but does not identify the educational level required of the successful candidate; and (2) for the position of sales engineer to sell and distribute IBM's products and services that lists the skills required for the position but does not identify the educational level for the successful candidate. Counsel also notes that the petitioner normally requires a bachelor's degree for the position and states that the duties of the proffered position are so specialized and complex that a bachelor's degree is required. The record also includes the petitioner's predecessor and its parent company's sales brochure for aluminum alloy wheels.

Counsel also asserts that the director misapplied *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) (*Defensor*) as the petitioner is the beneficiary's ultimate employer and thus *Defensor* can be distinguished on this ground as well as the facts of the matter as the position in *Defensor* was for a nurse.

Preliminarily, the AAO observes that *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) stands, in part, for the principle that CIS must review the description of the duties of a position and not rely on the title of the position. In the matter at hand, the director properly applied this principle. Although the petitioner may identify the position as a sales engineer, if the duties of the proffered position are the duties of another type of occupation, the director and the AAO will take notice and consider the duties of the position rather than the title.

The *Handbook* discusses the occupation of sales engineer as follows:

Many products and services, especially those purchased by large companies and institutions, are highly complex. Sales engineers – who also may be called *manufacturers' agents*, *sales representatives*, or *technical sales support workers* – work with the production, engineering, or research and development departments of their companies, or with independent sales firms, to determine how products and services could be designed or modified to suit customers' needs. They also may advise customers on how best to use the products or services provided.

* * *

Most sales engineers have a bachelor's degree in engineering, and many have previous work experience in an engineering specialty. Engineers apply the theories and principles of science and mathematics to technical problems. Their work is the link between scientific discoveries and commercial applications. Many sales engineers specialize in an area related to an engineering specialty.

* * *

Many of the duties of sales engineers are similar to those of other salespersons. They must interest the client in purchasing their products, many of which are durable manufactured products such as turbines. Sales engineers often are teamed with other salespersons who concentrate on the marketing and sales, enabling the sales engineer to concentrate on the technical aspects of the job.

In this matter, the petitioner has not adequately explained how its product, aluminum alloy wheels, requires the technical expertise of an engineer to explain or otherwise demonstrate the benefit(s) of such wheels to prospective purchasers. The petitioner has not explained how or why the customers' specifications and requirements and the adjunctive interaction with suppliers require the technical expertise of an engineer. The petitioner has not provided documentary evidence demonstrating the complexity of its product or any scientific or mechanical concerns associated with the inspection of its product. The petitioner has not provided evidence that the incumbent in the proffered position will apply the theories and principles of science and mathematics to technical problems or that the incumbent's work is the link between scientific discoveries and commercial applications or how the incumbent's technical knowledge is related to an engineering specialty. 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 petitioner has described a sales position not a sales engineering position. Although the petitioner's product may have mechanical or technical characteristics, the record does not provide any evidence that these mechanical or technical attributes require the services of an engineer to understand and to communicate those particular facets of the product to prospective purchasers. The responsibilities associated with processing sales/purchase orders, and providing after market services are similar to the duties of a salesman described in the *Handbook* in the discussion of retail salespersons who may require special knowledge or skills to convey the complexity or sophistication of a particular product to purchasers. The responsibilities associated with market research and market development are similar to the duties of a marketing manager, duties the *Handbook* discusses under the heading advertising, marketing, promotions, public relations, and sales managers. The record in this matter, including the description of the beneficiary's responsibilities while employed as a "business executive" for the petitioner's predecessor are insufficient to establish that the duties and responsibilities comprise the duties of a sales engineer. Labeling a position a "sales engineer" position is insufficient to identify the position as a specialty occupation, when the duties described as comprising the occupation do not reflect the duties of the labeled position.

The AAO acknowledges counsel's reference to the *O*NET*, however, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Moreover, as determined above, the proffered position does not comprise the duties of a sales engineer, thus the *O*NET's* general discussion of a sales engineer is irrelevant.

The *Handbook* does not report that the educational requirements to perform the duties of a salesperson or a marketing manager are equivalent to a bachelor's degree or higher. The petitioner has not described a position that encompasses the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. The petitioner in this matter has not described the duties of a "sales engineer" or any other occupation that requires the theoretical and practical application of a body of highly specialized knowledge requiring the attainment of a bachelor's or higher degree in a specific specialty. Thus, the petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner submitted three job announcements to demonstrate that a sales engineering position is a specialty occupation. Although the AAO has determined that the proffered position does not comprise the duties of a sales engineer, the AAO will briefly address the three job announcements. The first job announcement submitted is for a sales engineer who will design robot setups, buyoff process, and "electrical control built" and which requires a master's of science in mechanical engineering with experience using specific equipment and computer programs. The petitioner has not explained how the advertised position is parallel to the proffered position other than in job title. The two other job announcements for a pre-sales engineer and a sales engineer do not identify the education necessary to obtain the position. Moreover, the companies advertising for the positions are not similar to the petitioner's alloy wheel distribution business. 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 demonstrate that the proffered position is so complex or unique that only an individual with a degree can perform the duties of the position. In this matter, the description does not evidence the uniqueness or complexity of the duties of the position and thus is insufficient to distinguish the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The record does not contain evidence that establishes either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and whether the petitioner normally requires a degree or its equivalent for the position. The AAO acknowledges the petitioner's statement that the minimum requirement to perform the job is a bachelor's degree in mechanical or industrial engineering. Although the petitioner also states that this degree is necessary as the candidate must be able to comprehend computer applications and scientific principles involved in evaluating and analyzing computer software and software systems, the petitioner does not relate how these particular duties relate to its business of distributing alloy wheels. Also as noted above, the petitioner has not described the duties of a sales engineering position; and the described position does not include duties that require a bachelor's degree in either of these disciplines.

The AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The AAO notes the petitioner's implicit claim that the beneficiary's employment in L-1B

classification for its predecessor company somehow establishes that the petitioner normally requires a bachelor's degree for the proffered position. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In addition, the description of the duties of the beneficiary's position as a "business executive" as found on one of the organizational charts submitted, does not demonstrate that the beneficiary's prior duties comprised the duties of an H-1B specialty occupation.

Moreover, the AAO notes that a petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. 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. Further, 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The petitioner has not presented evidence that satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the description of the duties in the record does not demonstrate that the duties are sufficiently specialized or complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. As observed above, the description of duties is more akin to that of a salesperson or a marketing manager. The petitioner does not provide pertinent evidence to show how the performance of the described duties requires knowledge usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the director's decision, the petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation. The AAO has considered the evaluation of the beneficiary's qualifications but questions the evaluation of the beneficiary's work experience. The letter from [REDACTED], Interim Dean, College of Science, Engineering and Mathematics, University of Alaska Fairbanks does not unequivocally establish either that the university has a program for granting college level credit based solely on an individual's training and/or work experience, or that Dr. [REDACTED] has authority to grant college level credit for training and/or work experience. Further, the record does not contain the documents relied upon by Dr. [REDACTED] such as the training documents and reference letters from the beneficiary's former employers noted in the evaluation. As the petition will be denied, this issue will not be further discussed.

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. As always, 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. The petition is denied.