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U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 140 52249 Office: CALIFORNIA SERVICE CENTER Date: **JUN 06 2008**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and dismissed a subsequent motion to reconsider. 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 distributor of preventative maintenance products for consumer electronics. It seeks to employ the beneficiary as a sales engineer. 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 (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; (5) counsel's motion to reconsider; (6) the director's dismissal letter; and (7) the Form I-290B, with counsel's brief and documentation in support of the appeal. 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 petitioner seeks the beneficiary’s services as a sales engineer. Evidence of the beneficiary’s duties includes: the petitioner’s April 2, 2007 letter in support of the petition and counsel’s May 24, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

Analyze, develop, and market strategies for professional grade products, such as sales systems, scales, gaming systems, vending machines, and other products that utilize card readers, bill validators, thermal printers, and other electronic products. Identify specific products to analyze, develop, and market. Source products to wholesalers, retailers, and distributors, ensuring that such products meet industry standards and mandated engineering specifications.

In a May 24, 2007 response to the RFE, counsel further describes the proposed duties and time allocations as follows:

- Analyze available professional grade products, such as sales systems, scales, gaming systems, vending machines and other products that utilize card readers, bill validators, and thermal printers for the marketing and sales of the petitioner’s products; Develop competitive analyses utilizing specialized engineering principles to determine the ideal strategy to market and sell the petitioner’s products and to recommend best business development practices (30%);
- Utilize specific engineering knowledge of the development and function of multidisciplinary sensors, load cells, control systems, and measuring devices to identify products for analysis,

development and marketing. Evaluate products on the basis of an understanding of technical engineering properties, such as resistance, force, optics, and mechanics. Construct a sales and marketing strategy (35%);

- Utilize knowledge of engineering sales and analysis of industry reports to source products to wholesalers, retailers, and distributors (30%); and
- Ensure that the products meet industry standards and mandated engineering specifications (5%).

The director found that the proposed duties, which are similar to those duties of a sales manager, do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, under the category of Advertising, Marketing, Promotions, Public Relations, and Sales Managers, 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 states, in part, that the director ignored the evidence presented in the petitioner's motion to reconsider, and incorrectly concluded that the proffered position is a sales manager and that the proffered position does not involve utilizing a body of specialized knowledge. Counsel states that the evidence of record correctly reflects that the proffered position is that of a sales engineer, as described in the DOL's *O*Net*, and that the position requires a bachelor's degree in engineering, in accordance with the *Handbook*.

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. The AAO does not concur with counsel that the proffered position falls under the category of sales engineers, who 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. See the *Handbook*, 2006-07 edition. Information on the petition reflects that the petitioner was established in 1971 and has two employees. The petitioner did not provide the information

requested in Items 13 and 14 pertaining to the amount of its gross annual income and net annual income. As the petition required additional information, the director requested additional evidence in an RFE. In response to the RFE, counsel indicated that the beneficiary is an E-1 treaty trader who would provide services to the petitioner from his Ohio home office. Counsel provided the petitioner's individual federal income tax returns for 2005 and 2006, with Schedules C, Profit and Loss from Business, reflecting the nature of the petitioner's business as "cleaning products sales," gross annual sales of \$191,969.00 and \$214,859.00, respectively, and no wages paid in either 2005 or 2006. Upon review of the proposed duties, it is not clear how the beneficiary could realistically perform duties related to a sales engineering position for the petitioner, whose business is described on its federal income tax returns as "cleaning products sales" and as "a distributor for preventative maintenance cleaning products for sensitive head equipment" on its website. Although counsel asserts that the proposed duties entail complex analysis utilizing engineering principles, without a meaningful list of duties related to the petitioner's specific business operations that correspond to its federal income tax returns, the petitioner has not established that the incumbent in the position must possess a bachelor's degree in a specific discipline. The record does not demonstrate that the beneficiary would be performing the complex duties of a sales engineer, such as working with the petitioner's production, engineering, or research and development departments, or with independent sales firms, to determine how the petitioner's products and services could be designed or modified to suit customers' needs. The record does not contain evidence establishing that the petitioner's pre-packaged products require extensive technical expertise. 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). Consequently, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. 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 not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. Counsel's assertion on appeal that the proffered position is more complex than that of a sales manager and that the more complex duties are related to the petitioner's determination and recommendation of expansion and other new business initiatives, is noted. There is no documentation of record, however, that current expansion plans are underway or that the specific requirements of those plans or other new business initiatives would require the expertise of a sales engineer. Neither does the petitioner's owner/president discuss any expansion plans or new business initiatives in her April 2, 2007 letter that was submitted at the time of filing. The record contains no evidence in support of counsel's assertion that the proffered position entails helping in the development of products, performing technical work, and collaborating with engineering personnel and chief decision makers for the purchasing departments of wholesalers, retailers and distributors. Without documentary evidence to support these claims, the assertions of counsel will not satisfy

the petitioner's burden of proof. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The AAO acknowledges counsel's reference to the *O*NET* and the assertion that the proffered position falls squarely within the *O*NET* description for a sales engineer. The AAO again observes that the record does not contain evidence establishing that the proposed duties within the context of the petitioner's business require extensive technical expertise. The petitioner has not described tasks within the context of the petitioner's business that would require a level of sales engineering knowledge gained while attaining a bachelor's degree in the specific discipline of engineering. Moreover, 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. When discussing an occupational title such as a sales engineer, the petitioner cannot repeat portions of the generalized descriptions found in the *O*NET* or the *Handbook* as its description of the duties of the proffered position. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. 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).

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. To establish this criterion 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; however although the petitioner has been established since 1971 it has not provided evidence that it previously employed personnel for this position. The AAO further observes that the 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. 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements 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.

Counsel states, on appeal, that the proposed duties include: working with customers and assisting them in operating their professional grade devices at optimal levels for efficiency and economic benefit; determining the mean time between failures of the devices which utilize card readers and offering advice regarding the actual cause of the failure; and developing competitive analyses utilizing engineering knowledge of the mean time between failures. Counsel asserts that those duties require the application of theories and principles of science and mathematics to technical problems and thus require that the beneficiary hold a bachelor's degree in engineering. The record, however, contains no evidence to substantiate the complexity of the petitioner's product or any scientific or mathematical concepts associated with the sale of the petitioner's product. As discussed above, the complexity of the duties in relation to the petitioner's business must be analyzed. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements that would require the beneficiary to have a unique set of skills attained through study at a bachelor's degree level in a specific discipline. 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 beneficiary does not appear to be qualified to perform the duties of a specialty occupation. The record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For this additional reason, the petition may not be approved.

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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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