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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

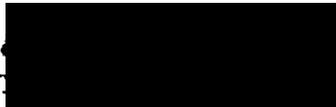
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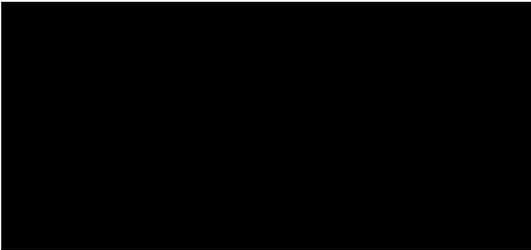
FILE: LIN 04 031 51251 Office: NEBRASKA SERVICE CENTER Date: **FEB 25 2005**

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:



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 that reads "Robert P. Wiemann".

Robert P. Wiemann, Director
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 wholesaler of ice and ice machines. It seeks to employ the beneficiary as an electrical 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

The AAO will first discuss whether the proffered position is a specialty occupation.

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 an electrical engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail designing, developing, testing, and supervising the manufacture of ice machines. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in electrical engineering or a related field.

The director found the job description vague, and therefore, he could not determine whether the proffered position was a specialty occupation. No evidence established that the beneficiary's education, training, and/or experience was equivalent to a baccalaureate degree in engineering; the director therefore found the beneficiary was not qualified for the proffered position.

On appeal, counsel states that the proffered position is a specialty occupation, and that the beneficiary holds two baccalaureate degrees, one in engineering and the other in hotel management. Counsel contends that the petitioner's job description is clear, and that sufficient evidence established the proffered position as a specialty occupation.

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.

In the November 7, 2003 letter, the petitioner indicated that CIS approved another petition that had been previously filed on behalf of the beneficiary. However, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition had been approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. 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)

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 a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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 AAO next considers 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 (DOL) *Occupational Outlook Handbook* (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.Min. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO does not simply rely on a position's title when determining whether a position qualifies as a specialty occupation. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors that the AAO considers.

There is a significant inconsistency in the evidentiary record regarding the nature of the petitioner's business operations. The Form I-129 petition stated that the petitioner is a wholesaler of ice and ice machines; the company letter alleged it is "an ice machine designer and manufacturer." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record explains this material inconsistency.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Electrical engineers in the *Handbook* are described as designing, developing, testing, and supervising the manufacture of electrical and electronic equipment. The *Handbook* states:

Some of this equipment includes broadcast and communications systems; electric motors, machinery controls, lighting, and wiring in buildings, automobiles, aircraft, and radar and navigation systems; and power generating, controlling, and transmission devices used by electric utilities.

The *Handbook* continues:

Electrical and electronics engineers specialize in different areas such as power generation, transmission, and distribution; communications; and electrical equipment manufacturing, or a specialty within one of these areas—industrial robot control systems or aviation electronics, for example. Electrical and electronics engineers design new products, write performance requirements, and develop maintenance schedules. They also test equipment, solve operating problems, and estimate the time and cost of engineering projects.

According to the *Handbook*:

Electrical and electronics engineers held about 292,000 jobs in 2002, making up the largest branch of engineering. Most jobs were in professional, scientific, and technical services firms, government agencies, and manufacturers of computer and electronic products and machinery. Wholesale trade, communications, and utilities firms accounted for most of the remaining jobs.

Based on the evidence in the record and information in the *Handbook*, the AAO does not agree with counsel that the beneficiary will occupy an electrical engineer position. The record shows that the petitioner has 12 employees and an undisclosed income. The employees are described as a company president, plant manager, supervisor/human resources manager, and plant laborers. The *Handbook* describes an electrical engineer as specializing in areas such as power generation, transmission, and distribution; communications; and electrical equipment manufacturing, or a specialty area—industrial robot control systems or aviation electronics. The evidence reveals that the beneficiary will not work in these areas. We have already discussed the inconsistency about the nature of the petitioner's operations; thus, the petitioner has not established it is engaged in research and development or manufacturing. Because the evidence in the record is inadequate to establish that the beneficiary would occupy the specialty occupation of electrical engineer, the petitioner cannot establish that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the proffered position.

There is no evidence in the record to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed, the evidentiary record fails to demonstrate that the beneficiary will occupy an electrical engineer position, a specialty occupation.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As already discussed, the evidentiary record fails to establish that the beneficiary will occupy an electrical engineer position, a specialty occupation.

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 on this ground.

Now the AAO will discuss whether the beneficiary is qualified to perform the proffered position. The proffered position is not a specialty occupation requiring a baccalaureate degree in electrical engineering. Accordingly, the beneficiary is qualified to perform the proffered position.

The AAO notes that the director correctly noted that the credential evaluation report from WES is unsigned and does not have an affixed seal.

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.