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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

File: EAC-99-096-52143 Office: Vermont Service Center

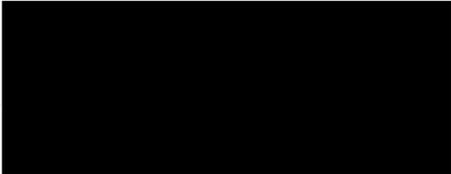
Date: OCT 22 2001

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a custom home building and design firm with three employees and a gross annual income of \$1 million. It seeks to employ the beneficiary as an electrical engineer for a period of three years. The director determined that the petitioner had not submitted a certification from the Secretary of Labor that a labor condition application had been filed. The director also found that the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, counsel had provided additional information in support of the appeal.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not demonstrated, either initially or on appeal, that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation. The Associate Commissioner also found that although the petitioner submitted a labor condition application on appeal, that application was certified subsequent to the filing date of the visa petition and not in accordance with regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1).

On motion, counsel argues that the Service has recognized the substantial frustration and dramatic delays that surround the timely obtaining of a labor condition application and has further published a proposed rule that would allow petitioners to obtain and submit the required certified labor condition application after the petition is filed with the Service but before the petition is adjudicated. Counsel also states that the issues of the proffered position being a specialty occupation and the beneficiary's qualifications have already been addressed by the petitioner though such issues were not addressed by the Associate Commissioner.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

Counsel's statement on motion is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

At present we require an electrical engineer to assist in the installation of electrical [w]iring in custom built homes, as well as the designing and load calculations of those electrical [i]nstallations. This engineer will develop and test electrical components, equipment, and [s]ystems and [sic] they apply in the construction of custom homes, applying the principles and [t]echniques of electrical engineering.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in engineering or a related field. The proffered position appears to combine the duties of an electrician with those of an engineering technician. A review of the Department of Labor's Occupational

Outlook Handbook (Handbook), 2000-2001 edition, at pages 422-423 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as an electrician. People usually learn the electrical trade by completing a 4- or 5-year apprenticeship program. Others still learn their skills informally, on the job.

A review of the Handbook at pages 96-97 also finds no requirement of a baccalaureate degree in a specialized area for employment as an engineering technician. Most employers prefer to hire someone with at least a 2-year associate degree in engineering technology. Such training is available at technical institutes, community colleges, extension divisions of colleges and universities, public and private vocational-technical schools, and through some technical training programs in the Armed Forces. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as engineering, for the offered position. Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

Counsel's comments regarding the Service's proposed rule to allow the labor condition application to be filed subsequent to the filing of the petition is noted. Nevertheless regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, it is concluded that for this additional reason the petition may not be approved.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The decision of the Associate Commissioner dated February 24, 2000, is affirmed.