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U.S. Department of Justice

Immigration and Naturalization Service

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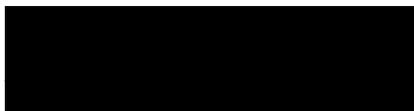
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-01-226-56253 Office: California Service Center

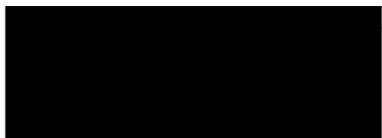
Date: AUG 04 2002

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:



Public Copy

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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. Wieman, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a petroleum business with 220 employees and a gross annual income of \$34,500,000. It seeks to employ the beneficiary as an auditor for a period of three years. The director determined the petitioner had not established that the beneficiary is qualified to perform the duties of a specialty occupation. The director further found that the record contains conflicting information as to where the beneficiary would work.

On appeal, counsel submits a brief.

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.

The director denied the petition because the beneficiary's degree in industrial engineering does not appear related to the proffered position. The director further found that although the petitioner's labor condition application indicates that the beneficiary will be working in San Diego, the petitioner's letter to the beneficiary states that she will be working in San Diego and Sacramento. On appeal, counsel states, in part, that the proffered position encompasses both the duties of an industrial engineer and an auditor. Counsel further states that the proposed duties, which involve substantial use of linear programming and optimization software, are so complex that a baccalaureate degree is required. Counsel further states that the beneficiary will be working in San Diego only.

Counsel's statement on appeal 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. The only description of the beneficiary's proposed duties is found in counsel's letter dated October 2, 2001, in which he states, in part, as follows:

Petitioner has sought an individual to optimize the allocation of its numerous resources scattered throughout the geographic limits of the service territory. Petitioner's assets include tanker trucks, depots, and employees.

In a letter addressed to the beneficiary dated April 25, 2001, the petitioner's owner and president states, in part, that:

Since you do not already have extensive work experience, we would like to offer you the position of Auditor to start gaining the experience you will need to better utilize your degree and benefit our company. Therefore, your employment with [the petitioner] will begin in the position of Auditor. This position is a full-time position wherein you will be rendering services in San Diego and Sacramento, California.

Although not explicitly stated, the statement of the petitioner's owner and president suggests that the beneficiary does not qualify for an industrial engineer position because she lacks extensive work experience. As such, the petitioner has not demonstrated that the proffered position is that of an industrial engineer.

A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 22, finds that the usual requirement for accountant and internal auditor positions is at least a bachelor's degree in accounting or a related field. As the proffered position does not have such degree requirement, the petitioner has not demonstrated that the proffered position is primarily that of an auditor.

Rather than the positions of an industrial engineer or an auditor, the proffered position appears to be primarily that of an industrial engineering technician. At page 101 of its Handbook, the DOL describes the position of an industrial engineering technician as follows:

Industrial Engineering Technicians study the efficient use of personnel, materials, and machines in factories, stores, repair shops, and offices. They prepare layouts of machinery and equipment, plan the flow of work, make statistical studies, and analyze production costs.

A review of the Handbook finds no requirement of a baccalaureate degree for an industrial engineering technician position. Most employers prefer to hire someone with at least a 2-year associate degree in engineering technology. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

In addition, 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 industrial engineering, for the offered position. Nor did the petitioner 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.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation . . .

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application. The labor condition application indicates that the beneficiary would be working in San Diego, California. The April 25, 2001 letter from the petitioner's owner and president, however, indicates that the beneficiary would also be rendering services in Sacramento, California. As the petitioner's labor condition application does not include Sacramento, California as one of the beneficiary's work locations, the petitioner has not demonstrated that it has complied with the terms of the labor condition application. 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.

ORDER: The appeal is dismissed.