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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

[Redacted]

File: WAC-02-002-50584 Office: California Service Center

Date: **DEC 10 2002**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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INSTRUCTIONS:

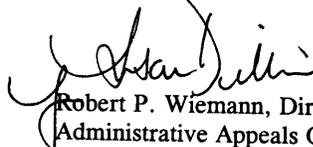
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a company that owns and operates five gas stations and minimarts, four auto repair stations, and a car wash. It has 36 employees and a gross annual income of \$13.25 million. The petitioner seeks to employ the beneficiary as a mechanical engineer for a period of three years. The director determined that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

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 concluded that the proffered position is actually that of an electronics repairer of commercial and industrial equipment, an occupation that does not require a bachelor's degree in mechanical engineering.

On appeal, counsel argues that the position is that of a mechanical engineer and as such requires a bachelor's degree in mechanical engineering. Counsel further asserts that the petitioner requires a bachelor's degree in mechanical engineering for the position in question.

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. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

The [beneficiary] will apply his knowledge of theoretical and applied mechanical engineering principles to direct

the maintenance, repair and testing of the petitioner's existing machinery and equipment. In addition, he will oversee the purchase, installation, operation, and design modification of all machinery and equipment that the petitioner will need in its referenced retooling [or] modernization and expansion plans and insure the prevention of system malfunction. In performing such functions, the [beneficiary] will analyze the employer's various machinery and equipment needs, consider factors such as the relative cost and life-expectancy of such machinery and equipment, specifications and capacity, energy costs, etc. He will oversee any work performed by design technicians and repairmen.

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.

The Service does not agree with counsel's argument that the proffered position is that of a mechanical engineer. In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to be that of an electromechanical engineering technician or a mechanical engineering technician. The Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 100-101, indicates in part that:

Electromechanical engineering technicians combine fundamental principles of mechanical engineering technology with knowledge of electrical and electronic

circuits to design, develop, test, and manufacture electrical and computer controlled mechanical systems.

Mechanical engineering technicians help engineers design, develop, test, and manufacture industrial machinery, consumer products, and other equipment . . . They make sketches and rough layouts, record data, make computations, analyze results, and write reports. When planning production, mechanical engineering technicians prepare layouts and drawings of the assembly process and parts to be manufactured. They estimate labor costs, equipment life, and plant space.

A review of the Handbook at page 101 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as an electromechanical engineering technician or mechanical engineering technician:

Although it may be possible to qualify for a few engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology. Training is available at technical institutes, community colleges, extension divisions of colleges and universities, public and private vocational-technical schools, and the Armed Forces.

While counsel asserts that the petitioner requires a bachelor's degree in mechanical engineering for the proffered position, no evidence has been submitted to corroborate this assertion. It was held in Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I&N Dec. (BIA 1980) that the assertions of counsel do not constitute evidence.

The petitioner has not submitted any evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

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 in mechanical engineering.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Therefore, the director's decision is affirmed.

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.