



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: LIN0201553908 Office: NEBRASKA SERVICE CENTER Date:

DEC 16 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:



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 the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a law firm that provides services to the Chinese community in the greater Chicago area. It has two attorneys, three support persons, and a gross annual income of \$282,727. It seeks to temporarily employ the beneficiary as a Chinese/English translator for a period of three years. The director determined that the petitioner had not established that the position offered to the beneficiary was a specialty occupation.

On appeal, counsel asserts that the petitioner established all four criteria contained in the regulations to qualify a position as 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.

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 field 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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation.

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.

In the initial filing, the petitioner stated that the beneficiary would work as a Chinese/English translator. In the petition, the duties were listed as:

legal translation from English to Chinese and Chinese to English. The documents are in the areas of immigration, business transaction, client communication and other areas. Court interpretation is also in the job duty.

According to the petitioner, the beneficiary graduated in 1991 from the Nanchang Institute of Aero-Technology in China with a Bachelor of Arts in Literature having completed a four-year course in the Department of Teacher Training with a major in English. In describing the previous work done by the beneficiary, the petitioner stated that the beneficiary worked as a document translator and helped U.S. consular officers to communicate with Chinese counterparts and customers. In an accompanying letter, the petitioner stated:

At this time we wish to employ [the beneficiary] as a translator. The person in the translator position, which requires a four-year college degree, will be mainly responsible for:

- 1) Translation of legal documents from Chinese to English and from English to Chinese,
- 2) Translating and rewriting English documents into Chinese and vice versa in connection with attorney/client correspondence,
- 3) Interpretation for clients in courts, and
- 4) Management of the Chinese version of the computer software, including setting up and maintaining the Chinese computer program document writing, storing, edition, retrieving and backing-up.

The petitioner went on to state that the functions of the job require someone with a four-year college education majoring in English for a Chinese native speaker or majoring in Chinese for an English native speaker. He further stated:

From my own experience and my dealing with thousands of Chinese people, translation of documents, especially legal documents, is a very demanding job. The documents we have to translate on a daily basis include articles of incorporation, corporate by-laws, corporate meeting minutes, business license, financial statements, such as balance sheet, income statement and tax records, contract, employment verification, birth certificate, marriage certificate, award certificate, death certificate, diploma, school transcript, and resume, just name a few. A good translator is supposed to have profound education and knowledge in both languages in regard to their grammar, usage, style and writing technique, as well as a good understanding of both culture, history, and social systems. The above cannot be achieved without systematic and professional training and practical experience.

On December 13, 2001, the director requested additional information with regard to the position being offered to the beneficiary and how the position met one of the four criteria for qualification as a specialty occupation. Among other items, the director requested evidence that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position. The director also requested documentation on parallel positions to show that the degree requirement is common to the industry. The director further requested that the petitioner submit documentation to show that the beneficiary employed individuals with a baccalaureate or higher degree in a specialized area in the past. Finally, the director requested that the petitioner provide evidence to show that the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

In response, the petitioner submitted documentation on six individuals either presently or previously employed by the petitioner who had worked as translators for the law firm. Five of these individuals were described as graduates of mainland Chinese universities. Four had degrees in English while one had a degree in law and the sixth had a degree in business administration. The petitioner also submitted four copies of the same job advertisement it placed in the China Start, described as a local ethnic Chinese newspaper in the greater Chicago area. The advertisements were for October 12, 2001, October 26, 2001, November 2, 2001, and November 9, 2001. The help wanted

advertisement solicited an individual with a college degree in English with some working experience.

On January 26, 2002, the director denied the petition stating that the petitioner's evidence did not satisfactorily demonstrate that a baccalaureate degree in a "specialized field of study" is a prerequisite for hiring personnel as translators. The director noted that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) did not examine the field of translator. He then used the Department of Labor's Dictionary of Occupational Titles (DOT) in reaching the determination that the job of translator did not require a baccalaureate degree as a minimum for entry into the field. The director stated that the DOT classification of Translator had a Specific Vocational Preparation (SVP) of 7. The director further stated: "This SVP rating is assigned to positions that require from two to four years of vocational education, apprenticeship training, and/or on-the-job experience to successfully perform the tasks assigned." Based on this SVP rating, the director determined that a baccalaureate degree in English is not an industry standard, or the minimum educational requirement for entry into the profession.

The director also advised counsel that the imposition of a baccalaureate degree standard alone to screen applicants is inadequate to demonstrate a given position as a specialty occupation. "Special occupation criterion not only demands the possession of a baccalaureate degree, but the position itself must require an individual to possess the minimum of a baccalaureate degree in a "SPECIALIZED field" to perform the tasks assigned." (Emphasis in original.)

On appeal, counsel asserts that the director inappropriately relied on the SVP ratings in the DOT in reaching his decision. Furthermore, counsel asserts that even if the SVP rating were to be used, it does not preclude the requirement of a baccalaureate degree in English as the minimum requirement for entry into the profession. Counsel states that in looking at the SVP rating, the decision indicates that the training time for such a position is "over 2 years up to and *including* 4 years." (Emphasis in original.)

Counsel also maintains that it is within the discretion of the employer to determine what type of training it will require for a translator within the guidelines of such training totaling between two and four years. Counsel asserts that INS has incorrectly and apparently, arbitrarily concluded that an SVP rating of 7 means that an employer must accept some period of training less than four years as the minimum standard for a translator position. Counsel states that the director has not only misinterpreted the DOT in this respect, but the director has also substituted his own judgment for that of an employer.

Counsel states that the DOT does not mandate what proportion of educational training versus on-the-job training is necessary. It only provides a minimum and maximum length of training, from one or all of various learning circumstances provided by the DOT.

Counsel further asserts that it has always been a requirement in the petitioner's organization that persons filling the translator position, have at a minimum, a baccalaureate degree. The petitioner also provided evidence that it advertised the translator position as requiring an undergraduate degree in English. Furthermore, counsel submits excerpts from The Watson Wyatt Data Services ECS Geographic Report on Professional and Scientific Personnel Compensation, 2001/2002 version, (ECS Report). The excerpts identify the position of translator at an entry level as requiring, inter alia, a bachelor's degree or equivalent.

In explaining why the translator job is a specialty occupation, counsel states the following:

The position offered is that of a Chinese-English translator in a practicing law office. Petitioner's practice serves primarily Chinese-speaking clients and in order to effectively communicate with and understand, linguistically and culturally, those clients, Petitioner employs native Chinese staff. As Chinese is then obviously the first language of Petitioner's staff, those persons employed as translators must use English as a second language. Due to the complex nature of the practice of law and sophistication of the language skills needed to be conversant in legal matters in two languages, Petitioner has always required its translators to have, at a minimum, a baccalaureate degree in English. That the INS failed to determine that English is a specialized field of study, is an error. Were the situation reversed, that is, a native English speaker were expected to perform sophisticated translations to and from Chinese, petitioner is certain the INS would realize that it is not by any means unreasonable to assume that the employer of such a translator would require at least a baccalaureate degree in the second language in order to fill the position.

Counsel further maintains that the director inappropriately raised a new issue, i.e., the SVP rating, in his denial decision that was not brought up in the original request for further evidence, and that the petitioner was never given the opportunity to answer prior to the director's denial. Counsel requests that the Administrative Appeal Office give careful consideration to the petitioner's response to this issue contained in the appeal. Finally counsel maintains that the director made an error in its disparate treatment of similarly situated cases involving

translator positions. According to counsel, the Service has previously approved an H-1B for a translator position in the petitioner's office. Counsel points out that H-1B petitions for Japanese-English translators in the Chicago area have also been approved. Counsel submits INS Forms I797B to document this point.

Upon review of the record, the director appears to place undue reliance on the DOT and SVP levels for his analysis of whether the position in the instant petition is a specialty occupation. Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The 2001 edition of the Handbook contains no information on interpreters and translators. However, the Handbook, 2002-2003 edition, does have a brief mention of this group in the section "Data for Occupations Not Studied in Detail." This section contains information on 116 additional occupations, for which employment projections are prepared, but for which detailed occupational information is not developed. On page 596, this section describes the interpreter and translator category as "translate or interpret written, oral, or sign language text into another language for others," and notes that the most significant source of training is "long-term on-the-job training".

To date, the Handbook does not support the fact that a translator position requires a baccalaureate degree in a specific specialty. In addition, there is no evidence on the record from any professional association of translators that states a degree is a minimum entry requirement, and no letters or affidavits from firms or individuals in the industry that attest that firms similar to the petitioner routinely employ and recruit only degreed individuals. To date evidence on the record does not establish that the proffered position requires a bachelor's degree in English or a related specialty.

With regard to the second criterion for establishing a position as a specialty occupation, namely that the degree requirement is common to the industry in parallel positions among similar organizations, this also is not established on the record. The petitioner made reference to other translators hired by law firms in the area and submitted INS Form I-797B H-1B approval notices; however, there is no mention of their educational backgrounds in the evidence submitted.

With regard to the third criterion, contrary to counsel's assertion that the petitioner has always required its translators

to have, at a minimum, a baccalaureate degree in English, the record reflects that the petitioner has not always hired native Chinese university graduates with degrees in English. Rather, the petitioner appears to have always hired native Chinese speakers with bachelor's degrees for this position. (Emphasis added.) Four out of the six translators hired had baccalaureates with English degrees, while two others hired had either a degree in law or business administration. The record does not reflect that the petitioner has always required a baccalaureate degree in a specific specialty.

With regard to the final criterion, namely that 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's description of the beneficiary's duties does not establish the complexity of the proffered position. The petitioner lists various categories of documents that would be translated; however, many of these documents contain basic information items, such as name and birth date of persons, and other personal information or affiliations. It is not clear from the record how much time the beneficiary would spend in more complex duties, such as doing the original translation of a lengthy and complex legal document as opposed to translating items to be put into a previously translated document, or doing simultaneous translations in court, as opposed to providing the petitioner's Chinese clients with orientation to the firm's work. It is also not clear why the maintaining of the Chinese computer would be considered a specialized and complex duty. Without more compelling testimony, the petitioner has not established the specialized and complex nature of the duties to be performed by the beneficiary.

With regard to counsel's final assertion, it should be pointed out that review of appeals submitted to INS Administrative Appeals Office is done on a case-by-case basis. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v. INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

Also, with regard to the vacancy advertisements submitted by counsel, only those that were printed or filed prior to the filing of the instant petition will be considered as evidence in the instant case. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. 8 C.F.R. 103.2(b)(12). In addition, the provision by the petitioner of earlier advertisements for previous hires that contained the same educational requirements as the present petition would have provided more weight to this determination.

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.

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. The appeal will be dismissed.

ORDER: The appeal is dismissed.