

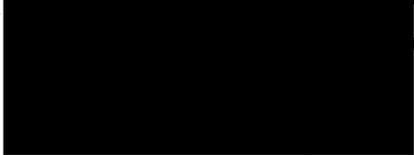


DA

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: EAC-99-148-50552 Office: Vermont Service Center

Date: **DEC 17 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)

**PUBLIC COPY**

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, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. A subsequent motion to reopen and reconsider was granted by the Associate Commissioner, who affirmed his previous decision. The matter is now before the Associate Commissioner for Examinations on a second motion to reopen and reconsider. The motion will be granted. The previous decisions of the Associate Commissioner will be affirmed.

The petitioner manufactures frozen and grocery ethnic foods. It has 55 employees and a gross annual income of \$6.5 million. It seeks to employ the beneficiary as a plant engineer (as stated by the petitioner's vice president of operations in his letter dated March 31, 1999) for a period of three years. The director found that the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel had submitted a brief and additional documentation 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.

On motion, counsel had submitted additional information in support of the motion.

The Associate Commissioner affirmed his previous decision reasoning that the petitioner had not demonstrated that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On second motion, counsel submits a brief and additional documentation in support of the motion.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary holds a diploma in mechanical engineering conferred by an Indian institution. The beneficiary's foreign education has been found by a credentials evaluation service to be equivalent to an associate's degree in mechanical engineering conferred by an accredited community college in the United States. The beneficiary also completed a post diploma course in refrigeration and air-conditioning at an Indian technical institute. The record also indicates that, in addition to the beneficiary's education, the beneficiary has over 20 years of relevant employment experience. The same credentials evaluator found that the beneficiary's educational background and employment experience are equivalent to a bachelor's degree in mechanical engineering technology with an emphasis in refrigeration and air conditioning technology from an accredited college or university in the United States.

This Service uses an independent evaluation of a person's foreign credentials in terms of education in the United States as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. See Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988).

As stated by the Associate Commissioner in his two previous decisions, the record does not contain any corroborating evidence to support the evaluator's finding such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). Furthermore, the evaluator did not demonstrate specifically how the evaluation was made, nor did he specify the documents and resources upon which he based his findings (including copies of the relevant portions of any research materials used). The Associate Commissioner also noted that the letters from the beneficiary's former employers did not provide a comprehensive description of the beneficiary's duties. For these reasons, the above credentials evaluation was accorded little weight.

On second motion, counsel states, in part, as follows:

Enclosed please find copy of an educational and work experience evaluation provided by Professor Ajay Prasad - Professor of Mechanical Engineering at the University of Delaware, who is authorized to grant college level credits for training, and work experience in the specialty of Engineering disciplines.

The beneficiary's foreign education and approximately 17 years of relevant work experience have been found by an academic expert to be equivalent to a bachelor of science degree in mechanical engineering from an accredited institution of higher education in the United States. The evaluator's opinion that the beneficiary is qualified to fill the proffered position appears reasonable and will be accepted. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the proffered position.

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 appeal that the proffered position is a specialty occupation 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:

- \* Analyze, design and implement refrigeration, heating, ventilation and air-conditioning systems and equipment;
- \* Determine materials and equipment required;
- \* Coordinate installation, testing and repair activities to obtain optimum utilization of machines and equipment;
- \* Evaluate installations and recommend design modifications to eliminate machine or system malfunctions.

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 beneficiary is a mechanical engineer, an occupation that would normally require a bachelor's degree in mechanical engineering or a related field. In its Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 114, the Department of Labor (DOL) describes the job of a mechanical engineer as follows:

Mechanical engineers research, develop, design, manufacture, and test tools, engines, machines, and other mechanical devices. They work on power-producing machines such as electric generators, internal combustion engines, steam and gas turbines. They also develop power-using machines such as refrigeration and air-conditioning equipment, machine tools, materials handling systems, elevators and escalators, industrial production equipment, and robots used in manufacturing. Mechanical engineers also design tools needed by other engineers for their work.

The record reflects that the petitioner, which is in the food manufacturing business, employs 55 persons and has a gross annual income of \$6.5 million. The business in which the beneficiary is to be employed does not require the services of a mechanical engineer who researches, develops, designs, manufactures and tests tools, engines, machines, and other mechanical devices.

The duties that the petitioner endeavors to have the beneficiary perform are primarily the general maintenance duties, which are similar to the duties that a heating, air-conditioning, and refrigeration mechanic and installer would execute in a small business establishment. In contrast to the description of a mechanical engineer, at page 501 of the Handbook, the DOL describes the position of a heating, air-conditioning, and refrigeration mechanic and installer as follows:

Heating and air-conditioning mechanics install, service, and repair heating and air-conditioning systems in both residences and commercial establishments. *Furnace installers*, also called *heating equipment technicians*, follow blueprints or other specifications to install oil, gas, electric, solid-fuel, and multiple-fuel heating systems. *Air-conditioning mechanics* install and service central air-conditioning systems. After putting the equipment in place, they install fuel and water supply lines, air ducts and vents, pumps, and other components. They may connect electrical wiring and controls and check the unit for proper operation.

*Refrigeration mechanics* install, service, and repair industrial and commercial refrigerating systems and a variety of refrigeration equipment. They follow

blueprints, design specifications, and manufacturers' instructions to install motors, compressors, condensing units, evaporators, piping, and other components. They connect this equipment to the ductwork, refrigerant lines, and electrical power source. After making the connections, they charge the system with refrigerant, check it for proper operation, and program control systems.

Those working for smaller operations tend to do both installation and servicing, and work with heating, cooling, and refrigeration equipment.

The types of duties the petitioner ascribes to the beneficiary primarily fall within the scope of a heating, air-conditioning, and refrigeration mechanic and installer position rather than a mechanical engineering position. For example, the petitioner states that the beneficiary will "[c]oordinate installation, testing and repair activities to obtain optimum utilization of machines and equipment" and "[e]valuate installations and recommend design modifications to eliminate machine or system malfunctions." Such general maintenance duties are not duties normally associated with a mechanical engineer. 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 mechanical engineering, for the offered position. Third, although the record contains numerous job advertisements, 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. The job fits the description of a heating, air-conditioning, and refrigeration mechanic and installer position, rather than a mechanical engineer. A review of the DOL's Handbook at page 502 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a heating, air-conditioning, and refrigeration mechanic and installer. Most employers prefer to hire those with technical school or apprenticeship training. In addition, a sizable number of technicians still learn the trade informally on the job. 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 opinion from the academic expert indicating that the proffered position is that of a mechanical engineer is noted. In his opinion, however, the academic expert discusses an expanded description of the proposed duties. While the expanded description of the proposed duties is noted for the record, it is not indicative of the nature of the proffered position at the time of filing. As such, it provides little support for the instant petition, and this portion of the opinion from the academic expert is accorded little weight.

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 decisions of the Associate Commissioner dated February 12, 2001, and December 8, 2002 [sic - December 8, 2001], are affirmed.