



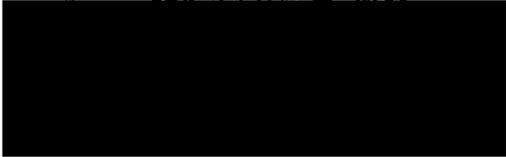
*DR*

U.S. Department of Justice

Immigration and Naturalization Service

~~Identifying data deleted to prevent clearly unwarranted invasion of personal privacy~~

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



File: WAC 02 008 50891 Office: California Service Center

Date: 08 JUL 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 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, Director  
Administrative Appeals Office

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

The petitioner is a manufacturer specializing in the dyeing, printing, finishing, and knitting of textiles. The petitioner claims 300 employees and an approximate gross annual income of \$27 million. It seeks to employ the beneficiary as a textile engineer for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel asserted that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not shown that the proffered position is a specialty occupation.

On motion, counsel submits a brief that reasserts the same claims that were previously presented on appeal. Counsel asserts in part that the Service incorrectly evaluated the proffered position as a "Textile Machinery Operator/Textile Designer," as that position is described in the Department of Labor's Occupational Outlook Handbook. Counsel asserts that the position should have been evaluated as a "Textile Engineer." Counsel further asserts that the petitioner operates a knitting facility, where the beneficiary will be involved in the analysis of fabric structure and the development of new fabric. Finally, counsel asserts that the petitioner has employed two "Textile Engineers" in the past and that the employer required bachelor's degrees for these positions. The petitioner submits new evidence in the form of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the two claimed employees.

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 the classification of qualified nonimmigrant 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 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.

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

1. Set up and implement qualify control methods compatible with the International Standard Organization [sic] (ISO) for knitting, dyeing, and finishing textiles (15% of time);
2. Analyze fabric structure and develop new fabrics (30% of time);
3. Assist with the purchase and set up of textile machinery and equipment for the dyeing and finishing [of] textiles (10% of time);
4. Conduct tests utilizing various textiles testing equipment (30% of time); and
5. Write evaluation reports, analyze results, and offer corrective measures (15% of time).

Upon review, counsel's assertions are not persuasive. First, counsel disregards the original decision of the Associate Commissioner which determined that the duties of the proffered position do not parallel those of a "textile machinery operator" or a "textile designer." As noted in the previous decision, there is no obvious parallel to the position of "textile engineer" in the Department of Labor's Occupational Outlook Handbook. On motion, counsel does not point to any other parallel position that may be used as a basis for comparison. Accordingly, counsel's assertion on this point is inconsequential.

However, upon further review, the job description that most closely resembles the proffered position is that of an "engineering technician." As described in the Occupational Outlook Handbook, "engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection, and maintenance." Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, 2002-03 edition, at 100. The Occupational Outlook Handbook further states that:

Their work is more limited in scope and more practically oriented than that of scientists and engineers. Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control - inspecting products and processes, conducting tests, or collecting data. In manufacturing, they may assist in product design, development, or production.

According to the Department of Labor, an individual may qualify for an engineering technician position without formal training, although most employers prefer to hire someone with at least a two-year associates degree. Id. at 101.

An individual in an engineering position, on the other hand, applies the theoretical knowledge of science and mathematics to research and develop solutions to technical problems. Engineers apply theoretical knowledge to design products and the machinery to build those products, the factories in which the products are made, and the systems that ensure the quality of the products. Id. at 103. An individual must possess a bachelor's degree in engineering in order to qualify for an entry level position in the field of engineering. Id. at 104.

In these proceedings, the duties of the position are dispositive and not the job title. Although counsel continuously refers to the position as an engineering vocation, the description of the job duties does not parallel that of an engineer. Instead, the job description states that the beneficiary would be inspecting products, performing quality assurance tests, operating textile

testing equipment, collecting data for analytical reports, assisting with the set up of machinery, and performing other functional aspects of regulating the manufacture of fabric. Regarding the task of implementing quality control methods, the job description states that the beneficiary would rely on the standard principles established by the International Organization for Standardization (ISO), rather than the application of theoretical scientific and mathematical knowledge. Finally, although the petitioner states that the beneficiary would "develop new fabrics," the petitioner has not established that this duty would rise to the level of an engineering function. Although the previous decision of the Associate Commissioner noted that there was no evidence that the petitioner maintains a knitting facility and develops new fabrics, the petitioner declined to provide additional evidence of this duty on motion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The description of the beneficiary's job duties represents a position that is limited in scope and entirely focused on the practical rather than theoretical aspects of the fabric manufacturing process.

Although not dispositive on the issue, it is further noted that the beneficiary would earn an annual salary of \$36,000, which places the beneficiary below the median annual salary of an engineering technician in either the electrical and mechanical engineering fields. See id. at 101. According to the Occupational Outlook Handbook, chemical engineers earned a median annual salary of \$65,960 in 2001, almost twice the salary of the beneficiary's proposed position. See id. at 108.

Second, the petitioner has not established that it requires a degree or its equivalent for the position, as stipulated at 8 C.F.R. 214.2(h)(4)(iii)(A)(3).<sup>1</sup> In the previous decision, the Associate Commissioner noted that the petitioner had not submitted evidence to establish that the petitioner had employed textile engineers that held the requisite degree. On motion, the petitioner submits employment records for two employees that correspond to previously submitted educational records.

---

<sup>1</sup> In Defensor v. Meissner, the Fifth Circuit Court of Appeals observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." 201 F.3d 384, 387 (5th Cir. 2000). The critical evaluation is not the title of the position or an employer's standards, but whether the position qualifies as a specialty occupation under the statutory definition at section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1).

Although the petitioner has submitted copies of IRS Forms W-2 for two previous employees, the petitioner has not established that it has employed *only* persons with a degree in this position. While the petitioner now claims that two persons have previously held the textile engineer position, the petitioner previously stated that at least three persons have held the position. The petitioner did not establish that the third claimed textile engineer actually held a bachelor's degree. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). It is further noted that in response to the director's request for evidence, the petitioner specifically stated that "three of Tissurama's previous Textile Engineers" held bachelor's degrees, thereby implying that the petitioner previously employed more than three textile engineers. The petitioner has not established how many textile engineers the firm has employed in the past, nor has the petitioner established the educational level of the remaining undisclosed textile engineers.

Finally and fundamentally, the petitioner has not established that the proffered position is a specialty occupation. In support of the motion, counsel refers to the statutory definition of "profession" at section 101(a)(32) of the Act, which states that "the term profession shall include but no be limited to architects, engineers, lawyers . . . ." (Emphasis provided by counsel.) Counsel states that "the Service contradicts this federal statute by stating that the instant position is not a profession that warrants H-1B classification and belittles it to that of a mere machinery operator!"

Contrary to counsel's claims, the critical determination is not whether the proffered position is a "profession" as defined at section 101(a)(32) of the Act, but whether the position is a "specialty occupation" as defined at section 214.1(i)(1) of the Act. As previously discussed, the petitioner has not established that the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty, as the minimum for entry into the occupation. For this reason, the petition may not be approved.

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the statute or 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. Accordingly, the previous decision of the Associate Commissioner will be affirmed.

**ORDER:** The decision of the Associate Commissioner dated February 20, 2002, is affirmed.