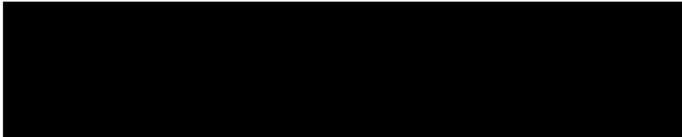


Identifying data deleted to protect clearly unwarranted invasion of personal privacy U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



File: LIN 01 268 53467 Office: NEBRASKA SERVICE CENTER

Date: AUG 25 2003

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)

ON BEHALF OF PETITIONER:

PUBLIC COPY

SELF-REPRESENTED

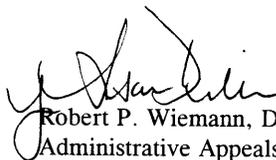
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an Alaska flight school that provides flight training and services, and distributes flex wing ultra light motorized gliders. It has two employees and a gross annual income of \$325,474. It seeks to temporarily 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 was a specialty occupation.

On appeal, counsel asserts that the services performed by the beneficiary involve engineering services to design and prepare an ultra light airplane kit for assembly. Counsel also asserts that the Bureau misinterpreted the most important aspect of the proffered position and ignored another relevant piece of correspondence.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) 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.

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 issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Nebraska Service Center on September 18, 2001, the petitioner described the duties of the proffered position as follows:

Direct, supervise and maintain quality control as well as coordinate manufacturing of ultra light Antares aircraft kits. Oversee maintenance and repair of those aircrafts.

The petitioner also explained that the Federal Aviation Administration (FAA) had given approval to an ultra light 51 percent kit for the assembly and use of the Antares flexible wing trike, a three wheeled motorized hang glider to be distributed by the petitioner in the United States. The Antares was already certified as a kit in Europe where the beneficiary had designed the specifications for the kit. According to the petitioner, the petitioner would import pre-manufactured pieces and parts from Europe for the assembly of the Antares trike. The beneficiary would use locally obtained materials to pre-manufacture kits for the U.S. market, using the beneficiary's specifications developed for the FAA 51 percent kit certification process.

In addition, the petitioner stated that, in 2002, the FAA had proposed a new rule for the certification of light sport aircraft and the creation of a new sport pilot license and certification. As a result, pre-assembled ultra lights, such as the Antares, would be subject to regulation. According to the petitioner, the pre-assembled ultra lights will need to obtain individual airworthiness certificates, and the FAA must approve the aircraft design. The petitioner stated that no U.S. standards exist for obtaining approval, although the FAA could adopt similar, if not matching, European standards. According to the petitioner, since the beneficiary obtained government certification in Germany for the Antares ultra light, his experience is needed to duplicate that result in the United States.

On December 3, 2001, the director asked for further information with regard to the petition. In particular, the director requested

information on the duties of the petitioner's two employees, and whether the petitioner had employed a mechanical engineer previously. The director also requested documentary evidence of the FAA requirements for the 51 percent kit certification process. Finally, the director requested documents to establish the immigration status of the beneficiary and his wife and children, as well as evidence of the beneficiary's marital status.

In response, the petitioner submitted the requested immigration documents and supporting evidence, as well as a breakdown of the job duties of the petitioner's two employees. The petitioner submitted a document entitled "Section 7: Experimental Amateur-Built Airworthiness Certifications", 8130.2D, that identified the FAA requirements for 51 percent kits certification. The petitioner also submitted another document entitled "Advisory Circular 23-15 Small Airplane Certification Compliance Program" dated January 2, 1997. Finally, the petitioner submitted a letter from the Experimental Aircraft Association (EAA) that stated:

EAA has been asked to provide information regarding the need for the manufacturer of ultra light or light sport aircraft to have the services of a mechanical engineer. The manufacture of sport aircraft including ultra lights requires an evaluation of the structural strength during the design of the aircraft and subsequently to evaluate repairs and changes to the design once the aircraft is in production. It is normal for the manufacturers of sport aircraft to perform their own engineering analysis of their aircraft and/or contract with a mechanical or aerospace engineer for further assistance. Recently the FAA proposed a new set of aircraft certification regulations that will require the manufacturers of light sport aircraft to have the services of a qualified engineer. The FAA in its NPRM [Notice of Proposed Rulemaking.] indicated that they would be providing a three-year time period for manufacturers of these aircraft to meet the new requirements.

The petitioner also submitted the FAA's proposed rule entitled "Certification of Aircraft and Airmen for the Operation of Light-Sport Aircraft: Proposed Rule", published in *the Federal Register* on February 5, 2002.

On March 27, 2002, the director denied the petition. The director noted that the duties of the petitioner's other two employees did not require a bachelor's degree to perform them and did not include specialty occupation duties. In addition, the director determined that the FAA documents submitted by the petitioner did not establish that a mechanical engineer was required to assemble the 51 percent kits.

On appeal, counsel states that the director missed the most important part of the proffered position, which is to design an

ultra light aircraft to obtain FAA certification under the newly proposed regulations. Counsel asserts that the director ignored the evidence provided by counsel, namely, the EAA letter that addressed the need for an engineer in the manufacture of aircraft under the new regulations. Counsel finally asserts that the job duties of the other employees are irrelevant as they are not aircraft designers or engineers.

In subsequent correspondence, the petitioner stated it had terminated its relationship with counsel and submitted further documentation to the record. The petitioner provided a more expanded description of the proffered position:

Job Title: Light Aircraft Design Engineer

Job Duties: To perform the design and engineering of flex-wing experimental and light sport aircraft that meet governmental and industrial standards. Establish a production facility with the correct machinery and tooling. To design and approve of new modifications made to existing flex-wing aircraft. Re-develop the construction and assembly procedures for the Antares light sport aircraft. Create detailed assembly manuals for kit built aircraft. To inspect and test other modifications made to flex-wing aircraft. Create and improve standards for the manufacture of the flex-wing aircraft. Identify and develop safety design issue for the flex-wing aircraft. Continue to do general research for the improvement of the flex-wing aircraft. Research U.S.A. and European government rules and regulations, and the light aircraft industry affecting the development of flex-wing aviation.

Job Requirements: A Bachelor['s] in Mechanical Engineering or a bachelor['s] degree in aeronautical engineering and progressive work experience in the design and construction of flex-wing aircraft.

The applicant must be familiar with all standards of measurements, S.I. and British units.

The applicant must be able to relate European aircraft standards to American aircraft standards.

The applicant must be familiar with special aircraft alloys and their recommended uses.

The applicant must know how to test and inspect aircraft material and hardware.

The applicant should have a strong practical background in aerodynamics as it relates to a flexible airfoil.

The applicant must posses[s] the ability to create an idea, design, construct a prototype, and test fly a new aircraft design.

The applicant should be able to utilize C.A.D. programs for the design of flex-wing aircraft.

Knowledge of industrial automation and advanced manufacturing techniques would be beneficial.

The petitioner also submitted letters from two ultra light aircraft manufacturers in the United States and a third letter from the beneficiary's former employer in Kiev with regard to educational requirements for aircraft design engineers.

Upon review of the record, the director's comments in his decision with regard to the job duties of the petitioner's two other employees appear immaterial to this proceeding. The job title and job duties of the proffered position described in the original petition and on appeal are quite distinct from those of the two other employees. The record is devoid of any information that the beneficiary would be performing flight instruction or field operations for the petitioner. The fact that the petitioner has not previously hired a design engineer is also not dispositive in the instant petition.

With regard to the EAA comments on the FAA's proposed requirement for a qualified engineer, the record does not conclusively establish this fact. The FAA 2002 proposed rule mentions new requirements for plane, repairmen and sport pilot certificates; however, a close reading of the proposed rule reveals no specific reference to the requirement for qualified engineers and a suggested three-year phase-in of such expertise into the new light sport aircraft process.

The FAA rule does mention that the ultra light aircraft industry will be called upon to develop consensus standards for design and performance, quality assurance system requirements, production acceptance test specifications, and continued operational safety monitoring systems characteristics. These areas would suggest expertise in aeronautical engineering for industry participants involved in the standards deliberations. Nevertheless, the EAA's assertion is not substantiated with any more conclusive documentation. Therefore, this statement is given less probative weight in this proceeding.

The Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The *Handbook* clearly states on page 104 that a bachelor's degree is required for almost all entry-

level engineering jobs.

Upon review of the petitioner's description of the beneficiary's job duties, and the documentation on the record, it does appear that the beneficiary will be performing design engineering responsibilities either in refining the existing Antares flex-wing aircraft kit, or participating in the establishment of industry design and production standards for the newly proposed FAA light sport aircraft certification. To the extent that the petitioner has established the proffered position is an engineering position, it has established that the beneficiary's proposed job is a specialty occupation.

In addition, the beneficiary possesses a baccalaureate degree in a specific specialty that has been documented to be the equivalent of a similar degree in an accredited U.S. academic institution. Since the beneficiary is not offering his services directly to the public, it does not appear that an engineering license is needed to establish that the beneficiary is qualified to perform the duties of the proffered position.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.