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ADMINISTRATIVE APPEALS OFFICE  
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DEC 23 2003

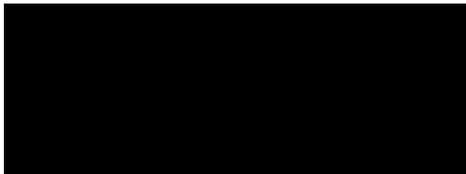
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IN RE: Petitioner  
Beneficiary



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:



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 Citizenship and Immigration Services (CIS) 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 Director, Nebraska Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a newly formed company that is an affiliate of a Canadian company, both of which specialize in the design, engineering, installation, project management and maintenance of industrial and commercial communications infrastructure systems. The petitioner has an anticipated staff of 14 and an unknown gross annual income. It seeks to temporarily employ the beneficiary as a data communications technician supervisor 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 proffered position is a specialty occupation. Counsel submits a contract between AT&T Broadband and the petitioner and other materials.

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 July 31, 2002, the petitioner described the duties of the proffered position as follows:

The [d]ata [c]ommunication [t]echnician [s]upervisor must be able to understand and lead those who work with highly technical telecommunications engineering principles and concepts, understand the overall project goal, instruct the subordinates, and verify that the work is being accomplished correctly. The specific duties and responsibilities of the [d]ata [c]ommunications [t]echnician [s]upervisor will include:

- o Responsible for implementation and tracking of all phases and components of a project including supervision of engineers, technicians, vendors and contractors
- o Responsible for the engineering specifications, inspection of work orders, and provision of red line drawings on all engineering specific construction jobs
- o Review telecommunication engineering plans to establish if design parameters meet standards to provide service requirements to the customer
- o Perform project preview, on-site field surveying and budget preparation
- o Initiate, engineer, monitor, and manage digital ISDN and TI site equipment installation and testing, scheduled maintenance and restoration activity with focus on quality control of design and construction
- o Through subordinates, test insulated wires in aerial, underground, or submarine multiple-conductor cables to determine continuity,

insulation and correctness of cable loading, using standard testing procedures and impedance, resistance, and frequency oscillating meters

- o Through subordinates, conduct load and voltage tests for specific capacities, and operating tests on circuits, relays, repeaters, and terminal equipment, to determine maintenance required
- o Through subordinates, conduct and analyze test results with predetermined standards to ensure that equipment is operating at the required service level
- o Through subordinates, examine telecommunication systems or components of systems and review maintenance records
- o Prepare, or receive and analyze, reports on progress, materials inventory and costs and adjusts work schedules as indicated by reports
- o Responsible for reviewing and analyzing job and contract requirements for materials and manpower
- o Attend various meetings related to the above duties
- o Provide leadership, training and mentoring to project team members

The petitioner stated that the position required a bachelor's degree or its equivalent in work experience and/or education, and that such a degree was required because an individual usually obtained the conceptual and theoretical knowledge required to perform the engineering aspects of the job through formal academic study. The petitioner stated the areas of knowledge needed to perform the position included engineering mathematics, physics, fiber optic transmission theories, digital and analog subscriber carrier concepts, engineering construction and testing methods. The petitioner stated that the person hired into the position needed to possess the ability to work with telecommunications engineering plans and specifications, to solve project, engineering and construction related problems, and to use engineering skills to develop long-term detailed plans for the implementation, extension and rearrangement of future cable routing and digital subscriber equipment.

On August 8, 2002, the director asked for further information with regard to how the proffered position met the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). In response, the petitioner submitted copies of thirty-three job vacancy advertisements from various Internet employment websites. The petitioner stated that it could not provide evidence with regard to present or former

employees in the same position who possessed baccalaureate degrees as the company was new and hired no other data communications technician supervisor. The petitioner stated that if other employees were hired, they would be required to have a baccalaureate degree or its equivalent in communications engineering or a related field. With regard to the specialized or complex nature of the duties of the job, the petitioner stated that the job was a technical management position and that the beneficiary had to be able to "explain and understand how to perform the technical telecommunications work, understand overall project goals, instruct the subordinates, and verify that the work is being accomplished correctly for T1 Telcom and for its customers."

On September 3, 2002, the director denied the petition. The director stated that the evidence submitted by the petitioner failed to establish that the proffered position involved anything more than the installation and repair of data communications lines and equipment. The director also stated that the petitioner had not established the exact nature of the contracted work to be performed. The director also determined that the job vacancy advertisements were insufficient evidence, since it was not clear that the advertised positions were equivalent in scope and complexity to the duties of the proffered position. The director also noted that most job advertisers did not list a required major field of study.

On appeal, the petitioner states that it is a telecommunications company that provides design, construction, project management and maintenance of broadband communication systems. The petitioner resubmits articles on the telecommunications industry, and submits a copy of a standing contract between AT&T Broadband and the petitioner as well as copies of requests for bids on two information technology cable service installation or upgrade contracts with the U.S. Army at Fort Lewis, Washington. On the AT&T contract, the beneficiary is identified as the secretary of the petitioner and as the authorized signator. This contract is dated March 5, 2002.

The petitioner also submits an article entitled "Standards For Fiber Optic Testing and Measurement" to illustrate the type of testing that the beneficiary would be responsible for verifying for contracted work. The petitioner states that the beneficiary will not perform any hands-on work with cables, fiber optics or wires. The petitioner further describes the duties of the proffered position as being responsible for managing the entire "turnkey" approach to its business-dealing with the clients and customers, its engineers and those employed by its clients, its technicians, whose responsibility is to perform the actual physical work, and its general labors. In addition the petitioner submits a chart that lists the academic requirements for the job advertisements that it originally submitted in its response to the director's request for further information. The petitioner states that the evidence submitted does establish that a baccalaureate

degree in a specific specialty is commonly required for a job similar to the proffered position. Finally the petitioner also states that the AAO has approved persons employed in similar positions and quotes from a decision for a position described as division manager, Volt Information Sciences Telecommunications.

The petitioner asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the reference provided by counsel are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert denied, 485 U.S. 1008 (1988).

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

**I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)**

Citizenship and Immigration Services (CIS) 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. With regard to the data communications technician supervisor, the position does not appear to be a technician position, due to the management aspects to the job, nor does it appear to be a strictly managerial position, due to the responsibilities with regard to verifying

the testing of telecommunications systems and projects. As such it appears to be an amalgam position. While the *Handbook* examines telecommunications installers and repairperson positions, it does not examine any supervisory or managerial positions within the industry. As a result, a review of the *Handbook* is inconclusive with regard to establish what the minimum requirement is for entry into the proffered position.

It should also be noted that the actual duties of the proffered position remain unclear even with the submission of the petitioner's contract with AT&T and the documentation as to the request for bid for the Fort Lewis contracts. The AT&T contract appears to be for projects to be performed under a master construction and installation agreement for the installation and maintenance of AT&T broadband systems. This contract is the only evidence placed on the record as to the petitioner's actual business activity. As such it provides no evidence of the knowledge areas identified by the petitioner as necessary knowledge skills for the proffered position, namely, engineering mathematics, physics, fiber optic transmission theories, digital and analog subscriber carrier concepts, engineering construction and testing methods. Neither the contract nor the petitioner has identified any engineering professionals that the beneficiary would supervise in this business activity, or the number or type of semi-professional, or technical personnel to be supervised and monitored by the beneficiary.

Furthermore the requests for bids for the Fort Lewis projects do not document any actual business activities that would further illuminate the duties of the proffered position. They also appear to be potential work contracts for the installation of data equipment. Without more persuasive testimony, the petitioner has not sufficiently established the nature of the actual duties of the proffered position. Without more clarification on the duties, no evaluation can be done on whether a baccalaureate degree in a specific specialty would be the minimum requirement for entry into the position.

**II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)**

A. Degree Requirement is Common to the Industry

Factors often considered by CIS when determining the industry standard include: whether the *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 *Handbook's* conclusions about a degree requirement for the proffered position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted thirty-three job advertisements. The advertisements range from a data specialist for the city of Milwaukee, Wisconsin, an in-house telecommunications manager for a Long Beach California company, to a project field supervisor for True Position. This last company identifies itself as the largest wireless location company in the world. All job advertisements require a baccalaureate degree; however, some do not identify the specific field. In reviewing all the job positions, all positions required varying degrees of job experience, and did not appear to be entry-level positions. Nevertheless, based on the actual job duties of the proffered position described by the petitioner, it is not clear that these job advertisements represent parallel positions in similar firms. Many positions appear to be at a much more senior level than the proffered position or with a specific division within a large business.

In addition, the petitioner submitted no documentation that any professional telecommunications association has made a bachelor's degree a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

#### B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner submitted articles on such topics as multiple systems operators (MSOs) and a document that outlined the standards for fiber optic testing and measurement; however, the petitioner does not establish the relationship between these articles and the actual duties of the proffered position. Without more persuasive testimony, the petitioner has not established this criterion.

#### **III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)**

The petitioner established that it has not hired anyone previously for the proffered position.

#### **IV. 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 - 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)**

As stated previously, the petitioner submitted several articles and documents to the record to establish the complexity of the proffered position; however, the relevancy of these articles to the proffered position is not clear. For example, the AT&T Broadband contract submitted by the petitioner on appeal establishes that the petitioner will be involved, on a project basis, in the installation and maintenance of broadband systems. The relationship between the article on MSOs or the article on the SONET transport systems and the petitioner's AT&T contract for the installation of broadband systems is not explained. With regard to the testing equipment article, the petitioner's job description relegates the testing of equipment to subordinates of the beneficiary, while leaving the responsibility of supervising such work to the beneficiary. Without any information on the volume of the petitioner's business activities or number or academic background of personnel needed to do the testing, it is not possible to establish that the monitoring of such work is either specialized or complex.

While the duties for both the beneficiary and his subordinates appear detail-oriented, they are not necessarily either specialized or complex. Without more persuasive evidence, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.