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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536



File: EAC-02-009-53543 Office: Vermont Service Center

Date: MAR 25 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

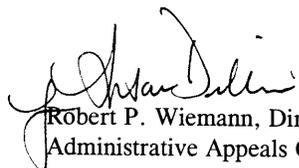
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration.

The petitioner is a surfacing technology business with one employee and an unspecified gross annual income. It seeks to employ the beneficiary as a senior research scientist for a period of six years. The director determined the petitioner had not established that the proffered position is a specialty occupation. The director further determined that the petitioner had not properly filed a labor condition application.

On appeal, the petitioner submits additional information and a certified labor condition application.

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)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

3. Evidence that the alien qualifies to perform services in the specialty occupation. . . .

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

The term "specialty occupation" is 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 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.

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 duties of the proffered position are described in pertinent part as follows:

The duties will entail the design and manufacture of the Cold Spray apparatus, such as the nozzle, gas heater, gas controls, mixing chamber, powder feeder, power supply and controls, safety controls and more. This equipment and controls [sic] will need to be maintained and repaired at

pre-determined intervals in order for it to remain at precise levels of operation. The duties will be to determine precisely and accurately the exact temperature and pressure at which the powder metals used in the Cold Spray process impact the various substrates . . . prepare papers and presentations for various industrial meetings and conferences as well as clients of [REDACTED] [REDACTED] direct and supervise employees of [REDACTED] [REDACTED] in all these aspects of Cold Spray. . . .

The record contains a "Non-Exclusive License Agreement" dated October 22, 1999, between the petitioner and [REDACTED] the holder of the U.S. and European patents for the Cold Gas Spray Method (CGSM), to authorize the petitioner to manufacture, use and sell any parts coated or manufactured with the aid of the CGSM.

The proffered position appears to be that of a physicist. The Department of Labor's *Occupational Outlook Handbook*, 2002-2003 edition, at pages 234-235 finds that the usual requirement for employment as a physicist is a doctoral degree in physics. In view of the foregoing, it is concluded that the petitioner has demonstrated that the proffered position is a specialty occupation within the meaning of regulations.

The director has not determined whether the beneficiary qualifies to perform services in a specialty occupation. It is noted that in the beneficiary's resume as well as in the credentials evaluation, it is stated that one of the beneficiary's 13 patents is: U.S. Patent 5,302,414, dated April 12, 1994, Gas dynamic spraying method for applying a coating. This information conflicts with the information found in the article entitled "COLD GAS-DYNAMIC SPRAY METHOD" in the publication, "Futuretech," No. 224, August 1998, which lists on its last page the patent information for U.S. Patent 5,302,414, dated April 12, 1994, Gas dynamic spraying method for applying a coating. In this publication, the beneficiary is not included in the list of inventors. The record contains no explanation for this discrepancy.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on 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. (Comm. 1988).

Accordingly, the matter will be remanded to the director to make such a determination and to review all relevant issues. The director may request any additional evidence he deems necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director will enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the AAO for review.

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