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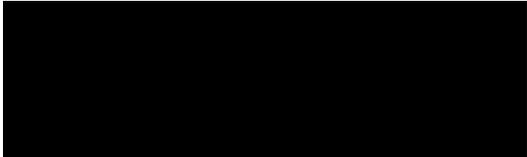
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Citizenship and Immigration Services

DA

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

OCT 23 2003



FILE: EAC 02 184 52282

OFFICE: VERMONT SERVICE CENTER

DATE:

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:



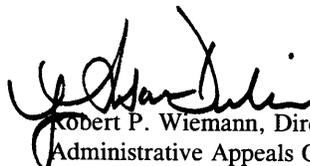
INSTRUCTIONS:

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 nonimmigrant visa petition was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical services company that presently employs over 30 persons and has a gross annual income of \$1,005,000. It seeks to employ the beneficiary as a mechanical engineer for a period of three years. The director denied the petition because the petitioner failed to establish that the proffered position qualified as a specialty occupation.

On appeal, counsel submits a brief.

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 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 one 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 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.

On the Form I-129, the petitioner described the proffered position as "Mechanical Engineer" and, for a description of duties, referred to an accompanying letter from its company administrator. This excerpt describes the duties of the position and why the administrator wants to hire a mechanical engineer:

After a meeting with our management, I have decided that we are in need of a Mechanical Engineer. As one can imagine[,] the work performed by [the petitioner] is very important and very precise, and therefore we are [in] need of a qualified mechanical engineer who can not only maintain the current electromechanical products and systems, but also to [sic] research and plan for new equipment in order to ensure that our clients get the best diagnoses/treatment possible. A mechanical engineer is also responsible to make sure that the apparatus and equipment are feasible and to make sure that the staff can optimize utilization of these equipments (sic) and apparatuses. We expect a Mechanical Engineer to perform the following duties:

1. Research, plan and recommend for purchase new mechanical and electromechanical products and systems related to diagnosis and treatment of renal illnesses[;]
2. Direct and coordinate activities of employees involved in fabrication, maintenance and repair of equipment to make sure that the equipment is feasible;
3. Engineer fabrication of test control apparatus, and equipment;
4. Design products and systems to interface machines, hardware and software; and

5. Coordinate operation, maintenance and repair apparatus to obtain optimum utilization.

The director issued a request for additional evidence that sought, in part: a brochure on the petitioner's business; a list of the petitioner's "current equipment types, function and manufacturers that would require the service of a Mechanical Engineer to maintain"; and definition of "the equipment types and function that the beneficiary would direct the fabrication, maintenance, and repair of," along with specification of the "employees and their training that would be directed in this activity." The request stated, in part, "It is the normal practice for manufacturers of highly technical machinery/equipment to require their trained personnel to service or maintain the equipment in order to guarantee its serviceability."

In response to the request for additional evidence, counsel submitted a copy of the request and 10 sets of documents, all of which the AAO has reviewed.

Among the documents is a list of equipment used by the petitioner to provide dialysis services. The list indicates these types, manufacturers, and functions:

1. Baxter meridian dialysis machine, by Baxter Health Care: performs dialysis, cleansing the blood and removing excess fluid. (The petitioner lists 20 of these.)
2. R.O. unit water treatment device (water softener, sediment filter, carbon tank, and "R.O. Osmonic G-23 Unit), by Osmonic: "Function is to filter and remove all unwanted materials and particles present in the water from large concentration to a small concentrator."
3. Ultrasound machine (transducer probe, central processing unit, and transducer pulse controls), by Dynamic Imaging Limited: sends and receives waves to produce images.
4. Oxygen concentrator, by Millenium Concentrator: serves as an oxygen tank that provides oxygen to patients. (The petitioner lists three of these.)
5. Dialysis chairs, by Lumex: for patient use during treatment. (The petitioner lists 18 of these.)

6. Electric Hi-Lo 3-section treatment table, by Lumex: serves as a gurney for patients. (The petitioner lists six of these.)
7. Conductivity meter, by Mesa Lab: measures temperature, pressure, and conductivity: (The petitioner lists two of these.)
8. Centralized computer system (renal link system by Baxter Health Care; computer by Gateway): monitors dialysis treatment and stores all of the patients' data and laboratory results.
9. Capnograph Plus Capnograph, by Capnograph Plus: monitors heart rate and pulse on both intubated and non-intubated patients. (The petitioner lists five of these.)
10. Silent air compressor, by WOB-L Systems: provides the air source for aerosol generators. (The petitioner lists three of these.)
11. Portable autoclave, by Ramon Surgical Company: sterilizes equipment and apparatuses. (The petitioner lists two of these.)
12. Safe Cycle 40, by Steris: removes excess fluids from patients during fluid waste treatments.
13. EMG System II, by Brackman: detects muscle action potential through the application of surface or needle electrodes.
14. Patient lift, by Hoyer: used to lift and transport patients.
15. Digital image enhancer, by Dyonics: enhances images during laproscopic and endoscopic procedures.

The documents also included another letter from the petitioner's administrator. It indicates that, as of the letter's date (May 20, 2002), the company's employees had increased to over 30. The letter states that, since incorporation in November 2000, there has been a vast increase in its clientele, to the point that it now provides services for hundreds of patients. Highlighting the extremely important and precise nature of the petitioner's services, the administrator states, "[I]t is essential that we obtain the optimum performance from our equipment in diagnosing and treating our patients." According to the letter, the beneficiary "will be directly responsible for supervising the technicians to maintain and repair the machines" that are listed above, and he "will also instruct and train technicians and our staff who use

these machines and as well as any new machines we will purchase." Acknowledging that manufacturers do employ personnel to service and maintain the equipment they sell, the letter indicates that it is "normal practice" to employ a mechanical engineer for reasons of timely response to problems, efficiency, and cost:

While the manufacturers of these equipments [sic] and machines do provide personnel to service and maintain their equipment, it is economically more feasible to have an individual onsite to serve these equipments [sic]. Also due to time restraints, staff members onsite are able to resolve problems with our equipment more efficiently. Therefore, it is normal practice in our industry to employ a Mechanical Engineer at the place of business to maintain and repair equipments.

The petitioner's brochure indicates, in part, that the business has 18 chairs and provides hemodialysis and peritoneal dialysis three days a week (Mondays, Wednesdays, and Fridays) in three shifts (7:00 a.m. to 10:30 a.m., 11:30 a.m. to 4:00 p.m., and 4:00 p.m. to 8:30 p.m.). The staff is listed as including "board certified Nephrologists, certified Registered Nurses, experienced technicians, a Masters prepared Director of Nursing, a Social Worker, and a Dietician." The brochure also provides the names of its medical director and its administrator.

In the denial, the director stated, "The evidence of record does not establish that the job offered qualifies as a 'specialty occupation' pursuant to section 101(a)(15)(H)(i)(b) of the Act."

In paragraphs preceding this conclusion, the director referred to the types of additional evidence that had been sought, again noted "the normal practice for manufacturers of highly technical machinery/equipment to require their trained personnel to service or maintain the equipment in order to guarantee its serviceability," and stated, "Your submitted evidence shows that your organization provides renal care and has associated personnel and equipment to supply this care." The director also asserted:

The need for a "Specialty Occupation" requiring the services of the beneficiary as a Mechanical Engineer does not appear to be proven. You have stated that the manufacturers of your equipment provide personnel to service and maintain their equipment. You provided no evidence of the equipment type(s) and function that the beneficiary would direct the fabrication, maintenance, and repair of. And you didn't specify your employees and their training that would be directed in this activity.

Referencing specific parts of the record, counsel's appellate brief takes great exception to the director's characterization of the evidence, asserts that that the content of the denial notice

reveals blatant disregard and misrepresentation of evidence favorable to the petitioner (including, but not limited to equipment/equipment functions list), and maintains that the denial constitutes an abuse of discretion.

The AAO is not bound by a director's denial or reasoning in its support. Rather, the AAO makes an independent determination based on the totality of the evidence before it. See *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The complete record has been fully reviewed to determine whether the petitioner has established the proffered position as a specialty occupation under any one of the qualifying criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A). As the following discussion of each criterion will show, the facts presented by petitioner are not sufficient to justify classifying the proffered position as a specialty occupation. More precisely, the record does not establish that the duties of the proffered position actually merit designation as a mechanical-engineer specialty occupation.

I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1).

The decisive issue here is whether the duties of the proffered position require, as a minimum for entry in the position, a bachelor's degree or equivalent in the specific specialty of mechanical engineering.

The AAO has not limited its review to the specific job title specified in the petition. It has also carefully considered the full spectrum of duties as described by counsel and the administrator of the petitioner company, as well as everything else presented in support of the petition.

The petitioner's descriptions of duties are too general to make clear what body of highly specialized knowledge the duties would require. The petitioner does not identify the practical tasks that the job entails and why those tasks require the specialized knowledge associated with a bachelor's degree in mechanical engineering.

For example, the record does not demonstrate why the body of specialized knowledge required for a mechanical engineering baccalaureate, or its equivalent, is necessary to perform any of these duties involving the instruments and equipment that the petitioner has listed: maintenance of electromechanical products and systems; research and planning for new equipment; ensurance of the feasibility and optimal use of equipment and apparatuses; research, planning, and recommendation of new mechanical and

electromechanical renal-care products and systems; direction and coordination of employees in maintenance and repair; coordination of equipment operation and repair; supervision of technicians and staff in maintaining and repairing machines; and instruction and training of technicians and staff in the operation of the company's machines.

The administrator's May 20, 2002 letter acknowledges that medical equipment manufacturers employ persons to repair and maintain the equipment they sell, but does not claim that these are mechanical engineers or people with the equivalence of a mechanical engineering degree. None of the evidence presented exhibits why a person with proper training and experience, but not an engineering degree, could not perform the maintenance and repair functions above. There is no evidence in the record why a mechanical engineering degree confers such special supervisory, coordinating, and training skills as to be required for those aspects of the position.

As it often does on specialty occupation issues, the AAO has considered the Department of Labor's *Occupational Outlook Handbook* (*Handbook*). The *Handbook's* treatment of precision instrument and equipment repairers, at pages 511 to 513 of the 2002-2003 edition, indicates that this occupation does not normally require a college degree or equivalent in any specialty.

There are also "engineer fabrication" and "design" aspects attributed to the proffered position. For instance, the administrator's March 11, 2002 letter states that the employee would have to "[d]irect and coordinate activities of employees involved in fabrication, maintenance and repair of equipment to make sure the equipment is feasible"; "engineer fabrication of test control apparatus, and equipment"; and "design products and systems to interface machines, hardware, and software." These descriptions also are too general. The petitioner does not translate these generally stated design and fabrication duties into specific tasks and task-related applications of knowledge that would be required for performance. Accordingly, these general descriptions fail to demonstrate why these duties are so specially technical they cannot be performed without the specialized body of knowledge peculiar to a bachelor's degree in mechanical engineering.

At page 3 of his brief, counsel indicates that the petitioner (which began business in November 2000 and filed its appeal in July 2002) has not used manufacturers' repair and maintenance technicians:

As the above paragraph indicates, the Petitioner never said that they use personnel provided by the manufacturers of their equipment. In fact, the Petitioner pointed out all of the reasons why they **do**

not use the services of the manufacturers to service and maintain their equipment. . . .(Emphasis in original.)

This raises another aspect of the specialty occupation issue. If the petitioner was able to operate up to at least July 2002 without the services of either a mechanical engineer or manufacturer's repair/maintenance personnel, the record fails to establish (1) the position and qualifications of anyone who may have been performing repairs and maintenance, and (2) what change of circumstances, if any, led to the need for a mechanical engineer's position now.

All of the information and documentation provided by counsel and the petitioner fail to establish that performance of the proffered position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

A. Degree requirement common to the industry.

The AAO has noted the relevant statement, in the May 20, 2002 letter submitted by the petitioner's administrator in response to the request for additional evidence, that it is "a normal practice in our industry to employ a Mechanical Engineer at the place of business to maintain and repair equipments [sic]." However, 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). Here, no supporting documents were presented.

The Internet job advertisements for mechanical engineers all refer to positions in industries different from the petitioner's medical services business. In the order in which they appear in the record, they reference their industries as: (1) "Government/Civil Service," with the vacancy at the Architect of the Capitol; (2) "Employment Services, Government/Civil Service," in a position with "Wallach Associates" that requires a Top Secret security clearance; (3) "High Tech/It," in "SSGN Tomahawk Launching System Test and Evaluation - Test Design- Data Analysis - Problem Solving involved; (3) "Technical, Services," at a "pentagon project" requiring a construction management background; (4) "High Tech/IT," with an opening in "engineering

support across electrical and mechanical aspects of ground systems in support of the System Support Manager for SBIRS"; (5) "High Tech/IT, Technical, Consulting Services, Engineering," in a position requiring experience in preparation of "engineering analyses with recommendations pertaining to mechanical systems in accordance with appropriate MIL-SPECS"; and (6) "Construction/Trades, Engineering, Environmental, HVAC," where the employee would "perform building assessments, design/build projects and project management associated with major mechanical equipment replacement and system renovations in a wide variety of commercial, residential, and mission critical facilities."

The record does not substantiate that it is common practice in the petitioner's industry to hire a mechanical engineer to perform the duties of the proffered position.

B. Degree necessitated by the complexity or uniqueness of the position.

Counsel does not explicitly address this issue, except to assert in the appeal that the petitioner satisfied all the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The record fails to establish that the particular duties of the proffered position are either so complex or so unique that only an individual with a bachelor's degree in mechanical engineering could perform them.

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

The record provides no evidence of prior hiring practice for the proffered position. In fact, the tenor of the administrator's March 11, 2002 letter, submitted with the petition, is that, at the time of filing the petition, the decision to add a mechanical engineer position to the company was a recent development: "After a meeting with our management, I have decided that we need a mechanical engineer."

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 14.2 (h) (4) (iii) (A) (4).

The totality of the petitioner's evidence does not establish that the specific duties are so specialized and complex that only a person with a baccalaureate in mechanical engineering can perform them.

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 appeal is dismissed. The petition is denied.