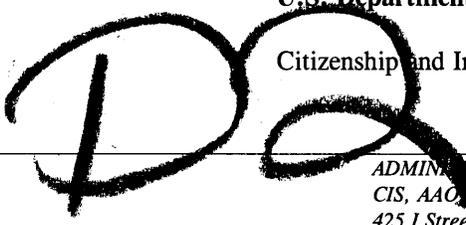


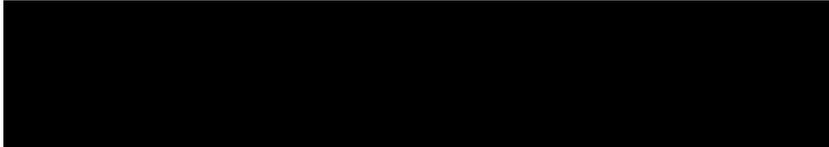
U.S. Department of Homeland Security

Citizenship and Immigration Services



ADMINISTRATIVE APPEALS OFFICE
CIS, AAC, 30 MASS, 3/F
425 I Street, N.W.
Washington, DC 20536

COPY



OCT 20 2003

File: WAC 02 126 50426 Office: CALIFORNIA 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)

ON BEHALF OF PETITIONER:



identifying data deleted to
prevent unwarranted
invasion of personal privacy

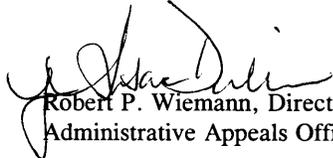
INSTRUCTIONS:

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, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a 200-bed convalescent home facility with 190 employees and a gross annual income of \$8.3 million. It seeks to temporarily employ the beneficiary as a mechanical engineer (HVAC systems) for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation and compared the job duties to those of a maintenance mechanic.

On appeal, counsel asserts that the CIS description of the proffered position as maintenance mechanic is incorrect.

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 March 4, 2002, the petitioner described the duties of the proffered position as follows: "Will maintain our HVAC systems for our facility. Will direct and coordinate activities involved in fabrication operation, application, installation and repair of facility['s]mechanical systems and products. Will ensure the proper maintenance of our HVAC systems." The petitioner added the following information:

Due to the increase in patients at our facility we are in need of a mechanical engineer for our HVAC. We feel that a full-time mechanical engineer would be appropriate to handle all of our maintenance of our air-conditioning and heating systems. . . . In addition, he will evaluate our systems and recommend design modifications to eliminate malfunction.

On March 11, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested a detailed explanation of the beneficiary's proposed duties and responsibilities, types of employees supervised and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested more evidence with regard to whether the petitioner's competitors in the convalescent home industry also required a baccalaureate degree in mechanical engineering for similar positions. The director also requested that the petitioner provide information on employees previously in the same position who possessed baccalaureate degrees.

In response, the petitioner reiterated the duties previously described and added the following additional duties: "[The beneficiary] will analyze equipment modifications and equipment modifications [sic] and performance requirements to determine the technical details of the systems." The petitioner also stated:

[The beneficiary] will design and give advice on the building and repair of machines, tools and systems with machine parts. He will also investigate problems and faults with machinery, and study production process improvement. He will carry out research into the use

of energy sources, machine and materials[,] and give advice on systems and machines.

The petitioner stated that the beneficiary would not supervise any employees and would spend equal time in coordinating operations, maintenance, and repair activities to obtain optimum utilization of systems. The petitioner also stated that a baccalaureate degree was required for the proffered position because the position required knowledge of testing equipment, as well as the ability to analyze blueprints, schematics and other technical documents. The petitioner stated that it had established the first and fourth criteria of 8 C.F.R. § 214.2 (h) (4) (iii) (A). With regard to the industry standard for the proffered position, the petitioner submitted three job advertisements for mechanical engineers taken off of the Internet.

On April 26, 2002, the director denied the petition. The director determined that the duties of the proffered position were indicative of a maintenance mechanic, general utility, as described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. In addition the director noted that the petitioner had not provided any documentation that it normally required applicants for the position to possess baccalaureate or higher degrees. Finally the director determined that the duties and stated levels of responsibility described by the petitioner did not indicate any particular complexity.

On appeal, counsel examines duties outlined in the *Handbook* for both mechanical engineers and maintenance mechanics, and asserts that the two job classifications are very different. He further asserts that the petitioner, through materials submitted in response to the request for further evidence, established all four criteria of 8 C.F.R. § 214.2(h) (4) (iii) (A).

Pursuant to 8 C.F.R. § 214.2(h) (4) (iii) (A) (1), namely that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position, the Department of Labor's *Occupational Outlook Handbook, (Handbook)* 2002-2003 edition, examines the jobs of both mechanical engineers and heating, air-conditioning and refrigeration mechanics and installers. This latter classification appears to be more analogous than the mechanic, general utility, category utilized by the director in her decision. With regard to mechanical engineers, the *Handbook* states the following on page 114:

Mechanical engineers research, develop, design, manufacture, and test tools, engines, machines, and other mechanical devices. They work on power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines. They also develop power-using machines such as refrigeration and air-conditioning equipment, machine tools, material

handling systems, elevators and escalators, industrial production equipment, and robots used in manufacturing.

. . . .

Mechanical engineers work in many industries, and their work varies by industry and function. Some specialties include applied mechanics; computer-aided design and manufacturing; energy systems; pressure vessels and piping; and heating, refrigeration, and air-conditioning systems.

With regard to heating, air-conditioning, and refrigeration mechanics and installers, the *Handbook* states on page 501:

Heating, air-conditioning, and refrigeration systems consist of many mechanical, electrical, and electronic components such as motors, compressors, pumps, fans, ducts, pipes, thermostats, and switches. In central heating systems, for example, a furnace heats air that is distributed throughout the building via a system of metal or fiberglass ducts. Technicians must be able to maintain, diagnose, and correct problems throughout the entire system. To do this, they adjust system controls to recommended settings and test the performance of the entire system using special tools and test equipment.

Although they are trained to do both, technicians often specialize in either installation or maintenance and repair. Some specialize in one type of equipment—for example, oil burners, solar panels, or commercial refrigerators. Technicians may work for large or small contracting companies or directly for a manufacturer or wholesaler. Those working for smaller operations tend to do both installation and servicing, and work with heating, cooling, and refrigeration equipment.

With regard to educational requirements for mechanical engineers, the *Handbook* states on page 104: "A bachelor's degree in engineering is required for almost all entry-level engineering jobs." With regard to heating and air-conditioning mechanics, on page 502, the *Handbook* states:

Because of the increasing sophistication of heating, air-conditioning, and refrigeration systems, employers prefer to hire those with technical school or apprenticeship training. A sizable number of mechanics and installers, however, still learn the trade informally on the job.

Many secondary and postsecondary technical and trade schools, junior and community colleges, and the Armed Forces offer 6-month to 2-year programs in heating, air-conditioning, and refrigeration. Students study theory, design, and equipment construction, as well as

electronics. They also learn the basics of installation, maintenance, and repair.

In comparing the job descriptions and duties of a mechanical engineer with those of a heating, ventilation and air-conditioning mechanic, the job described by the petitioner appears more analogous to the heating, ventilation and air-conditioning mechanic position. This is due, in part, to the lack of information on the record with regard to the numbers, types, or sophistication of any existing or planned heating or air conditioning systems in the petitioner's convalescent center. The petitioner also has provided no information with regard to the more advanced job responsibilities, such as research of energy sources, or design work. The fact that there are no other employees supervised by the beneficiary to do any basic or routine maintenance work also lends weight to the classification of the proffered position as a heating, and air-conditioning mechanic. Since the *Handbook* indicates that an apprenticeship or a 2-year associate degree is the usual academic preparation for the HVAC mechanic position, it does not appear that a baccalaureate degree is the minimum academic requirement for entry into the proffered position. Therefore the petitioner has not established the first criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the second criterion, factors often considered by CIS when determining the industry standard include: whether the Department of Labor's (DOL) *Occupation Outlook Handbook (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)).

With regard to the industry standard, the petitioner submitted three vacancy announcements for mechanical engineer positions within the United States. Two of the three job notices were for engineering companies or engineering consulting firms. The third was for placement with an industrial equipment manufacturer. The remaining documentary evidence submitted by the petitioner consists of an explanation of the job of mechanical engineers taken from a website identified as Kiwi Careers. There are no specific job advertisements identified in the Kiwi Careers excerpts. None of the submitted job vacancies appear to be for parallel positions within the convalescent care industry. Therefore the petitioner has not established the second criterion 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the third criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), namely, that the petitioner normally requires a baccalaureate degree for the proffered position, the petitioner noted that the needs of the patients necessitated having a full-time mechanical engineer on staff; however, the petitioner provided no information on any employees currently performing the duties of

the proffered position or previous employees who performed the same duties and their academic credentials. Without more persuasive evidence, the petitioner has not established the third criterion of 8 C.F.R. § 214.2 (H) (4) (iii) (A).

With regard to the fourth criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), namely that 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 petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position. The job duties described by the petitioner are generic in nature and do not contain sufficient detail to establish a specialized or complex nature of the position. For example, the petitioner provided no information on the complexity of the its heating or air conditioning systems, or the specialized nature of such systems within a healthcare facility. Without more persuasive evidence as to the specialized or complex nature of the proffered position, 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 proffered 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.