

D2

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

identifying data deleted to
prevent clearly unwarranted

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



FILE: WAC-01-065-52291 OFFICE: CALIFORNIA SERVICE CENTER DATE: OCT 29 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)

IN BEHALF OF PETITIONER:
[Redacted]

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.

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 petition will be denied.

The petitioner is a machine shop that employs 70 to 80 persons and has a gross annual income of \$5.7 to \$10 million. It seeks to employ the beneficiary as an engineering assistant (mechanical equipment). The director denied the petition because: (1) the offered position fails to qualify as a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief and previously submitted evidence. Counsel states, in part, that the offered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform services in a specialty occupation.

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.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation, and the second is whether the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(1) of 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 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.

According to the petitioner's company letter, the position of engineering assistant (mechanical equipment) is described as follows:

- 1) Perform quality assurance for all aspects of the machining operations, including performing evaluations and tests to verify that machines and tools conform to established guidelines[;]
- 2) Review new design drawings[,] and related specifications[,] for mechanical equipment against engineering sketches and design proposals to ensure [the] machine or tool will perform to client satisfaction[;]
- 3) Analyze engineering sketches, specifications[,] and related data and drawings to determine design flaws and propose solutions[;]
- 4) Recommend machine/tool improvements and corrections to other engineers and engineering assistants[;] and[,]
- 5) Monitor machine/tool performance after [their] design and manufacture to prevent [the] recurrence of operating problems and ensure efficiency of [their] operation.

On May 30, 2001, the director issued a request for evidence

seeking the following: a properly filed labor condition application; a detailed job description; position announcements; a detailed description of the materials that the evaluator analyzed for the foreign educational credentials evaluation; and evidence that the offered position satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response, the petitioner submitted the following: a copy of the labor condition application; counsel's detailed description of the offered position's duties; a copy of the balance sheet of Excel CNC Machining, Inc. as of December 31, 1999; an advertisement dated June 8, 2001; and the original of Globe Language Service's educational evaluation.

On February 2002, the director denied the petition, finding that the offered position, as described in the petitioner's initial Form I-129 and counsel's August 24, 2001 correspondence, failed to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the duties of the offered position reflected the position of a mechanical engineering technician, as found in the 2000-2001 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that a bachelor's degree was not required for entry into the position. The director also stated that the petitioner's advertisement was unrelated to the offered position.

With respect to the beneficiary's qualifications, the director found that the petitioner's evidence failed to establish that the beneficiary's diploma was equivalent to a U.S. bachelor's degree. Thus, the petitioner failed to show that the beneficiary met one of four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(C).

On appeal, counsel asserts that the offered position qualifies as a specialty occupation and that the beneficiary qualifies to perform its duties. First, counsel maintains that the job duties of the offered position are highly specialized and complex, requiring a broad understanding of areas such as mathematics, mathematical analysis, physics, general mechanics, and technical drawings. Second, counsel asserts that the petitioner has continuously employed engineering assistants and has normally required that they possess at least a bachelor's degree. Third, counsel asserts that the degree requirement for the offered position is common to the industry among similar organizations and the petitioner's competitors have successfully obtained H-1B classification for very similar positions. Fourth, counsel maintains that the *Handbook* should not be relied upon because it is a standardized government classification system. Fifth, counsel asserts that the beneficiary is qualified to perform the duties of a specialty occupation because he holds the U.S. educational equivalent of a combined bachelor and master of science degree in mechanical engineering.

Counsel's assertions are not persuasive. The record fails to establish that the offered position qualifies as a specialty occupation, and that the beneficiary qualifies to perform the duties of a specialty occupation.

According to the petitioner's letter dated December 12, 2000, the duties of the offered position are as follows:

- 1) Perform quality assurance for all aspects of the machining operations, including performing evaluations and tests to verify that machines and tools conform to established guidelines[;]
- 2) Review new design drawings and related specifications for mechanical equipment against engineering sketches and design proposals to ensure [the] machine or tool will perform to client satisfaction[;]
- 3) Analyze engineering sketches, specifications[,] and related data and drawings to determine design flaws and propose solutions[;]
- 4) Recommend machine/tool improvements and corrections to other engineers and engineering assistants[;] and[,]
- 5) Monitor machine/tool performance after [their] design and manufacture to prevent [the] recurrence of operating problems and ensure efficiency of [their] operation.

Later, in response to the director's request for a detailed job description that stated the percentage of time spent for each duty, counsel had submitted a letter, dated August 24, 2001, in which counsel described the duties of the offered position and the time spent for each duty. However, the duties as described in counsel's letter differ from those described by the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, in this proceeding, we will examine the duties as described by the petitioner.

The AAO does not simply rely on a position's title when determining whether a particular position qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that the AAO considers.

Counsel relies upon *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal., March 19, 1991) to assert that the *Handbook* should not be relied upon because it uses a standardized government classification system. According to the facts in *Unico American*, an unreported case, the Immigration and Naturalization Service (INS), now Citizenship and Immigration Service (CIS), would use the *Handbook* to determine a job's specific vocational preparation (SVP) level to decide the training and education required for the job, as each job had an assigned SVP level that stated its minimum training and education requirement. *Unico American*, 1991 WL 11002594 at *5.

The *Unico American* case is not on point, however, for two reasons. First, it is an unreported case and, therefore, has limited precedential value, if any. Second, the SVP rating system is found in the Department of Labor's Dictionary of Occupational Titles, not the *Handbook*. The AAO does not regard a specific SVP rating in the *Dictionary of Occupational Titles* as a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation.

Thus, the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) is instructive in evaluating the duties of a position. On page 101, it describes the duties of the offered position as resembling those performed by mechanical engineer technicians. The *Handbook* describes the position as follows:

Mechanical engineering technicians help engineers design, develop, test, and manufacture industrial machinery, consumer products, and other equipment. They may assist in product tests - by setting up instrumentation for auto crash tests, for example. They may make sketches and rough layouts, record data, make computations, analyze results, and write reports Mechanical engineering technicians prepare layouts and drawings of the assembly process and of parts to be manufactured. . . . Some test and inspect machines and equipment

According to the *Handbook*, the educational preparation for mechanical engineering technicians varies. Although it may be possible to qualify for a few engineering technician jobs without formal training, most employers prefer to hire someone with at least a two-year associate degree in engineering technology. The course work for mechanical engineering technicians includes fluid mechanics, thermodynamics, and mechanical design.

Similar to the offered position, the mechanical engineering technician helps engineers in the design, development, testing, and manufacture of machinery. Both perform product testing to ensure that machines and tools conform to established guidelines, and both prepare sketches and rough layouts of the parts to be manufactured. Both record data, make computations, analyze results, and write reports.

Under the *Handbook*, a bachelor's degree is not required for the position of mechanical engineering technician; thus, the petitioner fails to satisfy the first prong under 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a bachelor's or its equivalent is normally the minimum requirement for entry into the particular position.

Counsel asserts that the petitioner has established the second prong under 8 C.F.R. § 214.2(h)(4)(iii)(A) because the degree requirement is common to the industry in parallel positions among similar organizations, and further that the petitioner's competitors have successfully obtained H-1B classification for very similar positions. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior cases. In the absence of all corroborating evidence contained in the prior proceedings, the AAO is unable to determine whether those petitions were parallel to the offered position. Moreover, 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).

Counsel asserts that the record establishes the third prong under 8 C.F.R. § 214.2(h)(4)(iii)(A) because the petitioner normally requires a degree or its equivalent for the position. However, the petitioner has not produced evidence that would show a past practice of requiring a bachelor's degree for the offered position. For example, the petitioner's submitted evidence, an advertisement dated June 2001, seeks to fill a manufacturing engineer position, which has very dissimilar duties from the offered position. Excepting this advertisement, the petitioner has submitted no other evidence to support its claim. 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).

Counsel maintains that the petitioner satisfies the fourth prong under 8 C.F.R. § 214.2(h)(4)(iii)(A) because the job duties of the offered position are highly specialized and complex, requiring a broad understanding of areas such as mathematics, mathematical analysis, physics, general mechanics, and technical drawings. As shown on page 101 in the *Handbook*, a mechanical engineering technician's coursework includes subjects such as fluid mechanics, thermodynamics, and mechanical design. Moreover, most two-year associate degree programs accredited by the Technology Accreditation Commission of the Accreditation Board for Engineering and Technology (TAC/ABET) require, at minimum, college algebra and trigonometry, and one or two basic science courses, and depending on the specialty, more math or science may be required. The offered position and the position of mechanical engineering technician both require a broad understanding of the same subject matter. Thus, the petitioner fails to satisfy the fourth prong under 8 C.F.R. § 214.2(h)(4)(iii)(A).

In conclusion, the petitioner fails to establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the offered position does not qualify as a specialty occupation. Because the offered position does not qualify as a specialty occupation, this proceeding will not address the beneficiary's qualifications.

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.