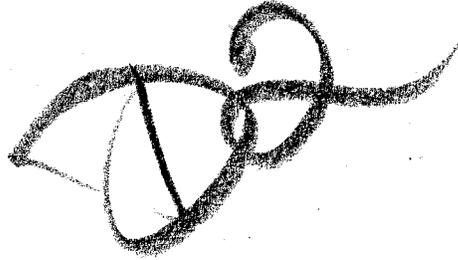




U.S. Citizenship
and Immigration
Services



FILE: WAC 02 142 52634 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

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

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

RP Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The service center director denied the nonimmigrant visa petition 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 heating, ventilation and air conditioning (HVAC) company with a new Internet-based energy management program. It seeks to employ the beneficiary as a project engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, the petitioner states that it requires only a period of six months to train the beneficiary in its HVAC systems prior to assigning him permanently to Brazil.

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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support dated January 22, 2002; (3) the director's request for additional evidence; (4) a letter, dated April 25, 2002, that responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a project engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; and the petitioner's letters in support of the petition and in response to the director's request for further evidence. According to the initial petition, the beneficiary would oversee the development of the petitioner's wholly owned subsidiary, imonitorenergy.com. According to the petitioner, this business will develop and implement internet-based energy controls internationally, beginning in South America. In the petitioner's response to the director's request for further evidence, the petitioner outlined the work to be done by the beneficiary for the first two months in the United States. According to the petitioner, the first month would be a training period to cover orientation to the job, the petitioner's office and the HVAC industry. During the second month, the beneficiary's duties would include design engineering of direct digital control systems for HVAC to include "kw analysis." The beneficiary would produce computer-assisted drawings with the assistance of journeyman technicians.

The petitioner further broke down the beneficiary's work day in the United States as follows: ten per cent of his time-site inspection; 25 per cent of his time-CAD work; 25 per cent of his time-calculation and analysis; 25 per cent of his time-energy analysis; and 15 per cent of his time-inspection of completed work. The petitioner described the concept of HVAC design combined with direct kw (energy) effect by monitoring and analyzing data for energy reduction as cutting edge. Finally the petitioner states that the minimum educational requirement for the position was an engineering degree with CAD experience.

The director found that the proffered position was not a specialty occupation and referred to the description of HVAC technician in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition. Based on this classification, the director noted that the position of HVAC technician did not require a baccalaureate degree in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that it is about to open an HVAC subsidiary in Brazil. The petitioner requests H-1B classification for only six months to acquaint the beneficiary with the various systems used in the United States. According to the petitioner, the beneficiary has already visited several factories located in Brazil that are interested in the petitioner's energy monitoring plus preventive maintenance programs, which are presently only offered in the United States.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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." See *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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, it appears to be an amalgam position that involves

mechanical engineering skills, more specific skills and knowledge in the HVAC industry, and project management skills to oversee an international subsidiary. Although the petitioner submitted a detailed breakdown for the first two months that the beneficiary would be working in the United States, there is no further breakdown of his duties while working in Brazil. For example, the petitioner has only provided minimal information as to whether the beneficiary would be performing engineering design work in Brazil, or installing and monitoring pre-existing HVAC systems in U.S. companies located in Brazil. The necessary skills for the engineering work are quite distinct from the business development or installation and monitoring of pre-existing HVAC systems. It is also not clear from the record whether the petitioner's subsidiary is actually functioning or is still in the planning stages. The petitioner to date has not provided sufficient evidence to establish that the proffered position is primarily a mechanical engineering position. As correctly noted by the director, the *Handbook* does not indicate that HVAC technicians require a baccalaureate degree in a specific specialty for entry into a position.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no further documentation regarding academic credentials required for other HVAC project engineers in similar firms. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its response to the director's request for further evidence that the subsidiary in Brazil would be its program in South America. The petitioner provided no other information on other project engineers employed by the petitioner and their academic credentials. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. As previously stated, the record is not clear as to the specific duties of the proffered position beyond the initial two months. Although the petitioner has stated that the beneficiary would be producing CAD drawings, this in itself does not make the duties of the proffered position so specialized that only a person with a baccalaureate degree in engineering could perform them. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, if the position had been determined to be a specialty occupation. The petitioner did not submit an educational equivalency document that established the beneficiary's foreign degree in civil engineering was the equivalent of a U.S. baccalaureate from an accredited U.S. educational institution in a specific specialty relevant to the proffered position. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications further.

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.