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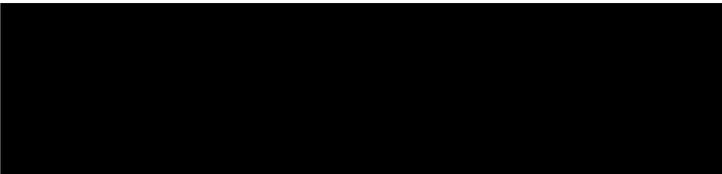
FILE: WAC 03 010 53816 Office: CALIFORNIA SERVICE CENTER Date:

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:



INSTRUCTIONS:

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 contract services provider. In order to employ the beneficiary as a radio based station tester, the petitioner 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation. The director's decision alternately referred to the proffered position as an electro-mechanic technician and an electrician, and it quoted extensively from the information on electricians in the 2002-2003 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* to support the finding that the proffered position did not require a minimum of a bachelor's degree or its equivalent in a specific specialty.

On appeal, counsel asserts that the director misunderstood the nature of the proffered position, which, according to counsel, involves an occupation – tester/engineer – that is materially different than electrician and is a specialty occupation.

For reasons discussed below, the AAO has determined that the director's decision to deny the petition was correct. The AAO based its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional information (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief with its enclosures.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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.” (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The October 11, 2002 letter of support that the petitioner submitted with the Form I-129 includes the following information. The petitioner, a general consulting company that was incorporated in September 2002, has entered into a subcontract with Amatel, Inc. According to this subcontract with Amatel, Inc., the petitioner is to provide “engineers, including Radio Based Station Testers to EXI/Parsons - a major contractor for multinational telecommunications companies such as AT&T, Singular, Ericsson, and Nokia.”

It is noted that the document memorializing the agreement between the petitioner and the beneficiary engages the beneficiary as a “consultant” to install and test RBS (radio based station) cabinets, upon request, at the petitioner’s offices “or such other places as reasonably requested” by the petitioner. According to this document, the petitioner and the beneficiary “anticipate” that the petitioner shall work “on average 40 hours per week.” Paragraph 8 (“Agreement”) states:

Consultant [i.e., the beneficiary] shall not be entitled to nor receive any benefit normally provided to Company's [i.e., the petitioner's] employees such as, but not limited to, vacation payment, retirement, health care, or sick pay. Consultant shall be solely responsible for filing all returns and paying any income, social security, or other tax levied upon or determined with respect to the payments made to Consultant pursuant to this agreement.

The aforementioned letter of support provided the following list as "a detailed description of the work to be done by the beneficiary:

- (1) Mechanical installation of Switching and RBS, transmission, power;
- (2) Cable fabrication, installation and testing;
- (3) Clearance of audit items;
- (4) On-site material inventory;
- (5) Create/generate Change Orders;
- (6) MOP generation and execution;
- (7) Redline modules/provide redlines;
- (8) Report and solve technical issues/problems and system disturbance reports;
- (9) Mentor/teach installation and testing to junior level implementation personnel;
- (10) Progress reporting for project delays, customer concerns, and/or complaints to immediate supervisor;
- (11) Customer support on project level;
- (12) Escalate project delays, customer concerns, or complaints to immediate supervisor;  
and
- (13) Acquire customer sign-off of acceptance/punchlist.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO consulted the 2004-2005 edition of the *Handbook* and the

2002-2003 edition, cited by the director, for information relevant to the educational requirements of the proffered position and its duties as described in the record. The AAO determined that, to the limited and generalized extent that the duties are described in the record, they more generally comport with the electrical and electronic installer and repairer occupation, and, more particularly, with its field technician subset as described in the *Handbook*. As described in the *Handbook*, members of this occupation install, maintain, and repair complex pieces of electronic equipment. As reflected in this excerpt from the 2004-2005 edition, the *Handbook* indicates that a bachelor's degree, or its equivalent, in a specialty is not required for such positions:

Knowledge of electrical equipment and electronics is necessary for employment. Many applicants gain this knowledge through programs lasting 1 to 2 years at vocational schools or community colleges, although some less skilled repairers may have only a high school diploma. Entry-level repairers may work closely with more experienced technicians who provide technical guidance.

The petitioner's description of the proposed duties lack sufficient detail to support counsel's contention that the proffered position requires at least a bachelor's degree in electrical engineering or a related specialty. The fact that paragraph 1.3 of Ericsson's RBS 2202 Implementation and Integration Manual recommends that installation personnel hold a "Bachelor's Degree in Technical College or equivalent education with emphasis on Electrical Engineering" is not sufficient to establish that such a degree is required as a minimum for entry into the position. Also, the pay rate proposed for a beneficiary is not a reliable measure of the particular educational credentials required for full performance of a position. The Amatel advertisement for radio test engineers is not very probative. The advertisement does not indicate whether the hiring standards it describes are the exclusive ones used by Amatel, nor does the advertisement convey whether those standards are necessitated by performance requirements or are a matter of employer preference that includes other considerations. In the advertisement requiring "BS in electrical, electronic, computer engineering or equivalent," the term "equivalent" is open-ended and does not indicate the yardstick that Amatel would use to judge equivalency. Furthermore, the petitioner has not provided any documentation that this Amatel advertisement pertains to any position that the beneficiary would hold. In this regard it is noted that, per the contract between Amatel and the petitioner, the beneficiary, unlike someone employed in response to the advertisement, would not be hired as an Amatel employee and would not necessarily be serving in the advertised position of Senior Radio Test Engineer.

As the evidence of record does not establish that the proffered position requires at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Also, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by showing a specific-specialty degree requirement that is common to the petitioner's industry in positions that are both (1) parallel to the one proffered here and (2) located among organizations similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed earlier in this decision, the evidence does not establish that the proffered position is a type for which the *Handbook* indicates an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, the record does not include any submissions from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least such a degree.

For reasons already discussed the single job vacancy announcement, from Amatel, has little probative value. Furthermore, a single advertisement is not sufficient to establish an industry-wide hiring and recruiting practice.

Next, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. As the record does not contain evidence about any prior hiring history, this criterion is not a factor in this proceeding.

Finally, the descriptions of the proffered position and its duties do not convey the complexity, uniqueness, or specialization required to qualify a position as a specialty occupation under either the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The evidence of record fails to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by distinguishing the proffered position from other electrical/electronic positions because of unique or more complex requirements that could be performed only by an individual with at least a bachelor's degree in a specific specialty. The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because the evidence of record does not establish that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. As generally and abstractly as they are described in the record, the position and its duties appear no more challenging than a regular electrical and electronic field technician position that requires less than a bachelor's degree in a specific specialty.

For the reasons discussed above, the director was correct to deny the petition because the petitioner had not met any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the following additional reason for denying the petition is also noted. Information submitted by the petitioner indicates that at the time of filing it did not agree to the terms of the labor condition application (LCA), although such agreement is a necessary condition for approval of an H-1B petition.<sup>1</sup>

The LCA requires the employer to develop and maintain documentation related to the payment of wages to H-1B employees as specified at 20 C.F.R. § 655.731. This regulation includes, in part, requirements that the petitioner

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<sup>1</sup> The Form I-129 requires an H-1B petitioner to sign that "By filing this petition, I agree to the terms of the labor condition application for the duration of the alien's authorized period of stay for H1-B [sic] employment." See page 4 of the Form I-129 Supplement H.

see that its H-1B employee's Federal Insurance Contributions (FICA) tax payments are reported and paid; that there is appropriate withholding for the employee's tax paid to the IRS; and that appropriate employer and employee taxes are paid as required by Federal, State, and local governments. 20 C.F.R. § 655.731(c). Contrary to this requirement, the petitioner's agreement with the beneficiary stated:

Consultant [that is, the beneficiary] shall be solely responsible for filing all returns and paying any income, social security, or other tax levied upon or determined with respect to the payments made to Consultant pursuant to this agreement.

In addition, it appears that the petitioner intended to deny the beneficiary benefits that it provides its employees, for its agreement with the beneficiary stated:

Consultant [i.e., the beneficiary] shall not be entitled to nor receive any benefit normally provided to Company's [i.e., the petitioner's employees] such as, but not limited to, vacation payment, retirement, health care, or sick pay.

The above contractual term violates the requirement at 20 C.F.R. § 655.731(c)(3) that the petitioner offer its H-1B employees the same benefits and eligibility for benefits that it offers its U.S. workers.

While the petitioner signed the Form I-129 indicating that it agreed to the terms of the LCA, the evidence of record indicates to the contrary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this additional reason also, failure to agree to the terms of the LCA, the petition must be denied.

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.