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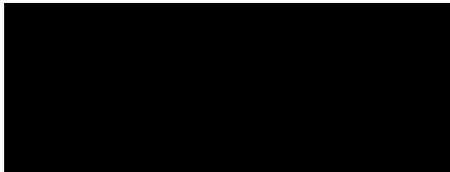
MAR 04 2004

FILE: WAC 02 071 51113 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

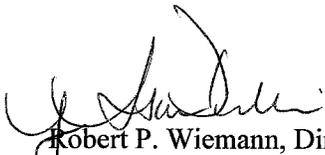
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. This matter will be remanded to the director for entry of a new decision.

The petitioner is a wholesale distributor of prepaid telephone cards, and seeks to employ the beneficiary as an industrial engineer. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional information.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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, in part, 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 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:

[A]n 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.

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 proceedings before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an industrial engineer. Evidence of the beneficiary's duties includes: the I-129 petition with attachment; the petitioner's response to the director's request for evidence; and the petitioner's amendment to the I-129 petition submitted on appeal. Those duties were detailed as follows:

DUTIES SUBMITTED WITH THE I-129 PETITION

In order to meet the expanding needs of our company, we need to employ [the beneficiary] who has a strong background in Industrial Engineering. In the present consumer market, our company needs to apply new techniques that will streamline our operations, [and] enhance and utilize valuable untapped resources of the company. His duties include: review current office procedures relating to sales, production, shipping, inventory and personnel utilization of company resources; plan best utilization of company resources, material and personnel to improve efficiency of company operations and production; [and] analyze work force utilization, office/storage layout and operational data from historical records. He will recommend methods that will improve worker efficiency, office organization, reduction of waste and restructuring of job duties, production procedures[,] and management as needed. He may develop new management systems for cost reduction and efficiency, financial planning[,] and wage salary administration.

DUTIES IN RESPONSE TO THE DIRECTOR'S REQUEST FOR EVIDENCE

In order to most effectively expand the petitioner's business, [the beneficiary] will establish standard operating procedures for controlling overhead costs and program developments in reducing these costs. He will review and evaluate the operations and determine the areas that require modification or improvement. He will formulate plans that will provide the most efficient use of the work force and the budget without sacrificing the productivity. [The beneficiary] will conduct feasibility studies and establish product costs that involve standard labor requirements and material usage.

[The beneficiary] will conduct extensive research and use mathematical analysis, method engineering, product and process costing techniques to more effectively acquire the

elements that comprise the petitioner's services, and he will put together the most economical packages for the petitioner's consumers.

The majority of [the beneficiary's] time on the job (about 70%) will be spent conducting extensive research, collecting data, and performing various method analysis to determine the most efficient way of expanding the petitioner's business and putting together the packages of services for the petitioner's consumers. The remaining 30% of his time will be spent on formulating plans and procedures to implement the fruit of his research and analysis into the company's day-to-day operations. He will not be supervising any employees, but will handle the research and development department alone. . . .

DUTIES ON APPEAL WITH AMENDMENT OF THE I-129 PETITION

Perform "Time and Motion" study to promote efficient and economical utilization of personnel and facility:

Conduct [o]bservation and analysis of personnel and work procedures to determine the "Time and Motion" requirements of job duties. Analyze work study data, loading and unloading of phone cards at each customer's place of business. To establish time required for the task of the current inventory [sic]. Collect funds for sold phone cards and to leave additional inventory with customers. Prepare new inventory and have customer sign for same. Determine methods for bookkeeping of cash received or purchases, to minimize loss by robbery. Apply principles of Industrial Engineering and to evaluate work methods and to develop recommendations to management for more effective work methods. Make wage and budget decisions for maximum sales performance of collectors/salesmen. It will be necessary for the Industrial Engineer to travel and conduct his studies with the various salesmen throughout the City of Los Angeles, San Francisco and San Diego, California, to determine the most efficient method of handling the sales of the telephone cards, maintaining control of inventory to prevent loss and confusion, increase productivity, promote more sales to customers and to suggest better advertising brochures or designs in English and Spanish languages as required based upon the ultimate consumer.

By amending the I-129 petition, the petitioner seeks to substantially change the nature of the proffered position. The petitioner, however, must establish that the position offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Neither counsel nor the petitioner may now change the title of the position or duties associated with it while the petition is pending. The duties offered by amendment to the I-129 on appeal will not, therefore, be considered.

The director found that the petitioner failed to establish that the beneficiary would be performing the services of an industrial engineer and, accordingly, denied the I-129 petition.

On appeal, counsel submits a brief detailing the duties of the petitioner's sales staff, and stating that an industrial engineer is needed to streamline work processes and procedures for a more efficient business operation. Counsel asserts that the proffered position qualifies as a specialty occupation.

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are closely related to those of a management analyst, not industrial engineer, as contended by the petitioner. Management analysts analyze and propose ways to improve an organization's structure, efficiency, or profits. The petitioner's business has annual sales of approximately \$32,000,000. The petitioner seeks an employee who will observe all aspects of operation, make recommendations for more efficient operation, and then implement management's ultimate decisions. The position offered is, therefore, that of a management analyst.

The *Handbook* further notes that a management analyst position normally requires a minimum of a master's degree in business administration, or a related discipline, for entry into the position. The position is, therefore, a specialty occupation because it satisfies the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The final issue to be considered is whether the beneficiary qualifies to perform the duties of proffered position.

Pursuant to 8 C.F.R. § 214.2 (h)(4)(iii)(c), one of the following criteria must be met in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The director did not consider the beneficiary's qualifications to perform the duties of a management analyst occupation as the I-129 petition was denied on other grounds. As such, this matter must be remanded to the director to determine whether the beneficiary qualifies to perform the duties of a specialty occupation. The director may request such additional evidence as he deems necessary in making this determination.

ORDER: The director's October 16, 2002, decision is withdrawn. The matter is remanded to the director for entry of a new decision commensurate with the directives of this opinion.