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U.S. Citizenship
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Services

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FILE: EAC 02 118 51609 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 Administrative Appeals Office (AAO) rejected a subsequent appeal as untimely filed. The matter is again before the AAO on an untimely motion to reopen or reconsider its rejection decision. The motion is dismissed, because it is untimely filed. The AAO will reopen and reconsider its rejection decision on its own motion. The previous AAO decision is withdrawn. Upon consideration of the appeal submitted by the petitioner, the appeal will be dismissed. The petition will be denied.

In order to employ the beneficiary as its fire safety engineer, the petitioner hotel 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, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

In a decision dated June 2, 2004, the AAO rejected the petitioner's appeal on the basis that it was filed two days beyond the 33 days that the Citizenship and Immigration Services (CIS) allows for filing.

On motion, counsel accurately asserts that his appeal filed on the 35th day comports with the date that the service center designated on the Form I-290B. Counsel's motion is untimely filed and dismissed. However, the AAO reopens the appeal in the exercise of its authority under 8 C.F.R. § 103.5(a)(5) for good cause shown. Upon review of CIS records, the AAO has determined that the director's decision was not mailed until two days after the date of the decision. Therefore, the appeal was timely filed and should not have been rejected. Accordingly, the AAO here considers and renders its decision on the appeal.

The director was correct in both of the determinations upon which he based his decision: the petitioner failed to establish that the proffered position is a specialty occupation, and it also failed to establish that the beneficiary holds the educational credentials necessary to serve in a specialty occupation. The AAO bases this decision on its review of the entire record, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B with its attachments, including counsel's letter of February 25, 2003 and its supporting documents.

The specialty occupation issue will be addressed first.

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.

Based upon the petitioner's letter of response to the RFE, the director summarized the proposed duties as follows:

[R]eview any type of reports or complaints regarding power failure; verify that all smoke detectors are in working order and files [sic] a report in accordance with his inspection; review and verify [that] all fire hydrants and fire extinguishers are in working order and is [sic] in condition as provided by the city code and the hotel code; review and inspect all power failures or electrical outage; review and inspect all sprinkler systems in both hotels to verify their working conditional [sic]; review [that] all elevators are in working condition and confirms [sic] that fire exits are accessible and available in cases of emergency; train all employees of fire hazards and fire prevention; train employees of procedures in cases [sic] of fire and disasters; confirm that the hotels have enough safety equipment for all employees and guests; write in-house hotel regarding electrical and fire safety rules and standards; and train all new employees of [sic] fire, electrical, and general disaster hazards.

Notwithstanding the minor failure to mention the requirement to inspect air conditioning, the director's summation fairly conveyed the duties as related in the petitioner's RFE response.

The AAO has also considered the statement of duties by functional areas (Electrical Infrastructure; Fire Prevention and Emergency Response; HVAC Inspections; Restaurant/Kitchen; and Federal, State, and Municipal Code Compliance) in the petitioner's February 23, 2003 letter submitted on appeal, but finds that it does not materially enhance the originally stated duties. The totality of the information in the record about the proffered position and its duties does not support the letter's main assertions (in its second paragraph):

The technical knowledge necessary to perform the required decisions and calculations in mechanical and electrical areas, related to electrical safety and fire protection technology is typically obtainable only in a university setting. This is particularly so given that the requirements of the position dictate not only maintaining the existing infrastructure, but also planning its expansion. There is an absolute necessity to precisely comply with fire protection laws and regulations and satisfy safety procedures. Industry-wide, at this level of sophistication (multiple properties of at least one hundred rooms each, plus additional amenities) a baccalaureate degree in the mechanical or electromechanical engineering field of study is a standard minimum requirement for the job offered.

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). Furthermore, 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). The evidence of record does not describe or catalogue the technical knowledge that the beneficiary would have to apply, nor does the petitioner identify any of the "required decisions and calculations in mechanical and electrical areas, related to electrical safety and fire protection technology [that] is typically obtainable only in a university setting." Likewise, the petitioner offers no evidence to support the contention that a

baccalaureate degree in a specific specialty is an industry-wide, standard minimum requirement for the proffered position.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to those positions 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 Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. To the extent that it is described in the record, the proffered position does not align with any occupation for which the *Handbook* indicates a normal requirement for a baccalaureate or higher degree, or the equivalent, in a specific specialty. Furthermore, standing alone and independent of reference to the *Handbook*, the proposed duties do not establish that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner. As already noted, the record of proceeding lacks evidence to establish the petitioner's assertion of an industry-wide requirement for a bachelor's degree in a specific specialty.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which assigns specialty occupation status if the particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty.

The petitioner has not presented any evidence to satisfy 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.

Finally, the totality of the evidence, including the record's information about the number and scope of the proposed duties, does not establish the level of specialization and complexity required to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) for specific duties that are so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

In summary, as the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed on that issue.

The director was also correct in denying the petition on the basis that the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;¹
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

According to the express terms of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), to satisfy this CIS-determination criterion, a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision imposes strict evaluation standards, stating:

[I]t must be *clearly demonstrated* [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation²;

¹ The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

[Italics added.]

To establish the beneficiary's qualifications, the petitioner relies chiefly upon a one-page "Evaluation Report" rendered by the Foundation for International Services (FIS), which cites as its basis, but does not attach or discuss, copies of: two certificates of the beneficiary's employment experiences from February 1981 to April 2001; a qualification certificate indicating that the beneficiary studied at the Korea Fireproof Safety Association; and two letters of commendation. The FIS "Evaluation Report" is without merit. It is a perfunctory document that provides no analysis and carries no weight. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), the AAO considers evaluations from credentials evaluation services only to the extent that they evaluate education, and the FIS document refers, summarily, to experience only.

The other documents that the petitioner has submitted regarding the beneficiary's qualifications are skeletal, and do not merit weight under any criterion of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

The record provides no basis for disturbing the director's decision that the petitioner failed to establish that the beneficiary is qualified to perform services in a specialty occupation according to the standards of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

² *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

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ORDER: The appeal is dismissed. The petition is denied.