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U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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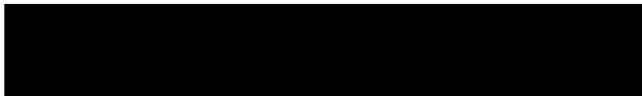


D2

FILE: WAC 04 073 53585 Office: CALIFORNIA SERVICE CENTER

Date: APR 29 2005

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

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 mechanical contractor corporation. In order to employ the beneficiary as a CAD (computer-assisted design) designer, 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. In part, the director determined that the proffered position most closely resembles the drafter occupation, and noted that the 2002-2003 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* indicates that a bachelor's degree in a specific specialty is not normally a minimum hiring requirement for entry into this occupation.

On appeal, counsel asserts that the petitioner's CAD designer position "is akin" to the mechanical engineer occupation as described in the *Handbook* and is characterized by duties that are so "highly technical and complex. . . that the skills and knowledge necessary to perform the duties of this position could only be obtained in Bachelor of Science programs in mechanical engineering or related disciplines."

The AAO has determined that the director's decision to deny the petition was correct. The AAO bases 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 evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

In the letter of support filed with the Form I-129, the petitioner described the duties as follows:

Create plans and layouts for equipment or systems arrangements and space allocation using [c]omputer aided design softwares in 3D or 2 dimensional environment. Research drawings, catalogs and sketches, to develop detailed, dimensioned drawings. Perform routine design functions such as layout of pipe routing. Utilize established computer programs for design work as directed by the supervisor. Coordinates space allocation and interferences for assigned areas of design with other discipline designer, detailers and drafters. Review shop drawings for accuracy. . . .

On appeal, counsel (brief, at page 4) provides the following list of job duties and responsibilities that is a modified version of what counsel provided in his February 2004 letter of response to the RFE:

With considerable latitude for independent judgment, will create complex, dimensioned and detailed engineering design plans and layouts from rough engineering notes, drawing(s), sketches, specifications and verbal instructions, using computer-aided design software such

as the latest version of AutoCAD for 2 dimensional, [and] Quickpen 3D for 3 dimensional environments.

Perform project site management; [p]rovide guidance and interpretation to entry level CAD drafters and detailers in the implementation of change orders to job site crew; and review detailed electronic working plans, layouts, and shop drawings for accuracy, clarity and conformity to engineering standards[.]

Perform advanced technical design functions is [sic] support of the company's mechanical, electrical, and plumbing contracts using the latest CD technology. Design and execute layout of complex assemblies [sic] or system[s] which are either electrical or mechanical in nature.

Research and analyze customer design proposals, specifications, manual and other engineering data to evaluate the feasibility, cost, and maintenance requirements of the designs or applications.

Generate revisions to drawings and coordinate space allocation and interferences for assigned areas of design with other discipline designer, detailers, and drafters.

The petitioner has attempted to materially expand upon the duties as described at the time that the petition was filed.

Prior to the appeal, the petitioner did not indicate that the proffered position involved the supervisory and project site management duties noted in the second paragraph above. Prior to the RFE reply, the petitioner did not identify the duty of researching, analyzing, and evaluating feasibility, cost, and maintenance requirements noted in the fourth paragraph above.

On appeal, or when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits recognition as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). To have significant changes to the content of a petition considered, a petitioner must file a new petition that incorporates those changes. Accordingly, the AAO did not consider additional duties that were identified for the first time on appeal or in response to the RFE.

Also, the AAO agrees with counsel that the director erred to the extent that he accepted and applied the proposition that a position whose performance requires specialty-occupation-level knowledge is not a specialty occupation if the duties that require that knowledge are not the majority of the beneficiary's duties. (See, at page 3 of the decision: "Although some of the duties described . . . require some engineering knowledge, however its [sic] minimal comapare[d] to the majority of the beneficiary's duties. . . .") If full performance of a position's duties requires at least a bachelor's degree or its equivalent in a specific specialty,

then the position qualifies as a specialty occupation. However, as discussed below, the AAO finds that the petitioner has not established that the proffered position has such a performance requirement.

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 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.

As the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, it consulted the 2002-2003 and the 2004-2005 editions for information relevant to the proffered position and its duties. The AAO found that, to the extent that they are described in the record, the position and its duties do not exceed those of the drafter and mechanical engineer technician occupations, occupations for which the *Handbook* indicates that at least a bachelor's degree or its equivalent in a specific specialty is not normally a minimum requirement for entry.

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.

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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

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 provides a petitioner the opportunity to show that its 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. Here the evidence of record fails to establish how the proffered position is unique from or more complex than mechanical engineering technician or drafting positions, for which the *Handbook* indicates a bachelor's degree is not a normal minimum entry-requirement.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor, as the petitioner has not presented evidence that the proffered position is one for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties 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. The assertions of counsel and the petitioner with regard to this criterion and about the complexity and specialization of the proffered position have been noted but are given no weight, as they are not supported by evidence in the record. 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).

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.

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. Accordingly, the appeal will be dismissed.

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