



U.S. Citizenship
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Services

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FILE: LIN 04 066 51083 Office: NEBRASKA SERVICE CENTER Date: DEC 22 2005

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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a transportation business. It seeks to employ the beneficiary as an electronics engineering technician and to continue his classification 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 grounds that the petitioner failed to establish that it was in compliance with the prevailing wage indicated on its certified labor condition application, that it is the beneficiary's employer, that the beneficiary was maintaining H-1B status at the time the instant petition was filed, or that the proffered position qualifies as 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.

As provided in 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 director's request for evidence (RFE); (3) the petitioner's response thereto; (4) the director's decision; and

(5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a business with four employees and gross annual income of \$250,000 that provides medical non-emergency transportation for Washington residents with a fleet of vans modified to meet the needs of handicapped and challenged patients. Each van is equipped with a two-way radio, the petitioner explains, and communicates over a vast, sparsely populated region by use of repeaters. The petitioner states that it intends to hire the beneficiary as an electronics engineering technician to set up the two-way radios and to provide maintenance, training and consultation services for the daily use of the radios. The beneficiary is qualified for the position, the petitioner declares, by virtue of his bachelor of science in electronics and communications engineering from Cebu Technical School in the Philippines, granted in October 1991.

In his decision the director found that the petitioner was not in compliance with its labor condition application (LCA), certified by the Department of Labor, because the prevailing wage indicated in the LCA is \$51,126 annually, while the payroll stubs in the record indicated that the beneficiary was being paid the equivalent of only \$16,640 annually. The director noted conflicting evidence and information from the petitioner as to whether it or a parent company is the beneficiary's employer, and that the petitioner failed to submit evidence that the beneficiary – who was previously granted an H-1B visa with a validity period from September 10, 2001 to December 1, 2003 – was maintaining H-1B status at the time the instant petition was filed in January 2004. The director also found that the proffered position reflects that of a radio and telecommunications equipment installer and repairer, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, an occupation that does not require a baccalaureate degree in a specific specialty and therefore does not qualify as a specialty occupation. For all of these reasons the director denied the petition.

On appeal the petitioner explains that the beneficiary worked for his previous employer until June 2003 and began working for the petitioner in November 2003. The petitioner states that the beneficiary is officially an employee of [REDACTED] the petitioner's parent company, but that his work is actually performed for the petitioner. According to the petitioner, the beneficiary's compensation of \$9.00/hour, which extrapolates to \$22,464/year, is supplemented by rent, utilities and insurance subsidies totalling \$9,711.12/year, plus \$2,500/year of guaranteed bonuses, \$400/year in medical expense coverage, and \$9,600/year in overtime pay – all of which adds up to \$44,675.12/year, thus making the beneficiary's actual compensation much closer to the prevailing wage in the certified LCA. The foregoing information does not overcome the grounds for denial discussed in the director's decision. The issue of whether the beneficiary was in valid status at the time of the visa petition is not before the AAO, which does not have jurisdiction over the denial of a request for extension of status. The record fails to establish an employer-employee relationship between the petitioner and the beneficiary (the W-2 wage and tax statements in the record identify the beneficiary's employer as [REDACTED]). Furthermore, the information about the beneficiary's supplemental income is not sufficient to meet the petitioner's obligation under the LCA. The petitioner stated that the beneficiary's hourly rate is \$9.00/hour, while the LCA indicates that the rate of pay should be \$24.58/hour (derived from the annual salary of \$51,126). Furthermore, according to 20 C.F.R. § 655.731(iv) benefits provided as compensation for services may be credited toward the satisfaction of the employer's wage obligation only if the deductions are recorded and reported as earnings, with appropriate taxes and FICA contributions withheld and paid. The pay stub of record issued to the beneficiary indicates an hourly wage of \$8.00, not \$24.58.

Nor has any evidence been submitted on appeal to establish that the proffered position qualifies as a specialty occupation. In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti v. Reno, Inc., id.*, at 1165-66.

The petitioner calls the proffered position an electronics engineering technician. That occupation is described in the *Handbook*, 2004-05 edition, at 144:

Electrical and electronics engineering technicians help to design, develop, test, and manufacture electrical and electronic equipment such as communication equipment, radar, industrial and medical measuring or control devices, navigational equipment, and computers. They may work in product evaluation and testing, using measuring and diagnostic devices to adjust, test, and repair equipment.

Based on the evidence of record, the AAO is not persuaded that the proffered position fits the *Handbook's* description of an electronics engineering technician. The duties of the proffered position are not as complex and do not require a comparable level of knowledge as an electronics engineering technician. The *Handbook* also indicates that a baccalaureate degree in a specific specialty is not required for entry into that occupation.¹

The AAO agrees with the director that the duties of the proffered position reflect those of a radio and telecommunications equipment installer and repairer, as described in the *Handbook, id.*, at 530:

Telephones and radios depend on a variety of equipment to transmit communications signals. Electronic switches route telephone signals to their destinations. Switchboards direct telephone calls within a single location or organization. Radio transmitters and receivers relay signals from wireless phones and radios to their destinations. Newer telecommunications equipment is computerized and can communicate a variety of information, including data, graphics, and video. The workers who set up and maintain

¹ As stated in the *Handbook*, "it may be possible to qualify for certain engineering technician jobs without formal training," although "most employers prefer to hire someone with at least a 2-year associate degree in engineering technology." *Id.* Such training, the *Handbook* continues, "is available at technical institutes, community colleges, extension divisions of colleges and universities, and public and private vocational-technical schools, and in the Armed Forces." *Id.*

this sophisticated equipment are radio and telecommunications equipment installers and repairers.

With respect to the educational requirements of the occupation, the *Handbook* states that:

Most employers seek applicants with postsecondary training in electronics and a familiarity with computers. Training sources include 2- and 4-year college programs in electronics or communications, trade schools, and equipment and software manufacturers. Military experience with communications equipment is valued by many employers.

Id. at 552. Thus, it is clear that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into the occupational field of radio and telecommunications equipment installer and repairer. Accordingly, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a degree requirement in electronics and communications engineering or a related specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty. Thus, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot show that it normally requires a bachelor's degree in electronics and communications engineering or a related specialty for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in electronics and communications engineering or a related specialty.

Thus, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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