



U.S. Citizenship
and Immigration
Services

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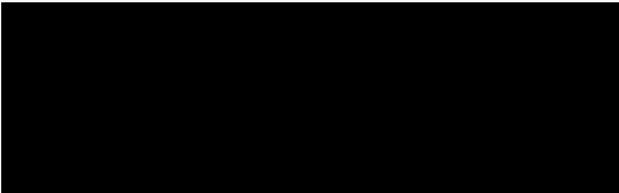
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FILE: WAC 04 214 50809 Office: CALIFORNIA SERVICE CENTER Date: 11/22/11

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:



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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.

On the Form I-129 (Petition for Nonimmigrant Worker) the petitioner describes its business as “Commercial Door & Hardware & Manufacturing.” In order to employ the beneficiary in a position that the petitioner designates “mechanical 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 issue on appeal is whether, as counsel asserts, the proffered position is that of a mechanical engineer, which is an occupational category that Citizenship Immigration and Immigration Service (CIS) recognizes as a specialty occupation.

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of any specialty occupation criterion set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). In part, the director determined that the proffered position reflects the duties of an engineering technician as that occupational category is discussed in the 2004-2005 edition of the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*. The *Handbook*’s information indicates that entry into engineering technician positions normally does not require at least a bachelor’s degree or the equivalent in a specific specialty.

On appeal, counsel maintains that performance of the proffered position requires the highly specialized knowledge of a mechanical engineer. Counsel argues, in part, that the specialty occupation status of the position is established by the director’s acknowledgment that, in counsel’s words, the petitioner’s “normal practice is to only hire individuals for the proffered position who possess a bachelor’s degree or its equivalent in mechanical engineering.” Counsel faults the director for not mentioning the petitioner’s statements earlier in the record about its distance from its closest competitors and about the industry’s hiring standard. Counsel also argues that the director’s characterization of the proffered position as that of an engineering technician does not take proper account of the nature of the duties as described in the record and “the absolute necessity for accuracy and precision in design and installation to ensure proper safety and functionality.”

With his brief, counsel submits the following documents in support of the appeal: (1) an October 21, 2004 letter from the petitioner’s president; (2) an October 14, 2004 letter from the Director of Manufacturing Engineering at Ceco Door Products (Ceco Door) of Milan, Tennessee; (3) an October 14, 2004 letter from the Engineering Supervisor at Los Angeles Fireproof Door (LAF Door); and (4) an October 24, 2004 letter from the Honorable Louis Capps, Member of the Congress of the United States.

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 and its attached documents.

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.

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.

In his September 9, 2004 letter of reply to the RFE, the petitioner’s president provided this job description:

[The beneficiary’s] job duties would include planning, designing, and reviewing plans for erection and installation of doors and accompanying hardware and structural supports. He will write specifications after conducting stress analysis and design each project to meet estimated stress load requirements, computing size, shape, strength and type of structural members. In some cases, he will research and perform structural analysis of customer design proposals, specifications, and architectural plans. He will analyze data and plans prepared by architects or other engineers to ensure that they meet stress load requirements. He will perform specification writing, calculating and designing hollow window walls, as seen in the attached example. This would be about 20% of his job.

After checking that each project is structurally sound to withstand the weight of the building, possible seismic activity, bad weather, etc., he will be responsible for further detailing and reviewing specifications to make certain they meet all United States building codes. Furthermore, he will be responsible for overseeing approximately 20-25 different commercial projects to ensure that each and every item is installed precisely according to specification. He will inspect the existing projects and recommend repair and/or replacement or defective door structures. This will consume 20 to 30% of his time.

Ten (10) percent of his time will be spent making corrections on door and hardware schedules and reviews with the architects and owners. He will further spend approximately 10 percent of his time reviewing purchase orders on the above 20 to 25 products, making sure that the items specified are purchased correctly.

He will spend approximately 15% of his time meeting with architects and construction managers in their offices discussing changes to such projects. Finally, since he has an extensive background in setting up a hollow metal manufacturing plant, 15% of his time will be spent reviewing the possibilities of the company expanding into the manufacturing of hollow metal doors and frames. This in itself will create additional employment opportunities for the Santa Maria community.

His work will vary from 40 to 50 hours a week depending on his workload. Being a salaried employee, he will not have a set schedule of hours.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements on the wide variety of occupations it addresses. The AAO finds that the petitioner has not provided sufficient evidence that the beneficiary would perform duties that characterize mechanical engineer positions or any other occupational category for which the *Handbook* reports a normal minimum hiring requirement of at least a bachelor's degree in engineering or other specialty.

The proposed duties are described in generalized terms such as “planning, designing, and reviewing plans for the erection and installation of doors and accompanying hardware and structural supports”; writing specifications; “conducting stress analysis”; designing “each project to meet stress loads”; “computing size, shape, strength and type of structural members”; and “research[ing] and perform[ing] structural analysis of customer design proposals, specifications, and architectural plans.” It is not self-evident that the duties require a bachelor's degree in mechanical engineering or a related specialty. The record does not contain evidence establishing that the performance of the proposed duties necessitates such a degree. The petitioner provides no objective reference by which the AAO can gauge the breadth and level of specialized knowledge that such duties require. Counsel and the petitioner assert that the proffered position requires a bachelor's degree or its equivalent in mechanical engineering or a related field, but they do not provide evidence that substantiates their claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO also finds that the petitioner has not provided documentary evidence to support its claim (at the second paragraph of its September 9, 2004 letter) to the effect that the majority of its work involves the manufacturing (“installation and manufacturing”) of hollow-metal window walled doors that reach up to 20 feet in height, 30 to 40 feet in width, and 2000 pounds in weight. Furthermore, while the petitioner states that part of its business is manufacturing, the record does not elucidate the nature of this aspect of the petitioner's business. The AAO notes that to illustrate door size, the petitioner provides a picture of church doors that, according to the picture's caption, was manufactured by a different company than the petitioner. The AAO also notes that, although the RFE included a request for photos of “both the inside and outside of all production, warehouse, and office spaces with equipment, merchandise, products, and employees clearly visible,” the petitioner chose only to provide a copy of the exterior of its premises, thus foregoing the opportunity to provide visual evidence of whatever manufacturing capacity it may have in terms of machinery, and supplies for manufacture. It is also noted that the petitioner's initial letter of support, dated July 21, 2004, does not mention that the beneficiary would be involved in the manufacturing of the sizeable doors that the petitioner later referenced in its September 2004 letter. Furthermore, the Ceco Door letter indicates that the petitioner lacks the machinery necessary for at least one type of manufacturing:

Your future expansion plans to include frame manufacturing will require the knowledge to specify, install and maintain the proper fabrication equipment and tooling, which is a function that is normally associated with a mechanical engineer.

The letters from Ceco Door and LAF Door are not probative of the level of knowledge required for the particular position proffered here. Neither the letters nor any other evidence of record establishes the extent of the authors' familiarity with the petitioner's particular business operations and the specific performance requirements of the particular position here proffered. Also, there is no evidence that the letter writers possess authoritative knowledge about the recruiting and hiring requirements for positions substantially similar to the one proffered here. Therefore, as the record does not establish that the authors are qualified to provide an expert opinion on the educational requirements of the proffered position, the AAO finds the author's opinions on this topic unpersuasive. 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).

As the evidence of record does not establish that a baccalaureate degree or higher, or the equivalent, in a specific specialty is a normal minimum-entry requirement for the proffered position, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 already discussed, the evidence of record does not establish that the proposed duties comprise a mechanical engineering or any other type of position for which the *Handbook* indicates a requirement for a degree in a specific specialty.

There are no submissions from a professional association attesting to the minimum degree requirement for the proffered position.

The letters from Ceco Door's director of manufacturing engineering and LAF Door's engineering supervisor are not probative of the requirements of this particular criterion. First, as already indicated above, the record does not establish that the authors are sufficiently familiar with the operations of this particular petitioner and with the performance requirements of this particular proffered position to provide an expert opinion comparing the petitioner and the requirements of its proffered position with other organizations and their positions. Second, there is no evidence in the letters or elsewhere in the record that establishes that either Ceco Door or LAF Door is substantially similar to the petitioner, or that its mechanical engineering positions are substantially similar to the

position proffered here. Third, the authors fail to provide the extent of their knowledge of recruiting and hiring practices throughout the industry in general, and for positions substantially similar to the one proffered here in particular. As earlier stated, where an opinion submitted as expert 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*.

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 does not establish either such uniqueness or complexity. Counsel argues that the work of the proffered position is so involved that lack of a bachelor's degree level of engineering knowledge could prove fatal (see page 3 of brief), but the record does not contain evidence substantiating this or establishing the position's specialization and complexity requiring the level of a bachelor's degree in engineering. 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 Soffici*. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Ramirez-Sanchez*.

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.

Counsel and the petitioner err to the extent that they rely upon their assertions to the effect that, for the 34 years of its history, it has been the petitioner's normal practice to hire for the proffered position persons with a bachelor's degree or the equivalent in mechanical engineering. Because they are not substantiated by evidence in the record, the assertions carry no evidentiary weight. The petitioner presents the name of four previous employers and declares that they "possessed either a bachelor's degree in engineering or a related field or its equivalent through more than 10 years of professional work experience." (Petitioner's September 9, 2004 letter, at page 2.) However, the record contains no documentation of the degrees and associated coursework of those employees asserted to have held engineering degrees; and there is no documentation of the non-degreed employees' experience or the determinations that they held the equivalent of a bachelor's degree in engineering or a related specialty. 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 Soffici*. Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Ramirez-Sanchez*.

Counsel correctly distinguished the circumstances in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), from the facts in this case: unlike the employment-agency petitioner in *Defensor*, the petitioner here is the actual entity that would employ the petitioner. *Defensor* is relevant, however, as it illustrates the principle that the critical element in CIS's specialty occupation analysis is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty

as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Also, *see Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988) (To qualify a position as one requiring a person of distinguished merit and ability, in accordance with an H nonimmigrant-worker statutory classification that preceded the current H-1B statute, a petitioner had to demonstrate that the proffered position required a precise and specific course of study that related directly and closely to the position in question; and, in light of this requirement for a close corollary between the required specialized studies and the position, the mere requirement of a college degree for the sake of general education, or to obtain what an employer perceived to be a higher caliber employee, would not establish eligibility.)

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. To the extent that they are depicted in the record, the proposed duties do not indicate such specialization or complexity.

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.

Beyond the decision of the director, the record does not establish that the beneficiary is qualified for the position. While an educational evaluation indicates that the beneficiary has the equivalent of a U.S. bachelor's degree in mechanical engineering, the beneficiary's transcripts from the pertinent foreign university are not attached. The AAO is unable to corroborate the conclusions of the evaluation without supporting documentation. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this reason also, the petition may not be approved.

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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.