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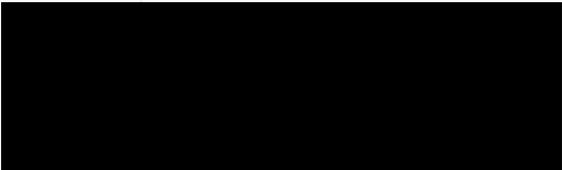
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FILE: WAC 04 024 52304 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

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 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 California 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 the U.S. distributor of semiconductor and flat panel display equipment products for its parent company Foxsemicon Integrated Technology, Inc. (FITI) in Taiwan. It has 20 employees and seeks to employ the beneficiary as a technical support specialist 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 he determined the proffered position was not a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner seeks the beneficiary’s services as a technical support specialist. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s October 21, 2003 letter in support of the Form I-129; and its June 22, 2004 response to the director’s request for evidence. As described by the petitioner, the proffered position would require the beneficiary to:

- Test, troubleshoot, repair and modify FITI semiconductor products, and evaluate test equipment to develop data for engineering evaluation of new designs;
- Review, discuss and evaluate completed projects with engineering staff of Taiwan headquarters to ensure that all the specifications are met and that the new products developed are compatible with different services already in use;
- Evaluate workload and capacity of product system design to determine the feasibility of expanding or enhancing services;
- Provide technical support in troubleshooting and repairing test equipment when problems arise; and
- Test and repair company products, and assist customers in solving technical problems.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In his denial, the director, relying on the 2004-2005 edition of the *Handbook*, concluded that the proffered position was that of a computer technical support specialist. However, the duties of the proffered position do not fall within the occupational title of computer support specialists and systems administrators described by the *Handbook*. Instead, they reflect engineering-related employment, consistent with the petitioner's activities as the U.S. distributor of semiconductor equipment and components manufactured by its FITI parent company.

To determine the nature of the engineering employment described by the petitioner, the AAO has reviewed the duties listed by the petitioner in relation to the *Handbook's* discussion of the occupation of engineer. That discussion includes a specific section on the work of mechanical engineers, the field most closely related to the proffered position. As indicated in the general discussion of the engineering profession at pages 125-126:

Engineers apply the theories and principles of science and mathematics to research and develop economical solutions to technical problems Engineers design products, machinery to build those products, plants in which those products are made, and the systems that ensure the quality of the products and the efficiency of the workforce and manufacturing process

In addition to design and development, many engineers work in testing, production, or maintenance. These engineers supervise production in factories, determine the causes of breakdowns, and test manufactured products to maintain quality

At pages 137-138, the *Handbook* offers the following description of the work of mechanical engineers:

Mechanical engineers research, develop, design, manufacture, and test tools, engines, machines, and other mechanical devices. They work on power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines. They also develop power-using machines such as refrigeration and air-conditioning equipment, machines tools, material handling systems, elevators and escalators, industrial production equipment and robots used in manufacturing. Mechanical engineers also design tools that other engineers need for their work

. . . .

Mechanical engineers work in many industries, and their work varies by industry and function. Some specialize in energy systems; applied mechanics; automotive design; manufacturing; materials; plant engineering and maintenance; pressure vessels and piping; and heating, refrigeration, and air-conditioning systems. Mechanical engineering is one of the broadest engineering disciplines. Mechanical engineers may work in production

operations in manufacturing or agriculture, maintenance or technical sales; many are administrators or managers.

The petitioner's discussion of proffered position, although it clearly indicates that the beneficiary would have engineering-related responsibilities, does not describe the work performed by mechanical engineers. The duties of the proffered profession have neither the complexity nor level of authority that characterizes the employment of engineers. Instead, they place the beneficiary in an engineering support role – evaluating test equipment to develop data for engineering evaluation; reviewing, discussing and evaluating project with the engineering staff in Taiwan; and providing technical support in troubleshooting and repairing the petitioner's test equipment. Accordingly, the duties of the proffered position appear more closely aligned to the employment of mechanical engineering technicians, an occupation described at pages 143-144 of the *Handbook*:

Engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection and maintenance. Their work is more limited in scope and more practically oriented than that of scientists and engineers. Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control – inspecting products, and processes, conducting tests, or collecting data. In manufacturing, they may assist in product design, development, or production

...

Most engineering technicians specialize in certain areas, learning skills and working in the same disciplines as engineers. Occupational titles, therefore, tend to reflect those of engineers.

...

Mechanical engineering technicians help engineers to design, develop, test, and manufacture industrial machinery, consumer products, and other equipment. They may assist in product tests They may make sketches and rough layouts, record data, make computation, analyze results, and write reports. When planning production, mechanical engineering technicians prepare layouts and drawings of the assembly process and of parts to be manufactured. They estimate labor costs, equipment life, and plant space. Some test and inspect machines and equipment to work with engineers to eliminate production problems.

Academic requirements for employment as a mechanical engineering technician are found at page 144:

Although it may be possible to qualify for certain engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology. Training 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. Persons with college courses in science, engineering, and mathematics may qualify for some positions but many need additional specialized training

and experience. Although employers usually do not require engineering technicians to be certified, such certification may provide jobseekers a competitive advantage.

As the *Handbook* does not establish that employers impose a degree requirement on individuals seeking work as mechanical engineering technicians, the proffered position cannot be established as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In the instant case, the petitioner contends that it is normal practice to require a technical support specialist to have a strong engineering background. In support of its statements, it has submitted ten Internet job advertisements to establish its degree requirement as an industry norm under the criterion's first prong.

However, none of the ten announcements are published by organizations similar to the petitioner, a distributor of semiconductor products and equipment. Nine come from information technology/computer firms and the tenth appears to represent a manufacturer of scientific instruments. None describe employment with duties that are parallel to the duties listed by the petitioner. Accordingly, the petitioner has not qualified the proffered position as a specialty occupation based on a degree requirement within its industry.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. The AAO finds no evidence to indicate that the position described by the petitioner is distinguishable from similar but non-degreed employment based on its unique nature or complexity. Accordingly, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the employment histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner's letter of support indicated that the proffered position is newly created in response to recent business developments. While the AAO notes that the petitioner, in response to the director's request for evidence, submitted a list of its employees indicating the degrees held by each, this listing does not establish the petitioner's normal hiring practices. Only one employee on the list is in a similar job to the proffered position, technical support specialist. The list does not indicate what degree is held by the technical support specialist, nor does it indicate that any of the employees hold degrees in fields directly related to their employment, as required for classification as a specialty occupation. Therefore, the proffered position has not been established to be a specialty occupation based on the petitioner's normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel contends that the distinctive features of the products distributed by the petitioner require immense theoretical and practical knowledge in mechanical engineering or a related field and that the detailed job duties described by the petitioner therefore establish the proffered position as a specialty occupation. The AAO does not agree.

The record offers no description of the distinctive features referenced by counsel or independent evidence of the complexity asserted. Without supporting documentary evidence, the assertions of counsel are insufficient to meet the petitioner's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Absent such evidence, the AAO does not find the proffered position's duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of mechanical engineering technicians who routinely work on complicated engineering issues. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications other than those held by mechanical engineering technicians. The AAO, therefore, concludes that the proffered position may not be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the record contains evidence indicating that the beneficiary, at the time of filing, was the beneficiary of an H-1B petition filed by a previous employer. CIS approval of a prior Form I-129 on behalf of the beneficiary does not, however, provide a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For reasons related in the preceding discussion, the petitioner has failed to establish that its proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

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