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U.S. Citizenship
and Immigration
Services

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FILE: SRC 04 093 52465 Office: TEXAS SERVICE CENTER Date: JUN 10 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 restaurant, with 25 employees. It seeks to employ the beneficiary as a mechanical engineer to assist with the expansion of its business. The director denied the petition because she determined the petitioner had failed to establish its proffered position as 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) counsel's response to the director's request; (4) the director's denial letter; and (4) Form I-290B, with counsel's brief and new and previously submitted 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 mechanical engineer. Evidence of the beneficiary’s duties includes: the Form I-129 and the petitioner’s February 9, 2004 letter in support of the Form I-129. As described by the petitioner, the proffered position would require the beneficiary to:

- Take charge of designing and developing the proper mechanical equipment for the petitioner’s new restaurants;
- Troubleshoot, modify, build, lay-out, and test the mechanical components and equipment; and
- Apply principles and theories of engineering mathematics as they pertain to new construction and buildings.

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. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has stated its proffered position is that of a mechanical engineer. Therefore, the AAO has reviewed the duties described by the petitioner in relation to the 2004-2005 DOL *Handbook’s* discussion of the occupation of engineer, which includes a specific section on the work of mechanical engineers. As indicated by the *Handbook’s* 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.

While the petitioner has indicated its desire to employ the beneficiary as a mechanical engineer, its description of the duties of the proffered employment does not allow the AAO to conclude that the position involves the highly complex responsibilities described above. To establish a position as a specialty occupation, a petitioner must describe the specific duties or tasks to be performed by a beneficiary in relation to its particular business interests. However, the petitioner in the instant case has offered only a brief, generic description of the proffered position, one that precludes identification of the specific duties that would be performed by the beneficiary. In its letter of support, the petitioner stated that the beneficiary would be in charge of designing and developing mechanical equipment for its new restaurants, but failed to identify the equipment to be developed and designed or the extent of the beneficiary's involvement in the process required to do so. It also asserted that the beneficiary would troubleshoot, modify, build, lay-out and test mechanical components and equipment, but again offered no specific description of what such responsibilities would entail or to what types of mechanical components and equipment it referred. Finally, the petitioner stated it would require the beneficiary to apply the principles and theories of engineering mathematics to new construction and buildings, but did not describe the duties the beneficiary would be performing when applying these principles and theories.

Counsel asserts that the proffered position is that of a mechanical engineer and has submitted a range of materials to support the occupation of mechanical engineer as a specialty occupation, including materials from the DOL *Occupational Information Network (O*Net)* and the *Dictionary of Occupational Titles (DOT)*. She cites *Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966) as further proof that mechanical engineering is a specialty occupation. The AAO agrees that a mechanical engineering position is a specialty occupation. It does not agree, however, that the proffered position is that of a mechanical engineer. A petitioner cannot establish a position as a specialty occupation by assigning to it an occupational title accepted as a specialty occupation. As already noted, it is not a position's title, but its duties that the AAO considers in determining whether employment qualifies as a specialty occupation. Cf. *Defensor v. Meissner*, 201 F. 2d 384 (5th Cir. 2000) In the instant case, the petitioner's limited description of the duties of its proffered position fails to establish it as that of a mechanical engineer. Accordingly, the materials submitted by counsel regarding the occupation of mechanical engineer are not probative for the purpose of these proceedings.

With regard to counsel's reliance on the *DOT* and the *O*Net*, which has replaced the *DOT*, the AAO notes that neither are a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation.

As the petitioner's description of the duties of its proffered position does not indicate precisely what tasks the beneficiary would perform for the petitioner on a daily basis, the AAO is unable to determine the nature of the petitioner's proposed employment and whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into that employment. Accordingly, the AAO finds the petitioner to be unable to establish that its position meets the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the position as a specialty occupation under the second criterion – a specific degree requirement is common to the 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 -- counsel submits 25 Internet job announcements for mechanical engineers. However, these advertisements cannot establish that the petitioner's degree requirement is the norm within its industry. To satisfy the requirements of the criterion's first prong, a petitioner must establish both that the degree requirement is found among organizations similar to the petitioner and in parallel positions. None of the advertisements, however, appear to have been posted by restaurant businesses. Further, as the petitioner has not provided a specific listing of the duties of the proffered position, it is not possible to determine whether the positions described are parallel to the proffered position.

The AAO also concludes that the record before it does not establish that the proffered position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence in the record that would support such a finding. Accordingly, the petitioner cannot establish its 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, there are no such records available. Counsel's response to the director's request for evidence stated that the proffered position was newly created and that the petitioner had never previously needed such a position. Accordingly, the petitioner cannot establish its proffered position as a specialty occupation based on its 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. However, as previously discussed, the petitioner has not provided a detailed and specific listing of the duties of its proffered position. Therefore, no analysis of the position's duties may be conducted, making it impossible for the proffered position to qualify as a specialty occupation under the requirement at 8 C.F.R. § 214.2(h)(4)(A)(4).

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.