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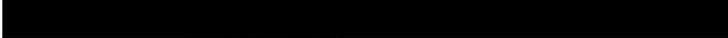
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JUN 22 2005



FILE: WAC 02 281 51980 Office: CALIFORNIA SERVICE CENTER Date:

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 materials have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner filed an appeal, which was summarily dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted. The appeal will be dismissed. The petition will be denied.

The petitioner owns and operates seven healthcare facilities. It seeks to employ the beneficiary as a mechanical engineer and to classify him 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 ground that the proffered position does not qualify as a specialty occupation. A timely appeal (Form I-290B) was filed on October 1, 2003, on which counsel indicated that a brief and/or evidence would be submitted to the AAO within 30 days. On July 22, 2004 the AAO summarily dismissed the appeal on the ground that no such brief or evidence was submitted and the petitioner had failed to identify in the appeal any erroneous conclusion of law or statement of fact in the director's decision. Counsel filed a timely motion to reopen or reconsider, asserting that a timely appeal brief had been filed. Along with the motion counsel submitted a copy of the brief and supporting materials, together with documentary evidence of their filing on October 28, 2003. The AAO determines that counsel's motion satisfies the requirements of a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Accordingly, the petitioner's appeal will be considered on the merits.

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 notice of decision; and (5) Form I-290B, counsel’s appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a management company, with four employees, that manages seven healthcare facilities with a total capacity of 700 beds. The petitioner stated that it intended to hire the beneficiary as a mechanical engineer to oversee renovation of the mechanical and electromechanical systems in its buildings, in particular the heating and air conditioning systems. The beneficiary is qualified for the position, the petitioner declared, by virtue of his bachelor of science in mechanical engineering in 1980 from the [REDACTED] in the Philippines, and over 18 years of work experience as a maintenance engineer with mechanical engineering responsibilities for a series of Filipino companies. In response to the RFE the petitioner listed the specific duties of the proffered position, and the percentage of time each duty would take, as follows:

- Research, plan, design, and implement the mechanical and electromechanical systems of the project, including the schematic transformation of electrical and fire safety devices – 25%.
- Research and analyze data, such as design proposals and specifications to determine feasibility of design or application – 25%.
- Direct and coordinate activities involved in operation, application, installation, and repair of the mechanical systems – 20%.
- Oversee the installation, operation, maintenance and repair of equipment for centralized heat, gas, water, and steam systems – 15%.
- Direct and coordinate the installation activities to ensure conformance to engineering design and management specifications – 15%.

The petitioner stated that the beneficiary would be supervising HVAC (thermodynamic) technicians and working with civil engineers, electrical engineers and other professionals.

In his decision the director found that the duties of the proffered position were similar to those of heating, air-conditioning, and refrigeration mechanics and installers, as described in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*. The director cited information in the *Handbook* that a baccalaureate level of educational training in engineering is not a normal, industry-wide minimum requirement for entry into that occupation. There was no evidence that the petitioner normally required applicants for the position to possess a baccalaureate degree in the field, the director stated, or that the duties and responsibilities of the position indicated complexity or authority beyond that normally encountered in the occupation. The director was not persuaded that the job could not be performed by an experienced individual without a baccalaureate degree in engineering. He concluded that the proffered position does not meet any of the qualifying criteria of a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A).

On appeal the petitioner asserts that the director erred in categorizing the proffered position as that of a heating, air-conditioning, or refrigeration mechanic and installer, instead of a mechanical engineer. The duties of the position require decisions on design and engineering procedures, the petitioner contends, which a mechanic is not equipped to make. According to the petitioner the duties and responsibilities of the proffered position are sufficiently complex that their performance requires a baccalaureate degree in engineering, and therefore 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* 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 *Handbook* describes the occupation of mechanical engineering as follows:

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, machine 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.

. . . . More than half of the jobs [nationwide in 2002] were in manufacturing – mostly in machinery, transportation equipment, computer and electronic products, and fabricated metal products manufacturing industries. Architectural, engineering, and related services, and the Federal Government provided many of the remaining jobs.

Handbook, 2004-05 edition, at 137-38. Based on the evidence of record, the AAO is not persuaded that the proffered position fits the *Handbook's* description of a mechanical engineer. There is no indication in the *Handbook* that management companies like the petitioner normally hire mechanical engineers as in-house employees to oversee the renovation of the heating and air-conditioning systems in the buildings they manage. To the extent that mechanical engineering skills might be needed in replacing the old

heating and air-conditioning systems with modern equipment, it appears more likely, based on information in the *Handbook* quoted above, that such activity would be performed by a mechanical engineer working for an engineering company or a heating and air-conditioning company actually performing the installation. Moreover, the petitioner describes the duties of the proffered position in general terms that provide little information about the level of engineering expertise required. Simply going on record without supporting documentary evidence does not satisfy the petitioner's burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). It is unclear from the job duties whether the beneficiary would be responsible for designing and building new heating and air-conditioning systems to meet unique needs of the petitioner's healthcare facilities, or whether he would primarily be overseeing the selection and installation of equipment designed by others, and suitable for the needs of many different facilities, and thereafter conducting routine maintenance and repair activities. While the petitioner claims that a baccalaureate degree in mechanical engineering is required for the proffered position, the petitioner must establish that its degree requirement is compelled by the performance demands of the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. Cf. *Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). In this case the evidence fails to demonstrate that the performance demands of the proffered position compel the petitioner to require a degree in mechanical engineering.

In accord with the director's determination and the job duties described by the petitioner, the AAO determines that the proffered position reflects that of a heating, air-conditioning, and refrigeration mechanic and installer. The duties of the occupation are described as follows in the DOL *Handbook*, 2004-05 edition, at 551:

Heating and air-conditioning mechanics install, service, and repair heating and air-conditioning systems in both residences and commercial establishments. *Furnace installers*, also called *heating equipment technicians*, follow blueprints or other specifications to install oil, gas, electric, solid-fuel, and multiple-fuel heating systems. *Air-conditioning mechanics* install and service central air-conditioning systems. After putting the equipment in place, they install fuel and water supply lines, air ducts and vents, pumps, and other components. They may connect electrical wiring and controls and check the unit for proper operation

With respect to the educational requirements of the occupation, the *Handbook* goes on to explain:

Because of the increasing sophistication of heating, air-conditioning, and refrigeration systems, employers prefer to hire those with technical school or apprenticeship training. Many mechanics and installers, however, still learn the trade informally on the job.

Many secondary and postsecondary technical and trade schools, junior and community colleges, and the U.S. Armed Forces offer six-month to two-year programs in heating, air-conditioning, and refrigeration.

Handbook, id., at 552. Thus, it is clear that a baccalaureate degree in engineering or a related specialty is not the normal minimum requirement for entry into the occupational field of heating, air-conditioning,

and refrigeration mechanics and installers. 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), the petitioner has submitted on appeal three internet job announcements for mechanical engineers requiring baccalaureate degrees in engineering. Two of the advertisements are from engineering companies, which provide engineering services to clients, and the third is from a manufacturer of heating, ventilation, and air-conditioning systems. Thus, none of the companies is in the same line of business as the petitioner, and they all appear to be considerably larger than the petitioner in their scale of operations. Thus, the job announcements are not persuasive evidence that a degree requirement in engineering is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2). 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 mechanical engineering or a related specialty, as required to qualify as a specialty occupation under the second 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 mechanical 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 mechanical 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.