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U.S. Citizenship
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Services

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MAY 11 2005

FILE: WAC 03 094 53191 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:

SELF-REPRESENTED

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 service center director 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 an employee leasing services company that seeks to employ the beneficiary as an electronic test 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 director denied the petition because the petitioner did not establish that the proffered position was a specialty occupation. On appeal, the petitioner submits a letter.

Section 214(i)(1) of the Immigration and Nationality Act (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.

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 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 notice of intent to deny the petition; (3) the petitioner's response to the director's notice; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an electronic test engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 28, 2003 letter in support of the petition; the petitioner's response to the director's notice of intent to deny the petition; the staffing service agreement between the petitioner and its client; and the employment agreement between the petitioner and the beneficiary. According to the I-129 petition, the letter in support, and the staffing agreement, the beneficiary would perform duties that entail: designing, developing and conducting electronic testing of components and specific cable systems; designing electronic circuits for telecommunication; monitoring network security and quality to achieve maximum usage and stability of the network; and documenting the results of electronic testing for quality control. The response to the director's intent to deny the petition added the following duties: solving operating problems and estimating the time and cost of engineering projects. The employment agreement described the beneficiary's duties as: evaluating hardware configuration, software application and recommending hardware upgrades; troubleshooting and determining the initial problem and providing solutions; recommending referrals to outside services, when necessary; evaluating new technology and acting as a liaison between vendors and administration; providing maintenance of hardware; and being in charge of the computer systems with an emphasis on maintenance, upgrades and quality control. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in computer engineering or electronics and communications engineering.

The director found that the proffered position was not a specialty occupation.

On appeal, the petitioner states that the director denied the petition based on a speculated link between the petitioner and JMJ Enterprises and its subsidiaries. The petitioner claims that it has no current association with any other organization. The petitioner also states that it has not filed more than 350 petitions as the director alleged, but instead has filed 120 petitions, with 13 approvals. The petitioner states that some people on the list of approved H-1B beneficiaries it submitted in response to the director's request for evidence have not yet entered the United States. The petitioner asserts that the director found the position to be a specialty occupation. The petitioner also states that the requirement for an electronic test engineer is not dependent on the size of the company or the nature of its business, but on the need of the company to fill the position to successfully operate its business. Finally, the petitioner states that there is a credible offer of employment to the beneficiary.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first 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; 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 often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The issue is not whether an engineer is a specialty occupation, because it normally is, but whether the petitioner has established that the beneficiary would be performing the duties of an engineer. The petitioner has provided two significantly different position descriptions. The employment agreement describes a position that is different from that described in the staffing agreement between the petitioner and the company where the beneficiary would be working. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As a result, the petitioner has not established that the beneficiary would be working in an engineering position or what the beneficiary would do in that position on a daily basis.

In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. The petitioner did not provide any information to establish how its client, a home construction and sales company, would use an electronic test engineer, nor did it resolve the issue of why there were two differing position descriptions. The petitioner has not established it will employ the beneficiary as an engineer; it cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner submitted several Internet postings for test engineers in its response to the director's notice of intent to deny the petition. The petitioner stated that the position descriptions were "similar to those described in the petition." There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements are for test engineers in industries that are significantly different than the petitioner or its client, and the duties have nothing in common with either of the descriptions submitted for the proffered position. Thus, the advertisements have little relevance. The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. There is no evidence in the record regarding the petitioner's client's past hiring practices. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the

petitioner to show that the entities ultimately employing the foreign nurses require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the nurses to the United States for employment with the agency's clients.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As noted above, there are two differing position descriptions, which provide conflicting information about how the beneficiary would perform this position; therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Regarding the petitioner's assertion that the director's decision was based on its connection to another company, the AAO notes that the director found that the position was not a specialty occupation. While the director did note that the petitioner's parent company appeared to have a history of suspicious filing practices, the decision was not based on this relationship. In addition, while the petitioner states on appeal that it has no current association with any other organization, it does not address any past associations. The petitioner's status at the time the petition was filed is the status that would be relevant to any adjudication. Nonetheless, as noted, the director found that the proffered position was not a specialty occupation, independent of any questions regarding the petitioner's business relationships with other companies.

An H-1B alien is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case, the petitioner did not establish that the beneficiary would be coming to the United States to perform services in a specialty occupation.

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.

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