U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 04 047 50821 Office: NEBRASKA SERVICE CENTER Date: NOV 09 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

The petitioner is a franchise engaged in the restoration and cleaning of residential and commercial facilities that have sustained fire, smoke, or water damage. In order to employ the beneficiary in a position that the petitioner designates Applications 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth in the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director based his decision partly on his determination that the following description by the petitioner of the major portion of the beneficiary's work effort "is vague and does not clearly establish what the beneficiary will be doing in the context of the petitioner's business":

> **Area of Process Development – 60%:**
>
> This area includes plan, design, research & coordinate integration of current machinery components & systems for better usage & improvement utilization of current processes. Create reports for product design & tooling efficiency, production methods & manufacturing capabilities.

On appeal, counsel contends that the proffered applications engineer position comports with the mechanical engineer occupation as discussed at pages 137-138 of the 2004-2005 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*).

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 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Citizenship and Immigration Services (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.

According to the petitioner's December 2, 2003 letter of support that was submitted with the Form I-129 (Petition for Non-Immigrant Worker), the petitioner employs 12 people, enjoys a "business and market base

that has grown to over $700,000.00 in annual revenue," and continues to expand. The letter states that the petitioner is a franchise of ServiceMaster Corporation, which is described as a "public trading company." According to the letter, this parent company:

> [H]as over 5,400 company-owned and franchised service centers and business units, operating under leading brands which include TruGreen ChemLawn, ServiceMaster Clean, Merry Maids, AmeriSpec, Furniture Medic, American Mechanical Services, TruGreen LandCare[,] Terminix and American Home Shield.

The letter describes the proposed duties as follows:

> The Applications Engineer will plan, design and coordinate integration of our current machinery and cleaning equipment for better performance. He will research, plan and design equipment for better usage by our employees. He will design components and systems to improve our utilization of current processes. He will develop and write equipment specifications, performance requirements, cost analysis, and proposal[s] for integrating machinery and equipment. The individual will apply knowledge of mechanics, hydraulics, pneumatics, electrical wiring, electronics, programming and manufacturing.
>
> In addition, the Applications Engineer will test the ability of the equipment, oversee installation and ensure proper functioning and will determine parts supply, maintenance tasks, safety procedures and [the] service schedule required to maintain the equipment in prescribed condition. Furthermore, the Applications Engineer will develop models of alternative processing methods to test feasibility of new applications of system components and recommend implementation of improved processes.
>
> The Applications Engineer will communicate with the planning and design staff concerning product design and tooling to assure efficient production methods and report to management on manufacturing capabilities, production schedules, and problems to facilitate decision making.

Counsel's April 12, 2004 letter of reply to the RFE states that the applications engineer's work will be divided according to the following percentages:

> **Area of Process Development – 60%:**
>
> This area includes plan, design, research & coordinate integration of current machinery components & systems for better usage & improvement utilization of current processes. Create reports for product design & tooling efficiency, production methods & manufacturing capabilities.

Area of Engineering Maintenance – 30%:

Oversee installation, test equipment, performance and ability, ensure proper functioning & service schedule, create equipment specification & safety procedures, troubleshooting, determine parts supply & cost analysis.

Area of Production Development – 10%:

Develop models & alternative process methods to test feasibility of new applications. Recommend new systems, components, equipment & implementation of new improved processes.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to those positions for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title or generalized descriptions of duties. It looks primarily for evidence about the specific duties, and about the nature of the petitioning entity's business operations. 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). Neither the title of the position, abstract descriptions of its duties, nor an employer's self-imposed standards are persuasive in the critical assessment that CIS must make: whether the evidence of record establishes that performance of the position 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 *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, establishes that the occupational category of mechanical engineer requires at least a bachelor's degree or its equivalent in engineering. However, the evidence of record does not establish that the proffered position substantially comports with this occupational category.

The record contains no evidence about the machinery upon which the beneficiary would concentrate his efforts. There are no descriptions of the planning, design, and research projects in which the beneficiary would engage, no indications of the installation and testing procedures that would be involved, and no depictions of any specific activities associated with the proffered position. Given the lack of concrete information about the machinery that is the subject of the proffered position, it is impossible for the AAO to confirm the accuracy of the petitioner's claim that the position requires a "knowledge of mechanics, hydraulics, pneumatics, electrical wiring, electronics, programming and manufacturing" that is attained by a "Bachelor Degree in Engineering (Mechanical, Industrial, Electrical or related) or its equivalent (letter of support, at page 2). Therefore, the evidence of record fails to substantiate that the petitioner is proffering a mechanical engineer position, or any other position for which the *Handbook* indicates that employers normally specify at least a bachelor's degree, or is equivalent, as a minimum hiring credential. 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*, 22 I&N Dec. 158, 165

(Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 *Handbook* does not indicate that the proffered position requires a degree in a specific specialty. There are no letters or affidavits from individuals, firms, or professional associations attesting to the minimum degree requirements for a position such as that proffered here.

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. In light of the petitioner's failure to identify the "very complex machinery" with which the beneficiary would work and to describe specific operations that the beneficiary would perform, there is no evidentiary basis for finding the complexity or uniqueness required by this criterion.

The petitioner presents no evidence to meet 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.

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. The record contains no factual basis for assessing the specialization and complexity of the duties. The petitioner failed to delineate any specific duties. The petitioner failed to provide any meaningful information about the machinery that would be the subject of the beneficiary's work or about concrete operations that he would perform with regard to that machinery.

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.

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.