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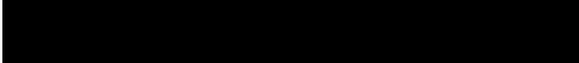


U.S. Citizenship
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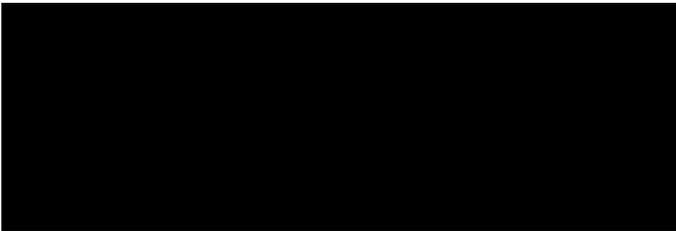


FILE: WAC 02 204 50522 Office: CALIFORNIA SERVICE CENTER Date: **NOV 23 2005**

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 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 service station that seeks to employ the beneficiary as a mechanical engineering technician. The petitioner, therefore, 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 proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

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 request for additional evidence; (3) the petitioner's response to the director's request; (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 a mechanical engineering technician. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail maintaining the equipment used for car/vehicle care; the building's heating, ventilating, and air-conditioning system; the gas/fuel pumps; and the fuel storage facilities. For the proposed position, the petitioner requires a baccalaureate degree in mechanical engineering.

The director stated that the proposed duties are a combination of those of an automotive service technician and an industrial machinery installation, repair, and maintenance worker as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* discloses that these occupations do not require a baccalaureate degree. According to the director, the proposed position has general managerial duties that do not require professional skills. The proposed duties and stated level of responsibility, the director stated, did not indicate a complexity or authority that is beyond what is normally encountered in the occupational field. The director further stated that the evidence of record did not show that the job offered could not be performed by an experienced person whose educational training fell short of a baccalaureate degree.

On appeal, counsel states that the petitioner maintains equipment for cars/vehicle care and a car care center, and owns and maintains five chains of service stations. The beneficiary will carry out all phases of developing and testing car/vehicle care machinery, and the cost analysis of products, services, and merchandise, counsel asserts. Counsel maintains that the petitioner is motivated to require a baccalaureate degree in mechanical engineering because of business necessity such as growth that provides investment opportunities and financial risks. Counsel asserts that the educational requirement of a baccalaureate degree in mechanical engineering is a business judgment, and that the business judgment rule indicates that a company should determine its particular needs. Citing to *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal. Mar 19, 1991), counsel states that the INS (now CIS) should defer to an employer's view, and should not rely simply on standardized government classification systems. Counsel states that the *Handbook* does not absolutely convey that a mechanical engineering technician does not qualify as a specialty occupation. To deprive the petitioner of a mechanical engineering technician on the ground that the proposed position has general managerial duties unduly restricts the petitioner's legitimate business plans and judgment, counsel contends. The *Handbook*, the *Dictionary of Occupational Titles (DOT)*, and the *Occupational Information Network (O*Net)*, counsel states, show that the proposed position is a specialty occupation. According to counsel, the DOL's wage library reflects a financial manager/comptroller merits a zone 4 classification, which is a classification requiring at least a baccalaureate degree.

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 first considers 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 *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)).

In determining whether a position qualifies as a specialty occupation, 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.

In the response to the request for evidence the petitioner expanded the beneficiary's duties, adding items such as calculating costs and the "amount of equipment required," preparing contracts and contacting suppliers, and recommending how to improve machinery. On appeal, counsel describes the beneficiary as providing cost analysis of the petitioner's products, services, and merchandise. In sum, the initial description appeared to have the beneficiary maintain equipment and facilities, while the petitioner's second iteration of the job has the beneficiary calculating costs, preparing contracts and contacting suppliers, and recommending how to improve machinery; and counsel's description has the beneficiary performing cost analysis. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification **as specialty occupation**. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence and counsel's job description on appeal did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description. Therefore, the AAO will not consider the new duties in this proceeding.

Counsel's reference to and assertions about the relevance of information from the *O*Net* and the *DOT* are not persuasive. Neither the *DOT*'s specific vocational preparation (SVP) rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. Counsel's

reference to a financial manager/comptroller in the DOL's wage library is not relevant as the proposed position differs significantly from a financial manager/comptroller.

The record indicates that the petitioner referenced the Occupational Employment Statistics (OES) report to establish that the proposed position is a specialty occupation. The OES report relates to salaries of occupations; it does not convey that the proposed position requires a baccalaureate degree in a specific specialty.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The record reflects that the beneficiary will maintain the equipment used for car/vehicle care; the facility's heating, ventilating, and air-conditioning system; the gas/fuel pumps; and the fuel storage facilities. The AAO finds that these duties are a combination of those of an industrial machinery installation, repair, and maintenance worker, and a heating and air-conditioning mechanic. According to the *Handbook* industrial machinery mechanics "are highly skilled workers who maintain and repair machinery in a plant or factory," and "[h]eating and air-conditioning mechanics install, service, and repair heating and air-conditioning systems in both residences and commercial establishments." The *Handbook* reveals that an industrial machinery installation, repair, and maintenance worker, and a heating and air-conditioning mechanic do not require a baccalaureate degree in a specific specialty. It states that employers prefer to hire heating and air-conditioning mechanics with technical school or apprenticeship training, and that many mechanics and installers still learn the trade informally on the job. For industrial machinery mechanics, the *Handbook* reports that individuals:

[O]ften learn their trade through 4-year apprenticeship programs that combine classroom instruction with on-the-job-training. These programs usually are sponsored by a local trade union. Other mechanics start as helpers and learn the skills of the trade informally or by taking courses offered by machinery manufacturers and community colleges.

Counsel's reference to *Unico American Corp.*, an unpublished decision, on appeal is not persuasive. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits job postings to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar

organizations. The job postings represent employers in industries that are dissimilar from the petitioner, a service station, or their nature is not disclosed in the posting. Taylor Made Environment develops vehicle products; Brooks-Pri Automation designs machinery for the semiconductor industry; the nature of The WE Agency and RW, Inc. are not described in the job posting. For these reasons, the job postings are inadequate to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position as so complex or unique that it can be performed only by an individual with a degree. The AAO concludes that the proposed duties are an amalgam of those of an industrial machinery installation, repair, and maintenance worker, and a heating and air-conditioning mechanic, which are occupations that the *Handbook* portrays as not requiring a baccalaureate degree. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO has already explained that the proposed duties are a combination of those of an industrial machinery installation, repair, and maintenance worker, and a heating and air-conditioning mechanic, which are occupations that the *Handbook* describes as not requiring a baccalaureate degree. As such, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 on this ground.

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.