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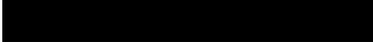
U.S. Citizenship
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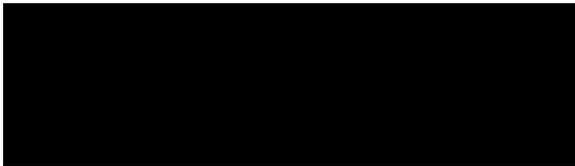
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FILE: WAC 04 255 52815 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the California 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 manufacturer of women's clothing, with 12 employees. It seeks to employ the beneficiary as an industrial engineer to implement quality control measures concerning its manufacturing and assembly-related activities. The director denied the petition because he 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) the petitioner's response to the director's request; (4) the director's denial letter; and (4) Form I-290B, with counsel's brief. 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 an industrial engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s August 25, 2004 letter in support of the Form I-129 and its November 29, 2004 response to the director’s request for evidence. These descriptions indicate the beneficiary would have responsibility for:

- Developing standardized manufacturing methods customized to make optimum use of machinery, labor utilization standards and facility utilization through the implementation of cost analysis production, scheduling and human-work relation job evaluatory programs;
- Providing the petitioner with time analysis studies in relation to current processes involving the manufacture of women’s clothing;
- Designing equipment that will increase production levels;
- Documenting workspace for maximum efficiency of workflow;
- Reviewing project instructions and blueprints to ascertain when certain types of manpower and machinery standards should be applied;
- Reviewing manufacturing specifications, order compliance and other related information;
- Studying operations sequencing and material flow so as to provide the petitioner with detailed estimations of production costs, as well as the effectiveness of product design changes, including labor and material costs; and
- Evaluating product data and design performance to specific industrial engineering principles, customer requirements and quality standards.

The petitioner further asserted that the above duties are critical to its efforts to upgrade its production facilities and increase its staff in response to heavy demand for its products, and require a baccalaureate degree in industrial/mechanical engineering, management engineering or a related field.

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

In his denial, the director concluded, in part, that the petitioner's business did not have operations of the scale or complexity to require the services of a full- or part-time industrial engineer. The director's decision does not, however, indicate the basis on which he reached this conclusion, nor is it supported by the *Handbook's* discussion of the occupation of engineers. Accordingly, the AAO withdraws the director's finding in this regard.

The petitioner has stated its proffered position is that of an industrial engineer. Therefore, the AAO has reviewed the duties described by the petitioner in relation to the 2006-2007 DOL *Handbook's* discussion of the occupation of engineer, which includes a specific section on the work of industrial engineers. As indicated by the *Handbook's* general discussion of the engineering profession at pages 133-134:

Engineers apply the theories and principles of science and mathematics to develop economical solutions to technical problems

. . .

In addition to design and development, many engineers work in testing, production, or maintenance. These engineers supervise production in factories, determine the causes of component failure, and test manufactured products to maintain quality. They also estimate the time and cost to complete projects

At page 135, the *Handbook* offers the following description of the work of industrial engineers:

Industrial engineers determine the most effective ways to use the basic factors of production – people, machines, materials, information, and energy – to make a product or to provide a service. They are mostly concerned with increasing productivity through the management of people, methods of business organization, and technology. To solve organizational, production, and related problems efficiently, industrial engineers carefully study the product requirements, use mathematical methods to meet those requirements, and design

manufacturing and information systems. They develop management control systems to aid in financial planning and cost analysis, and design production planning and control systems to coordinate activities and ensure product quality. They also design or improve systems for the physical distribution of goods and services, as well as determine the most efficient plant locations. Industrial engineers develop wage and salary administration systems and job evaluation programs. Many industrial engineers move into management positions because the work is closely related to the work of managers.

On appeal, counsel notes that the petitioner's description of the proffered position is "similar to the wording" of the *Handbook's* discussion of the occupation of industrial engineer, a similarity he asserts establishes the proffered position as an industrial engineer. While the AAO agrees that the proffered position's duties, as listed by the petitioner, reflect the work performed by industrial engineers, it does not find them to establish the proffered position as a specialty occupation.

A petitioner cannot establish a proffered position as a specialty occupation by listing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. While this type of generalized description is necessary when defining the range of duties that may be performed within an occupation, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing 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. In the instant case, the petitioner refers to the beneficiary's responsibilities for designing equipment, developing standardized manufacturing methods, providing time and analysis studies and studying operating sequencing and material flow, but fails to relate any of these duties to its own clothing operations.

The AAO, as previously discussed, requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of the position and its degree requirements, if any. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no meaningful description of the proffered position's responsibilities, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In reaching this conclusion, the AAO has considered the evidence of record that could potentially establish the proffered position as a specialty occupation under the first criterion – the materials related to the occupation of industrial engineers from the DOL *Occupational Information Network (O*Net)*, which has replaced the *Dictionary of Occupational Titles (DOT)*; and the opinions of professors from the University of Arizona and the State University of New York at Buffalo regarding the degree requirements for industrial engineers and the proffered position.

The *O*Net* materials indicate that a baccalaureate degree is required for employment as an industrial engineer. While the AAO agrees that an industrial engineer qualifies as a specialty occupation, it does not find

the record to establish the proffered position as that of an industrial engineer. Accordingly, the *O*Net* materials submitted by the petitioner regarding the occupation of industrial engineer are not probative for the purpose of these proceedings. Moreover, the *O*Net* is not 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. It provides 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. The education and training codes assigned to occupations by the *O*Net* do not indicate a degree requirement in a specific specialty, as required for classification as a specialty occupation.

The opinions of the two university professors also fail to establish the proffered position as a specialty occupation under the first criterion. Both individuals claim expertise in the field of industrial engineering and indicate that their opinions are based on the description of the “industrial engineering position” in the petitioner’s August 25, 2004 letter of support. They conclude that the proffered position requires the beneficiary to hold a degree in industrial engineering, industrial management, civil engineering or a related field. However, as previously discussed, the outline of the position provided by the petitioner in its letter of support is so generalized that it describes the occupation of industrial engineer rather than the duties to be performed by the beneficiary in relation to the petitioner’s apparel manufacturing business. As the professors’ opinions are based on a list of responsibilities that does not provide a meaningful description of the proffered position in relation to the petitioner’s apparel business, they do not establish it as that of an industrial engineer, employment that would impose a degree requirement on the beneficiary. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept it or may give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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 – the petitioner has submitted 17 Internet job announcements for industrial engineers and the previously-discussed opinions from the University of Arizona and State University of New York professors. However, the advertisements and the opinions do not satisfy either of the criterion’s alternate prongs.

None of the advertisements indicate they are published by organizations similar to the petitioner, a clothing manufacturer. Instead, they represent the employment needs of manufacturers of pharmaceuticals, shower valves, car body systems, caskets, electronic sensors, automotive products, food, and recreational products; healthcare companies; technology firms and two organizations that do not identify their business. 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 it. Accordingly, the announcements fail to establish a degree requirement in parallel positions among similar organizations.

The opinion from the professor at the State University of New York at Binghamton addresses his credentials and the degree requirement for the duties of the position as listed on the August 25, 2004 letter of support, not industry practice. The opinion of the University of Arizona professor states only that it is “quite common for any type of manufacturing company to hire Industrial Engineers,” not that it is common for small clothing

manufacturers like the petitioner to do so. Therefore, they, too, fail to establish the petitioner's degree requirement within its industry. Moreover, the AAO notes that the record does not establish the authority of either professor to speak to hiring practices in the apparel manufacturing industry. The petitioner has submitted no evidence that demonstrates that either individual is knowledgeable about the hiring practices of U.S. clothing manufacturers and neither professor cites to industry surveys, trade publications or other trade data in support of his conclusion. Going on record without supporting documentation is not sufficient to meet 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)).

The AAO also concludes that the record before it does not establish the proffered position 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 – despite the opinions expressed in the letters from the Arizona and New York professors. While both individuals find that the proffered position could be performed only by an individual with an engineering or related degree, their conclusions are, again, based on their respective readings of the duties described in the petitioner's August 25, 2004 letter, duties that describe the occupation of industrial engineer rather than the actual duties of the proffered position. Accordingly, the AAO finds the professors' opinions to be of little evidentiary value in establishing the proffered position as a specialty occupation based on its complexity or unique nature. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Having failed to submit a meaningful description of the proffered position, the petitioner is precluded from establishing it as either complex or unique.

On appeal, counsel states that CIS' denial failed to provide "expert testimony" disputing the professors' conclusions and that, in the absence of such evidence, their opinions must be accepted as true. Counsel has mistakenly shifted the burden of proof in these proceedings. It is the responsibility of the petitioner or applicant to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Pursuant to 8 C.F.R. § 103.3(a)(1)(i), CIS is required only to explain its reasoning in denying an application or petition.

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, the petitioner has not attempted to establish the proffered position as a specialty occupation based on its normal hiring practices. Neither is there any evidence in the record that would indicate that the petitioner has previously filled the proffered position with a degreed individual. Although the petitioner has submitted a copy of its job announcements seeking candidates with engineering or related degrees, the petitioner's requirements for the instant position are not proof of its hiring practices. Accordingly, the record does not establish the position as a specialty occupation based on the petitioner's normal hiring practices.

The fourth criterion requires a petitioner to demonstrate that the nature of the specific duties of a proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel asserts that the opinions of the university professors establish the proffered position as a specialty occupation under the criterion's specialized and complex threshold. The AAO does not agree.

While the two professors indicate that the duties of the proffered position are so technical and detailed that a bachelor's degree in an engineering-related field would be required to perform them, both, as previously discussed, are based solely on the petitioner's generalized description of the employment of an industrial engineer, rather than a description of the specific tasks that would be performed by the beneficiary. Accordingly, the professors' opinions of the nature of the duties described by the petitioner offer insufficient evidence of their specialization and complexity. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept it or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Without a meaningful description of the proffered position's duties, a petitioner cannot establish them as being of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the petitioner claims 12 employees as of the petition filing date of September 20, 2004. On its 2003 tax return, it claims \$22,500 in compensation paid, \$30,239 in total salaries and \$61,248 in commissions. Thus, it appears that the bulk of the petitioner's employee expenses lies in sales and not in manufacturing. The petitioner also paid \$140,574 in sewing charges to a third party or parties. Thus, the nature of the petitioner's manufacturing operation is not clear from the record. Considering the petitioner's failure to provide a detailed specification of industrial engineering duties in relation to its manufacturing business, the petitioner has not established that it would employ the beneficiary temporarily in a specialty occupation as required by the regulation at 8 C.F.R. § 214.2(h)(1)(B)(1).

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 AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.