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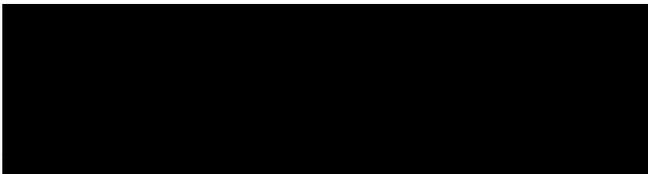
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FILE: WAC 04 260 50458 Office: CALIFORNIA SERVICE CENTER Date: JUN 09 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 an architectural lighting systems company, was established in 1998, has 10 employees, and annual sales of \$1.2 million. It seeks to employ the beneficiary as an Industrial Engineer 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 based on his determination that the proffered position was not 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 (RFE); (3) the petitioner's response to the RFE, dated December 6, 2004; (4) the director's denial letter; and (5) Form I-290B, and an appeal brief.

The issue before the AAO is whether the 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 states that it is seeking the beneficiary’s services as an industrial engineer.

At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position would require the beneficiary to develop a Six Sigma quality control program and apply the six sigma methodology to facilitate orders, expedite assembly, shorten shipping time and improve inventory control. The petitioner specified the job duties as follows:

- Utilize and implement the Six Sigma system;
- Identify opportunities that improve manufacturing performance by applying engineering fundamentals;
- Record, analyze and interpret line performance and recommend methods to alleviate constraints on equipment and output;
- Conduct time studies assessing rates, crewing, ergonomic and general safety improvements;
- Assess benefits of technology changes to manufacturing operations;

- Provide cost estimates of labor based ROI comparisons on anticipated business ventures or processes;
- Create and maintain standards and audit procedures;
- Spearhead challenging projects as needed;
- Make standard cost analysis of new products and process the cost impact of material changes;
- Create and analyze current state and future state value stream maps of material and information flow in processes;
- Work with customers and suppliers to determine packaging needs;
- Create and maintain other written work instructions according to standards;
- Develop work cell layouts with CAD;
- Develop standard data from the time studies or pre-determined elemental time systems;
- Utilize standard data for labor-estimates; and
- Develop and maintain time study process.

The petitioner stated that it required a bachelor's degree and deems the beneficiary qualified by virtue of her bachelor of science degree in business administration with a concentration in computer management.

The director found that the proffered position was not a specialty occupation because the duties are not so specialized and complex as to require a bachelor's degree in a specific field of study. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director found that the duties of the position were similar to those of an industrial engineering technician, a position which does not require a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel asserts that an industrial engineer position requires a bachelor's degree and points to the *Handbook's* section on the education and training for industrial engineers. With the response to the RFE counsel submitted Internet job advertisements to demonstrate the industry requirement of a related bachelor's degree. On appeal, counsel states that the director erroneously focused on only the duties of utilizing and implementing the Six Sigma system, and that the fact that the beneficiary would be performing some of the duties of an industrial engineering technician does not take away from the fact that the primary duties are those of an industrial engineer.

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.

To determine whether the duties just described are those of 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; 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 *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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 turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. While the *Handbook* indicates that almost all entry level engineering positions require a degree in engineering, the petitioner will accept a degree in business administration, with a concentration in computer management. The petitioner's degree requirement does not establish the position as an industrial engineer. The *Handbook* indicates that industrial engineers carefully study the product requirements, use mathematical methods to increase those requirements and design manufacturing and information systems. They also design or improve systems for the physical distribution of goods and services, as well as determine the most efficient plant locations. They develop wage and salary administration systems and job evaluation programs. None of these duties are included in the primary job duties for the proffered position.

The AAO does not agree that the position is that of an industrial engineer. The AAO agrees with the director that the proffered position is similar to that of an industrial engineering technician. The 2006-2007 *Handbook's* description of industrial engineer, at <http://www.bls.gov/oco/ocos112.htm>, states:

Engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection, and maintenance. Their work is more limited in scope and application-oriented than that of scientists and engineers. Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control, inspecting products and processes, conducting tests, or collecting data. In manufacturing, they may assist in product design, development, or production. Although many workers who repair or maintain various types of electrical,

electronic, or mechanical equipment are called technicians, these workers are covered in the *Handbook* section on installation, maintenance, and repair occupations.

Engineering technicians who work in research and development build or set up equipment; prepare and conduct experiments; collect data; calculate or record results; and help engineers or scientists in other ways, such as making prototype versions of newly designed equipment. They also assist in design work, often using computer-aided design and drafting (CADD) equipment.

...

Industrial engineering technicians study the efficient use of personnel, materials, and machines in factories, stores, repair shops, and offices. They prepare layouts of machinery and equipment, plan the flow of work, make statistical studies, and analyze production costs.

With respect to the educational qualifications for industrial engineering technicians, the *Handbook* states:

Although it may be possible to qualify for certain engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology. Training is available at technical institutes, community colleges, extension divisions of colleges and universities, public and private vocational-technical schools, and in the Armed Forces. Persons with college courses in science, engineering, and mathematics may qualify for some positions but may need additional specialized training and experience. Although employers usually do not require engineering technicians to be certified, such certification may provide jobseekers a competitive advantage.

Prospective engineering technicians should take as many high school science and math courses as possible to prepare for postsecondary programs in engineering technology. Most 2-year associate degree programs accredited by the Technology Accreditation Commission of the Accreditation Board for Engineering and Technology (ABET) require, at a minimum, college algebra and trigonometry and one or two basic science courses. Depending on the specialty, more math or science may be required. About 230 colleges offer ABET-accredited programs in engineering technology.

The type of technical courses required also depends on the specialty. For example, prospective mechanical engineering technicians may take

courses in fluid mechanics, thermodynamics, and mechanical design; electrical engineering technicians may need classes in electrical circuits, microprocessors, and digital electronics; and those preparing to work in environmental engineering technology need courses in environmental regulations and safe handling of hazardous materials.

Because many engineering technicians assist in design work, creativity is desirable. Because these workers often are part of a team of engineers and other technicians, good communication skills and the ability to work well with others also are important.

Engineering technicians usually begin by performing routine duties under the close supervision of an experienced technician, technologist, engineer, or scientist. As they gain experience, they are given more difficult assignments with only general supervision. Some engineering technicians eventually become supervisors.

...

The National Institute for Certification in Engineering Technologies has established a voluntary certification program for engineering technicians. Certification is available at various levels, each level combining a written examination in 1 of about 30 specialties with a certain amount of job-related experience, a supervisory evaluation, and a recommendation.

The *Handbook* does not establish a specific degree requirement for industrial engineering technicians. The *Handbook* emphasizes technical training at technical school or two-year colleges, and work experience, and for advancement, varying combinations of experience and education depending on the type of engineering.

The *Handbook* is clear that a degree or its equivalent is not the normal minimum requirement for entry into the occupation. Accordingly, the AAO finds that 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.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – the petitioner must establish that a 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.

Regarding parallel positions in the petitioner's industry, the petitioner submitted 4 Internet job postings for industrial engineers. The four advertisements are from employers in fields unrelated to the petitioner's. One is a multi-plant manufacturer of commercial truck trailers, one is a glass and mirror manufacturer, and two are logistics service providers. One logistics provider has 9,000 employees in 600 locations in 96 countries. The other one provides logistics services for the apparel industry. The glass and mirror manufacturer requires a bachelor's degree in industrial engineering, manufacturing engineering, logistics engineering, or a related discipline. It is further noted that 3 of the advertisements specify a degree in engineering, and the fourth seeks an experienced professional engineer. The petitioner is seeking an industrial engineer for one plant that employs 10 workers, and seeks to employ the beneficiary, who has a degree in Business Administration with a concentration in Computer Management.

Further, the duties of the advertised positions are not specific enough to compare with the job duties of the proffered position. Counsel asserts in the response to the RFE that the petitioner's business is similar to the businesses in the advertisements. However, the petitioner provides no information that would establish them as organizations of comparable size and complexity to the petitioner. Thus, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Therefore, the petitioner has failed to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

As noted above, the petitioner has described duties normally performed by industrial engineering technicians. In its response to the RFE, in addressing the first, second, and fourth criteria, counsel simply made reference to the *Handbook's* description of industrial engineer to offer a further explanation of the proffered position's duties. The AAO finds the petitioner to have provided no evidence that would support a finding that the job duties are so complex or unique that they can be performed only by an individual with a degree in engineering. Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - the position is so complex or unique that it can be performed only by an individual with a degree.

Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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 them is usually associated with the attainment of a baccalaureate or higher degree. To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the 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, counsel has indicated that the proffered position is newly created. Counsel contends, however, that the petitioner would only hire a person with a baccalaureate degree for the position, and has a history of hiring professionals with baccalaureate degrees. However, of its 10 employees, the petitioner lists only three employees with degrees. One has a degree in Electrical Engineering, one has a degree in Accounting, and one has a degree in Economics. Counsel has not established that the petitioner would only hire an individual with a related degree in the proffered position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner has not established its position as a specialty occupation under the third criterion.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position are 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 contends that the duties of the proffered position satisfy the criterion's requirements.

Counsel stated that the beneficiary will perform duties similar to those of an industrial engineer and will deploy a Six Sigma quality control program and apply the Six Sigma methodology. However, the job description provided does not indicate that the duties of the proffered position are distinguishable from those of an industrial engineering technician described in the *Handbook*, which does not indicate that a degree in a specialty is required. The petitioner has not submitted business documentation to establish that the complexity of the duties, such as the utilization and implementation of Six Sigma methodology, and providing time studies, cost analyses, audit procedures and standardized work instructions require a 4-year degree in engineering.

Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.