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FILE: WAC 03 261 50187 Office: CALIFORNIA SERVICE CENTER Date: MAR 28 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:

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 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 nursing facility that seeks to employ the beneficiary as an electrical engineer. 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.¹

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.

¹ The California State Bar website indicates that [REDACTED] license to practice law was placed on inactive status as of July 1, 2005, and that as of February 17, 2006, [REDACTED] is not eligible to practice law. The AAO will refer to [REDACTED] as "counsel" in this proceeding.

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 an electrical engineer. 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: troubleshooting defective units to the component level of the facility; supervising the installation of equipment, cabling, and wiring of the office and facility; writing performance requirements and developing maintenance schedules for electrical projects; estimating the time and cost of electrical engineering projects, including equipment testing and solutions to operating problems; conducting research and developing and designing electrical components and systems; directing engineering personnel in fabricating test control apparatus and equipment, and determining implementation methods and procedures. The beneficiary will be involved with the interrelationships of circuits and components in equipment, and will be responsible for power distribution coordination, management of switchgear and relay operations, electronics design, and troubleshooting console and related hardware. The beneficiary will handle electrical projects, directing field operations and the maintenance of electronic installation for construction projects. The petitioner’s response to the request for evidence elaborated on the proposed duties. For the proposed position, the petitioner requires a bachelor’s degree in electrical engineering.

The director denied the petition, finding that the customary needs of a nursing home facility are normally tended to by electrical technicians who do not possess a baccalaureate degree in engineering. The director concluded that the evidence submitted failed to satisfy one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the proposed position is that of an electrical engineer and that the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) and the *Dictionary of Occupational Titles* (*DOT*) substantiate his assertion. Counsel refers to Internet printouts and the America Career Internet website to show that an electrical engineer requires a bachelor’s degree. According to counsel, two healthcare facilities attest to employing an electrical engineer. Counsel states that it is common in the healthcare service industry to require a bachelor’s degree for an electrical engineering position, and refers to Internet job postings to support this statement. Counsel contends that the petitioner is part of a conglomerate of 17 healthcare facilities, all of which are expanding, and points to exhibit F, which is a list of healthcare facilities “under the petitioner’s wing.” Counsel states that the beneficiary has played a role in the improvement of the petitioner’s facility, and that he will assist in expansion plans and programs. According to counsel, the beneficiary has proposed four projects: material handling systems integration, rapid project execution, operational enhancement, and integrated systems. Counsel discusses submitted articles.

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.

Counsel noted that CIS approved another petition that had been previously filed by the petitioner on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988)

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved a nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The *Handbook* describes an electrical engineer as follows:

Electrical engineers design, develop, test, and supervise the manufacture of electrical equipment. Some of this equipment includes electric motors; machinery controls, lighting, and wiring in buildings; automobiles; aircraft; radar and navigation systems; and power-generating, -controlling, and transmission devices used by electric utilities. Although the terms “electrical” and “electronics” engineering often are used interchangeably in academia and industry, electrical engineers have traditionally focused on the generation and supply of power, whereas electronics engineers have worked on applications of electricity to control systems or signal processing. Electrical engineers specialize in areas such as power systems engineering or electrical equipment manufacturing.

An electrical engineer is a specialty occupation, normally requiring at least a bachelor’s degree in electrical engineering. Although the petitioner has identified its position as that of an electrical engineer, its description of the beneficiary’s duties lacks the specificity and detail necessary to substantiate the petitioner’s contention. The petitioner failed to convey a detailed description of the beneficiary’s duties as they relate to the petitioner’s business operations. The duties are described in general terms; they are not depicted in a context that would convey the particulars of the engineering activities associated with a nursing facility. For example, as described by the petitioner, the beneficiary will be responsible for “electrical projects”; handle “testing of equipment”; “supervise the installation of equipment”; “research, develop and design electrical components and systems”; direct personnel in the “fabrication of test control apparatus and equipment”; and be responsible for “power distribution coordination, management of switchgear and relay operations.” The AAO observes that the petitioner does not describe in any detail the “equipment” or “electrical projects” that the beneficiary will be responsible for; does not amplify on the “electrical components and systems” that the beneficiary will research, develop, and design; and does not explain the “power distribution coordination, management of switchgear and relay operations” that the beneficiary will be involved with. On appeal counsel briefly describes four projects, material handling systems integration, rapid project execution, operational enhancement, and integrated systems, proposed by the beneficiary. Given the brevity of the project descriptions, the AAO cannot determine what each project will entail and what the beneficiary’s role on the projects would involve. For example, the rapid project execution is described as creating faster implementation “through the design and implementation of complex integrated systems that may be executed in less time.” The “complex integrated systems” is not described in any manner. CIS must examine the actual employment of a beneficiary, which are the specific tasks to be performed by the beneficiary, to determine whether a position qualifies as a specialty occupation. In light of the generic job description offered here, the AAO cannot identify the beneficiary’s specific tasks, and thereby, whether the position is that of an electrical engineer. A petitioner cannot establish that a position is a specialty occupation by describing the duties of that employment in general terms that do not relate the position to the petitioner’s specific business operations. Furthermore, without a reliable description of the position’s duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation.

Counsel contends that the petitioner is part of a conglomerate of 17 healthcare facilities, all of which are expanding, and refers to exhibit F, a list of healthcare facilities “under the petitioner’s wing.” The submitted evidence does not support counsel’s contention as the Form I-129 petition and the tax records do not reflect

that the healthcare facilities are “under the petitioner’s wing.” The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO concludes that, based on the submitted evidence, the proposed position differs from that of an electrical engineer. Thus, the petitioner fails to establish 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 submitted job postings and letters from two healthcare facilities fail to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is that a specific degree requirement is common to the industry in parallel positions among similar organizations. Aerotek Contract Engineering is a staffing agency, thus it differs in nature from the petitioner, a nursing facility. Comforce is not described in the posting; therefore, the AAO cannot determine whether it is similar in nature to the petitioner. The Doheny Eye Institute position involves designing, developing, and implementing medical devices for ophthalmic/optical microsurgery products; thus, the duties differ from those of the proposed position. Unlike the proposed position, the posting for a senior electrical engineer requires licensure.

The letters from [REDACTED] (doing business as [REDACTED] and [REDACTED]) attest that for positions in finance/accounting, management, engineering, human resources, marketing and information systems the minimum hiring requirement is a bachelor’s degree in the related field. The letters are not persuasive in establishing an industry standard, as they do not describe the duties of an engineer position. Thus, the AAO cannot determine whether the engineer positions in the letters are similar to the proposed position. Moreover, two letters is insufficient to establish an industry-wide standard of employing an electrical engineering with a bachelor’s degree.

On appeal, counsel states that exhibit G shows that healthcare companies seek the services of consulting firms for electrical engineering projects. The articles that comprise exhibit G discuss engineering consulting firms that specialize in the construction of healthcare facilities. These articles do not relate to the proposed position since the beneficiary is not required to possess a professional engineer license.²

For these reasons, the AAO finds that the job postings, letters, and exhibit G fail to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

² While the position does not require licensure, the *Handbook* indicates that electrical engineering positions require licensure unless the work is to be performed under the supervision of a licensed engineer. The record does not reflect that the beneficiary will be working under the supervision of a licensed engineer. The petitioner requires neither licensure nor working under the supervision of a licensed engineer for the position, which undermines its assertion that the proffered position is an electrical engineer.

The petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence portrays the proffered position as so complex or unique that it can be performed only by an individual with a baccalaureate degree in electrical engineering or a related field. As discussed already, in light of the generic job description, the AAO cannot identify the beneficiary's specific tasks, and thereby, whether the position is that of an electrical engineer. The proposed position does not require an electrical engineer's license, and the beneficiary is not exempt from licensure as he will not work under the direct supervision of a licensed electrical engineer. As such, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must show that it normally requires a degree or its equivalent for the position. Counsel asserts that the petitioner previously employed the beneficiary in H-1B status as an electrical engineer. Counsel's assertion is not persuasive, however. 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 or 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.³ As discussed under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the proposed position differs from that of an electrical engineer, which is an occupation that qualifies as a specialty occupation.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner 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. As discussed earlier under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the proposed position differs from that of an electrical engineer, which is an occupation that qualifies as a specialty occupation. Consequently, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Beyond the decision of the director, the AAO finds that the beneficiary is not authorized to perform the services of an electrical engineer. According to the *Handbook*, an electrical engineer is required to possess proper licensure. The *Handbook* states:

All 50 States and the District of Columbia require licensure for engineers who offer their services directly to the public.

The California Professional Engineers Act, Business and Professions Code section 6700-6799, Chapter 7, Professional Engineers, Article 3, Application of Chapter, Section 6740, indicates that licensure is not required for:

³ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

A subordinate to a civil, electrical or mechanical engineer registered under this chapter, or a subordinate to a civil, electrical or mechanical engineer exempted from registration under this chapter, insofar as he acts solely in such capacity, is exempt from registration under the provisions of this chapter. This exemption, however, does not permit any such subordinate to practice civil, electrical or mechanical engineering in his own right or to use the title, "civil engineer" or "structural engineer" or "electrical engineer" or "mechanical engineer" or "soil engineer."

Section 6705 of the California Professional Engineers Act defines a subordinate as "any person who assists a registered professional engineer in the practice of professional engineering without assuming responsible charge of work."

The record indicates that the petitioner does not require licensure for the proposed position, and the submitted organizational chart does not depict the beneficiary as working under the supervision of a licensed electrical engineer. For this additional reason, the AAO finds that the proposed duties would not qualify as those of a professional electrical engineer.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the services of an electrical engineer. 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.