

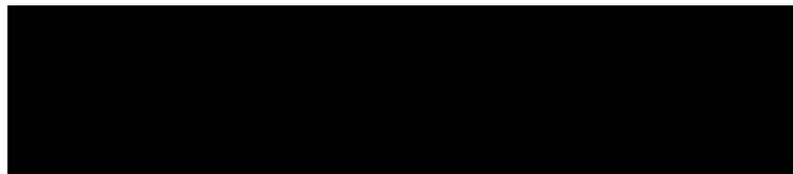
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U.S. Citizenship
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Services

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FILE: WAC 05 001 52344 Office: CALIFORNIA SERVICE CENTER Date: **MAY 26 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 wholesaler and retailer of electrical lighting products. It seeks to hire the beneficiary as a technical sales engineer. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was 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 for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

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 a technical sales engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the letter of support from the petitioner; and the petitioner’s response to the director’s request for evidence. According to this evidence, the beneficiary would perform duties that entail calling on management representatives at commercial, industrial, and other establishments to convince prospective clients to buy products or services (15% of time); assisting sales force in sales of company products (10% of time); demonstrating and explaining products or services to customer representatives, such as engineers, architects or other professionals (15% of time); drawing up sales or service contract for products or services (10% of time); providing technical services to clients relating to use, operation and maintenance of products (15% of time); designing and drafting variations of standard products in order to meet customer needs (10% of time); reviewing customers’ documents and preparing cost estimates or projected production increases from use of proposed equipment or services (10% of time); drawing up or proposing changes in equipment, processes, materials, or services resulting in cost reduction or improvement in customer operations (10% of time); and assisting in development of custom made machinery (5% of time). The petitioner stated that the duties of the proffered position require a degree in mechanical engineering.

The director noted that an analysis of the proposed duties reveals that the position described by the petitioner reflect the duties of a wholesale sales representative as described in the Department of Labor’s *Occupational Outlook Handbook (Handbook)*. The director noted that the *Handbook* states that although a baccalaureate level of training is sometimes preferred, the position of sales representatives, wholesale and manufacturing is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal minimum entry into the occupation. The director noted that although the petitioner submitted numerous job listings, none of the listings is sufficient evidence of a degree requirement being common to the industry in parallel positions in similar organizations. The director found that the petitioner has not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the director misclassified the proffered position, and that it should be classified as a sales engineer requiring an engineering baccalaureate degree. Counsel asserts that the duties of the proffered position are complex and intricate. Furthermore, counsel complains that the director did not request additional information about the duties of the position in the request for additional evidence. Counsel

contends that the petitioner has acted in good faith and was denied an opportunity to present further evidence that would have corrected the defects noted by the director.

The director is not required to issue a request for further information in every potentially deniable case. In this case, the director did issue a request for further information, even though it did not specifically ask for additional details regarding the proffered position. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

Counsel asserts that the proffered position is a specialty occupation because the position satisfies the criterion 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Counsel also refers to the Department of Labor's *Dictionary of Occupational Titles (DOT)* and the *O*NET*. Counsel's reliance on the *DOT* is misplaced. The *DOT* and *O*NET* rely on the specific vocational preparation (SVP) in describing the background required for a position. The SVP is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the AAO does not rely on the *DOT* or *O*NET* information.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, and, accordingly, considered the evidence of record in the light of the 2006-2007 edition of the *Handbook*.

The *Handbook* states the following about the position of a sales engineer:

Many products and services, especially those purchased by large companies and institutions, are highly complex. Sales engineers—who also may be called *manufacturers' agents*, *sales representatives*, or *technical sales support workers*—work with the production, engineering, or research and development departments of their companies, or with independent sales firms, to determine how products and services could be designed or modified to suit customers' needs. They also may advise customers on how best to use the products or services provided.

Selling, of course, is an important part of the job. Sales engineers use their technical skills to demonstrate to potential customers how and why the products or services they are selling would suit the customer better than competitors' products. Often, there may not be a directly competitive product. In these cases, the job of the sales engineer is to demonstrate to the customer the usefulness of the product or service—for example, how much money new production machinery would save.

Most sales engineers have a bachelor's degree in engineering, and many have previous work experience in an engineering specialty. Engineers apply the theories and principles of science and mathematics to technical problems. Their work is the link between scientific discoveries and commercial applications. Many sales engineers specialize in an area related to an engineering specialty. For example, sales engineers selling chemical products may have chemical engineering backgrounds, while those selling business software or information systems may have degrees in computer engineering. Information on engineers, including 17 engineering specialties, appears elsewhere in the *Handbook*.

Based on the record of proceeding, the AAO agrees with the director and determines that the proffered position is not that of a sales engineer as described by the petitioner. The petitioner has not submitted evidence to establish the technical nature of the sales position. Although the petitioner uses much of the same language as used in the *Handbook* under the section on sales engineers in order to describe the duties of the proffered position, the petitioner has not sufficiently related the duties to its business operations. The petitioner operates as a wholesaler and retailer of electric lights. The petitioner submitted several different manufacturers' catalogues for a variety of lighting and electrical products such as a recessed lighting catalog, a catalogue from the Milwaukee electric tool corporation, a commercial fixtures buying guide, and a lighting controls product selection guide. The petitioner has not provided evidence to establish the technical nature of the products it sells. The petitioner has not described how the beneficiary would use his technical skills to demonstrate to potential customers how and why the products the petitioner sells would suit their needs. The petitioner has not sufficiently described how the beneficiary would be applying theories and principles of science and mathematics to technical problems. The petitioner has not sufficiently described how the beneficiary is the link between scientific discoveries and commercial applications of electric lights.

Based on the record of proceeding, including the job description, the description about the petitioner and supporting documents from the petitioner, the AAO agrees with the director, that the proffered position is most similar to that of a sales representative as described in the *Handbook* which states:

Sales representatives are an important part of manufacturers' and wholesalers' success. Regardless of the type of product they sell, their primary duties are to interest wholesale and retail buyers and purchasing agents in their merchandise and to address clients' questions and concerns. Sales representatives represent one or several manufacturers or wholesale distributors by selling one product or a complementary line of products. Sales representatives demonstrate their products and advise clients on how using these products can reduce costs and increase sales. They market their company's products to manufacturers, wholesale and retail establishments, construction contractors, government agencies, and other institutions.

Sales representatives spend much of their time traveling to and visiting with prospective buyers and current clients. During a sales call, they discuss the client's needs and suggest how their merchandise or services can meet those needs. They may show samples or catalogs that describe items their company stocks and inform customers about prices, availability, and ways in which their products can save money and boost productivity. Because a vast number of manufacturers and wholesalers sell similar products, sales representatives must emphasize any unique qualities of their products and services. Manufacturers' agents or manufacturers' representatives might sell several complementary products made by different manufacturers and, thus, take a broad approach to their customers' business. Sales representatives may help

install new equipment and train employees in its use. They also take orders and resolve any problems with or complaints about the merchandise.

Obtaining new accounts is an important part of the job. Sales representatives follow leads from other clients, track advertisements in trade journals, participate in trade shows and conferences, and may visit potential clients unannounced. In addition, they may spend time meeting with and entertaining prospective clients during evenings and weekends.

In a process that can take several months, sales representatives present their product to a customer and negotiate the sale. Aided by a laptop computer connected to the Internet, or other telecommunications device, they can make a persuasive audiovisual sales pitch and often can answer technical and nontechnical questions immediately. . . .

The sales representative makes the preliminary contact with customers, introduces the company's product, and closes the sale. . . . After the sale, representatives may make follow-up visits to ensure that the equipment is functioning properly and may even help train customers' employees to operate and maintain new equipment. . . .

Sales representatives have several duties beyond selling products. They analyze sales statistics; prepare reports; and handle administrative duties, such as filing expense account reports, scheduling appointments, and making travel plans. They read about new and existing products and monitor the sales, prices, and products of their competitors.

The above described duties are very similar to those of the proffered position such as "providing technical services to clients relating to use, operation and maintenance of products"; "calling on management representatives at commercial, industrial, and other establishments to convince prospective clients to buy products or services"; and "assisting sales force in sales of company products."

The *Handbook* describes the training and other qualifications needed for sales representative, wholesale and manufacturing, in part, as follows:

The background needed for sales jobs varies by product line and market. Many employers hire individuals with previous sales experience who lack a college degree, but they increasingly prefer or require a bachelor's degree because job requirements have become more technical and analytical. Nevertheless, for some consumer products, factors such as sales ability, personality, and familiarity with brands are more important than educational background. On the other hand, firms selling complex, technical products may require a technical degree in addition to some sales experience. . . .

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on submitted internet job postings from various companies: Sencore Electronic test instruments, Phenomenex, an unknown Oil & Gas Company, KNF Neuberger, Inc. and Winpower, Inc. This evidence fails to establish that a specific baccalaureate degree is

common to the industry in parallel positions among similar organizations. The advertised positions are not parallel to the proffered position. For example, Winpower, Inc. is a manufacturer of power generators and specifies a four-year degree with 3 years of sales experience, preferably in the power equipment field, and notes that a mechanical/electrical and/or farming background is a plus; Sencore Electronic Test Instruments is a manufacturer of electronic test equipment and requires an ET, BSEE, or BSEET in electronics; Phenomenex is a biotechnology chemical manufacturer with subsidiaries in several countries and requires a bachelor's degree in chemistry, biochemistry, chemical engineering, biology or other sciences with at least one year in organic chemistry. The petitioner has not established that the companies listed in the internet job position are similar organizations or that the advertised positions are similar to the proffered position. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

As evident in the discussion of the first criterion, the petitioner has not established that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Counsel asserts the proffered position "assigns many complex-engineering specific and technical tasks consistent with the petitioner's nature of business specifically requiring the worker to possess an engineering degree." The record contains no description of engineering specific tasks. Counsel has provided no independent evidence to support his assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). Thus, the petitioner fails to establish the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position. The petitioner indicated that this is a new position and therefore has not provided evidence to satisfy this criterion.

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 the duties is usually associated with the attainment of a baccalaureate or higher degree. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Counsel asserts that the complexity and intricacy of the duties require an in-depth comprehension and analysis of engineering theories, principles, and practices. Counsel has not indicated which engineering theories, principles or practices would be used in performing duties such as "calls on management representatives at commercial, industrial, and other establishments to convince prospective clients to buy products or services" or "provides technical services to clients relating to use, operation, and maintenance of products." The petitioner is a wholesaler and retailer of lighting products with 9 employees. The petitioner has not established or provided evidence to establish that the duties of the proffered position are more specialized and complex than those described in the *Handbook* for a sales representative, wholesale and manufacturing. The duties parallel those in the *Handbook* for a sales representative, wholesale and manufacturing, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

Therefore, for the reasons related in the preceding discussion, 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.

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.**