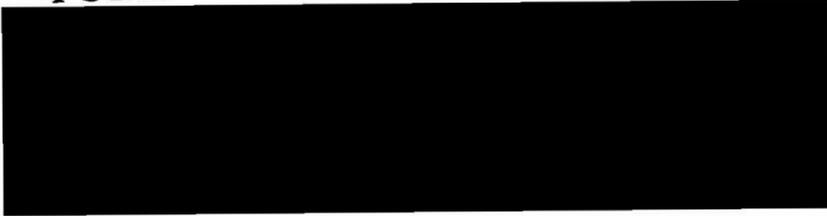


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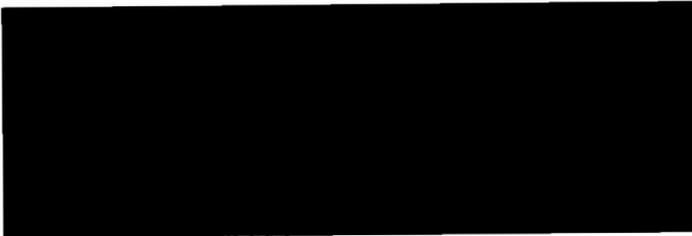
FILE: EAC 04 244 53050 Office: VERMONT SERVICE CENTER Date: SEP 08 2006

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, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a shipping line between the United States and ports in Latvia, Russia, Estonia, and Lithuania. It seeks to employ the beneficiary as a technical translator. Accordingly, the petitioner 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 determining that the record did not establish that the proffered position qualified as a specialty occupation. On appeal, counsel asserts that the duties of the proffered position require the theoretical and practical application of a body of highly specialized knowledge and thus qualifies as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's September 3, 2004 request for additional evidence (RFE); (3) the petitioner's undated response to the director's RFE; (4) the director's December 1, 2004 denial decision and March 22, 2005 motion denial; and (5) the Form I-290B and counsel's statement and documentation in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue in this matter is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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:

[A]n 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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner is seeking the beneficiary's services as a technical translator. In an attachment to a July 13, 2004 letter appended to the petition, the petitioner stated the duties of the proffered position as:

Translate documents from Latvian to English and English to Latvian[.]

Translate reports, manuals, briefs, proposals, instruction books, legal regulations[,] and related technical and administrative publications[.]

Read journals, reports[,] and other material to become familiar with [the] company's technology and terminology[.]

Organize material and complete translating assignment[s] according to set standards, including clarity, conciseness, style[,] and terminology. Review completed draft[s] and revise according to accepted standards of translation.

Provide translation, formatting[,] and electronic delivery of technical and scientific materials.

On September 3, 2004, the director requested a statement: specifying the number of employees currently working or who have worked for the petitioner in the position of technical translator, within the last three years (with similar duties as those proposed for the beneficiary), specifying the educational attainment of each of the petitioner's technical translators, or if the position is new, an explanation of how the petitioner previously accomplished the duties of the proposed position. The director also requested evidence to establish that a minimum of a bachelor's degree in a specialty field is the minimum requirement for the

position of technical translator within the firm or the cargo shipping industry, including a copy of job profiles and job announcements for the position or a position with similar duties, from businesses of similar size to the petitioner that offer similar goods and services.

In an undated response, attached to counsel's November 24, 2004 cover letter, the petitioner indicated that the proffered position was a new position and that the president of the company had previously performed the duties of the proffered position. The petitioner asserted that the work to be performed requires the services of someone with the proper experience and training, with very specific qualifications, and that a bachelor's degree is a standard minimum requirement for a technical translator. The petitioner also provided its job announcement for the position of "managing director" that included the description of the duties for the position of translator that had been previously submitted, as an indication that college or university education is required, and that the required degree/formal training is in foreign language/translation. The petitioner further provided a copy of an excerpt from the *Dictionary of Occupational Titles (DOT)* showing the Specific Vocational Preparation (SVP) level of 7 for a translator.

On December 1, 2004, the director determined that although the evidence submitted explained the petitioner's necessity for the position, the evidence submitted did not establish that a minimum of a bachelor's degree in a specific field of study is required to perform the duties of the position. The director observed that the petitioner had not provided evidence showing that the cargo industry required a minimum of a bachelor's degree in a specific field of study to perform the duties of the proffered position and that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry standard for translators varies in terms of minimum qualifications, work experience, specialized training, and certification, or education up to a master's degree. The director concluded that the petitioner had not established that the proffered position could only be performed by an individual with a minimum of a bachelor's degree in a specific field of study, a decision that was affirmed on March 22, 2005.

On appeal, counsel for the petitioner asserts that the duties of the proffered position require a high level of preparation and education in order to properly perform them. Counsel references the *Handbook* and notes that "a bachelor's degree is almost always required for a translator." Counsel contends that the occupation should be assessed on whether its particular requirements qualify as a specialty occupation and should not be assessed based on its industry. Counsel claims that CIS has approved petitions for translator positions for language services in the past and that the description of the duties of petitioner's proffered position is similar to the duties of the language services' job descriptions previously approved. Counsel also provides the petitioner's statement and related documents that it had employed a translator in the late 1990s and that the successful candidate had a master's degree in linguistics from a Canadian University.

When determining whether a particular job qualifies as a specialty occupation, CIS does not only 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 AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* indicates:

Translators convert written materials from one language into another. They must have excellent writing and analytical ability. And because the documents that they translate must be as flawless as possible, they also need good editing skills.

Interpreters convert one spoken language into another . . . This requires interpreters to pay attention carefully, understand what is communicated in both languages, and express thoughts and ideas clearly. Strong research and analytical skills, mental dexterity, and an exceptional memory also are important.

The *Handbook* reports: [t]he educational backgrounds of interpreters and translators vary; in high school, students prepare for these careers by taking a broad range of courses that include English writing and comprehension, foreign languages, and basic computer proficiency; beyond high school, there are many educational options and "[a]lthough a bachelor's degree is often required, interpreters and translators note that it is acceptable to major in something other than a language. However, specialized training in how to do the work is generally required." The AAO observes that, if a bachelor's degree or its equivalent in a variety of disciplines is the minimum entry requirement, then the job is not a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Section 214(i)(1) of the Act, 8 U.S.C. §1184(i)(1). Moreover, although specialized training may be required, the *Handbook* indicates: "[a] number of formal programs in interpreting and translation are available at colleges nationwide and through non-university training programs, conferences, and courses." Based on the *Handbook* statements, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into a position of an interpreter or translator. The petitioner has, accordingly, failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO acknowledges counsel's reference to the *Dictionary of Occupational Titles (DOT)* and the Specific Vocational Preparation (SVP) level of 7 for the position of a translator. However, the AAO does not consider the *DOT* to be 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. The *DOT* 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. 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. Therefore, the *DOT* does not establish a translator as a specialty occupation.

The AAO now turns to a consideration of the proffered position pursuant to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining

the industry standard include: 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 petitioner has not attempted to establish the proffered position as a specialty occupation under the first prong of the criterion. It has submitted no job postings from similar organizations to establish a degree requirement as the norm within the shipping industry. Neither has it provided evidence in the form of letters or affidavits from other firms or individuals in the industry. Counsel asserts instead that the occupation should be assessed on whether its particular requirements qualify as a specialty occupation. The record, accordingly, fails to establish the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. Although the petitioner asserts that the work to be performed requires the services of someone with proper experience, training and with very specific qualifications because the work involves translation, formatting and electronic delivery of legal, technical, and scientific materials, the petitioner does not support its conclusory statement. The petitioner has not submitted documentation to establish that the proffered position would involve duties that distinguish the proffered position from similar, but non-degreed employment based on its unique nature or complexity. It has failed to provide more than a generalized description of the type of documentation that would be translated by the beneficiary. Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting 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 190 (Reg. Comm. 1972)). The petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate 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 degree or its equivalent for the position. For the first time on appeal, the petitioner states that more than three years prior to filing the petition, it had hired a translator to perform the duties of the proffered position; however, the petitioner previously stated that the proffered position was new for its company, that its president had performed the work associated with the position, and submitted a copy of a job description for the position of managing director which listed translation duties. As such, it is not possible to conclude that the petitioner has previously employed a degreed translator in the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, the materials related to the petitioner's prior employment of a translator do not reflect the same duties as those described for the proffered position.

Moreover, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to

reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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. In the instant matter, the duties described by the petitioner do not require the beneficiary to possess skills or knowledge beyond that typically held by translators, employment the *Handbook* reveals does not require a specific baccalaureate degree for entry into the occupation. Instead, the petitioner has provided a routine description of the duties associated with the proffered position and an assertion that the duties are specialized. The petitioner, however, has not explained or offered documentary evidence to support its claims. *Matter of Soffici*, 22 I&N Dec. at 165. Accordingly, the petitioner has not proved that the position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.