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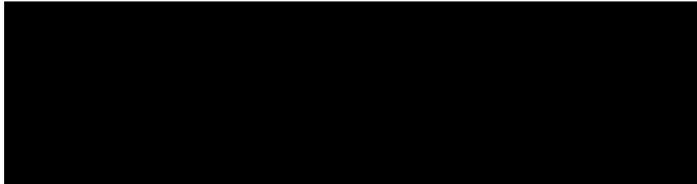
FILE: WAC 05 220 52216 Office: CALIFORNIA SERVICE CENTER Date: JUN 20 2007

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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 property management company that seeks to continue to employ the beneficiary as an electrical engineer consultant. It endeavors to continue the H-1B classification of 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 does not qualify as a specialty occupation. On appeal, counsel submits a brief asserting that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding 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 record of proceeding before the AAO contains: (1) the 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) the Form I-290B with 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 consultant. Evidence of the beneficiary’s duties was included with the Form I-129 petition and in response to the director’s request for evidence. According to this evidence the beneficiary would:

- Inspect properties/buildings for prospective purchase – inspect wiring systems, HVAC cables, transformers, wiring schematics; make recommendations to management on acquiring or repairing systems and costs, building designs, electrical components, systems and equipment, etc.;
- Design, develop, test, and install electrical equipment, components and systems for buildings/properties - including compressors, transformers, heating and air conditioning or ventilation systems, air and water filtration systems, wiring;
- Oversee repair of electronic systems - including detection of wear, misalignment, and maintenance of systems, direct installation, operation, and maintenance of electrical systems – including compliance with specifications, codes and safety requirements; and
- Estimate labor, material and construction costs, and prepare specifications for materials.

The petitioner requires a minimum of a bachelor’s degree in engineering for entry into the proffered position.

The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The petitioner contends that the proffered position is essentially that of an electrical engineer. To the extent that they are developed in the record, however, the duties of the position do not support that contention.

Electrical and electronics engineers design, develop, test, and supervise the manufacture of electrical and electronic equipment. The record of proceedings contains no evidence that substantiates the assertions of counsel and the petitioner to the effect that the beneficiary’s work has included and will continue to include

design and development of electrical equipment, components, and systems. The record is also devoid of examples of actual design and development work for the petitioner that would require the beneficiary to apply a baccalaureate level of engineering knowledge. Going on 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 Dec. 190 (Reg. Comm. 1972)). 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 Obaighena*, 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).

The position offered to the beneficiary involves the inspection and maintenance of properties/buildings. In that capacity, the beneficiary will inspect wiring systems, transformers, heating and air conditioning systems and make recommendations to management, who will use that information to make decisions regarding the purchase of property or repair and maintenance of systems/equipment. The beneficiary will install electrical equipment and oversee the repair of equipment/electronic systems while estimating associated costs.

The duties of the proffered position are more closely related to those noted for electricians. The *Handbook* notes that electricians perform a variety of functions depending upon their employment environment. They work with wiring installation in construction and also upgrade existing electrical systems. Electricians specializing in maintenance work primarily maintain and upgrade existing electrical systems and repair electrical equipment. Maintenance electricians working in factories, hospitals, and other settings repair electric and electronic equipment and install new electrical equipment. They periodically inspect equipment to ensure it is operating properly, and locate and correct problems before breakdowns occur. They may also advise management whether continued operation of equipment may be hazardous. The duties of the proffered position fall within those listed above in the beneficiary's work environment. The *Handbook* notes that most electricians learn their trade through apprenticeship programs and on-the-job training. A baccalaureate level education is not normally the minimum requirement for entry into the position. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner states that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, and in support of that assertion submits job advertisements for electrical engineers. These advertisements are, however, of little evidentiary value as it has been determined that the offered position is not that of an electrical engineer. Further, the job advertisements submitted are not organizations similar in nature and scope to that of the petitioner. The petitioner has failed to establish the first of the two alternative prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner states that it normally requires a degree in a specific specialty for entry into the proffered position, but it offers no evidence in this regard except to note that this is an extension petition and that the beneficiary has previously been approved for the position.

Employment of one person does not establish a history of requiring at least a bachelor's degree in a specific specialty. Further, regardless of the petitioner's hiring desires, the evidence of record does not establish that employment of a person with an engineering degree is necessitated by the type of work that the beneficiary would perform and that would characterize the true nature of the job.

The fact that this position and beneficiary have been previously approved for H-1B status will not establish the position as a specialty occupation under this or any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). 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 unsupported assertions that are contained in the current record, that approval would constitute material 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 prior approvals 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 the nonimmigrant petitions 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).

It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of at least a baccalaureate degree's level of a body of highly specialized knowledge in a specific specialty. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. In the present matter, the petitioner has offered the beneficiary a position as an electrical engineering consultant. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error and a violation of 8 C.F.R. § 214.2 paragraph (h). The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Counsel further contends that an April 23, 2004 memorandum from INS (now CIS) headquarters Office of Examinations requires approval of an extension petition if validity involves the same parties and underlying facts. The present petition is an extension petition (continuation of previously approved employment). The memorandum does not provide authority for counsel's assertion, however, in that the memorandum was provided solely for guiding CIS personnel in the performance of their professional duties. The memorandum was not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or party. Further, the memorandum provides that a prior approval need not be given deference where a material error was made with regard to the previous petition approval, such as the misapplication of statutory or regulatory requirements to the facts at hand. The prior approval of this petition involved the misapplication of statutory or regulatory requirements in that the present petition does not qualify by law, as previously and hereinafter set forth, as a specialty occupation.

The petitioner has not established that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor has it established that the duties of the offered position are so complex or

unique that they can only be performed by an individual with a degree in a specific specialty. To the extent that they are developed in the record, the duties of the proffered position are routine in the industry for electricians, and are normally performed by individuals with less than a baccalaureate level education. There is nothing in the record to establish that the duties detailed by the petitioner are so specialized and complex that their performance requires the theoretical and practical application of at least a baccalaureate degree's level of a body of highly specialized knowledge in a specific specialty. The record does not establish that the inspection of wiring systems and equipment, testing, installation and maintenance of electrical equipment and other components, and estimation of costs of repair require or are usually associated with an educational level above that normally held by an electrician. The petitioner has failed to satisfy the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

As related in the discussion above, 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.