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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 201 54673 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

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.

Mari Johnson

For Robert P. Wiemann, Director
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 corporation engaged in the business of growing and distributing fruit. In order to employ the beneficiary as a maintenance engineer, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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 on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

In reaching its decision, the AAO reviewed and considered the entire record of proceeding, including: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents attached to the brief as exhibits.

On appeal, counsel asserts that the director erred in denying the petition, because the evidence of record does not support either basis of the director's decision. Upon review of the entire record and all of counsel's assertions on appeal, the AAO has determined that the director was correct, for the evidence fails to establish both that the proffered position is a specialty occupation and that the beneficiary is qualified to serve in a specialty occupation.

The petitioner has satisfied none of the criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

According to counsel and the petitioner, performance of the proposed duties requires a bachelor's degree in mechanical engineering or a related field. The evidence does not support this assertion.

In his letter of reply, the petitioner's vice president outlined three major duty areas. The beneficiary would spend about 50 percent of his time in oversight and maintenance of the petitioner's cold storage plant, which involves responsibility for "daily maintenance, pressure temperature calculations, compressors, electric motors and fans, electrical systems, pneumatic controls and hydraulic controls," as well as reprogramming computers as needed to maintain the proper temperature range. According to the vice-president, the remaining 50 percent of the beneficiary's time would be evenly divided between management of the packaging plant and "managing the fabrication function," which is described elsewhere in the record as designing and developing mechanical and agro-mechanical devices as needed.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) is satisfied where the evidence establishes that a baccalaureate or higher degree, or the equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

The AAO recognizes the Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. However, the evidence of record does not establish that the proffered position comports with that of a mechanical engineer or any other occupational category that the *Handbook* recognizes as requiring at least a bachelor's degree in a specific specialty.

Even as expanded on appeal by the letter from the petitioner's CEO, the information about day-to-day operation of the cold storage plant is fairly encompassed by the refrigeration mechanic occupation as described in the *Handbook*:

> *Refrigeration mechanics* install, service, and repair industrial and commercial refrigerating systems and a variety of refrigeration equipment. They follow blueprints, design specifications, and manufacturers' instructions to install motors, compressors, condensing units, evaporators, piping, and other components. They connect this equipment to the ductwork, refrigerant lines,

> and electrical power source. After making the connections, they charge the system with refrigerant, check it for proper operation, and program control systems.

The *Handbook* numbers refrigeration mechanics among technicians who "must be able to maintain, diagnose, and correct problems throughout the entire system," and who "adjust system controls to recommended settings and test the performance of the entire system using special tools and test equipment." According to the *Handbook*, refrigeration mechanic positions do not require a bachelor's degree in any subject.

The AAO discounted the letter of Mr. Russel M. Adams, a civil engineer who works as a consulting sanitary engineer, which opined that the beneficiary's involvement with the petitioner's anhydrous ammonia refrigerant system would require "a Bachelors Degree in Mechanical Engineering with a strong specialty in chemical piping systems and controls." Mr. Adams's finding conflicts with the *Handbook's* information to the effect that a refrigeration mechanic who has no degree in mechanical engineering or any other specific specialty is capable of performing maintenance, programming, and re-piping and other repairs of refrigerant systems. Mr. Adams's emphasis upon the anhydrous ammonia coolant is not persuasive, as the *Handbook's* section on working conditions of refrigeration mechanics explicitly notes the hazardous nature of the coolants involved in refrigeration systems. Also, there is no indication in the record that the petitioner has ever in the past employed a mechanical engineer for the daily operation of the cold storage plant. [1] Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The information about the fabrication component of the proffered position lacks specific details about the particular machinery and equipment which the petitioner asserts the beneficiary would build, fabricate and/or design for use in the packaging houses, cold storage plant, and orchards. There is no concrete information about (1) whatever specific equipment or machinery the beneficiary would design and fabricate, and (2) whatever parts of machinery or equipment the beneficiary would modify according to his original design. Accordingly, there is insufficient information to establish that the fabrication function requires the application of the highly specialized knowledge of a mechanical engineer. To the limited extent to which the fabrication duties are described, they appear to within the scope of the *Handbook's* occupational categories of industrial machinery installation, repair, and maintenance workers and machinists, categories for which the *Handbook* does not report a requirement for any bachelor's degree.

According to the petitioner, the "smooth overall operation of the packing house" will include repairing and maintaining mechanical, electric, pneumatic, and hydraulic systems; installing, adjusting and monitoring electronic, pneumatic, and hydraulic controls; troubleshooting computer and electronic control problems; and coordination with equipment manufacturers, engineering contractors, and contract electricians. These duties do not appear to require the application of the highly specialized level of knowledge that is attained by a baccalaureate degree in mechanical engineering or any other specific specialty. Rather, the duties are within the

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[1] According to his letter, Mr. Adams, the engineer, has only "been retained from time to time by [the petitioner] to prepare safety studies, reports, and programs required by hazardous materials regulatory agencies regarding the ammonia refrigeration systems at [the petitioner's] packing plant."

capabilities of properly trained installation, repair, and maintenance workers who do not have a bachelor's degree in any specific specialty.

The record, then, lacks sufficient evidence to establish that proffered position is that of a mechanical engineer or any other occupation for which a baccalaureate or higher degree, or the equivalent, in a specific specialty, is the normal minimum requirement for entry. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Next, the petitioner has not presented evidence that would qualify the proffered position under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(*2*).

The first prong is not satisfied, because the evidence does not establish that there is a specific-specialty degree requirement that is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS 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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As discussed earlier, the evidence does not establish the proffered position as one for which the *Handbook* reports a degree requirement in a specific specialty. Also, there are no submissions from individuals, other firms, or professional associations in the petitioner's industry.

The job vacancy advertisements in the record have no probative value. The advertising organizations are not similar to the petitioner, and the duties described for most of the advertised positions are not substantially similar to the duties of the proffered position. Also, the US-CA-Woodland-Maintenance Manager vacancy – arguably, the closest to the proffered position because of its involvement with chillers, cooling towers, and regulatory compliance - only states a preference for an engineering degree, while requiring only a "4 year college degree or equivalent." In any event, the advertisements are too few to establish an industry-wide hiring practice.

Next, while the evidence of record indicates that the proffered position involves multiple responsibilities of a technical nature, it does not demonstrate that the position and its associated duties are especially complex, specialized, or unique. Therefore, the record does not establish either that the proffered position could only be performed by a person with at least a bachelor's degree in a specific specialty, or that the position requires the application of highly specialized knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. Accordingly, the proffered position does not qualify as a specialty organization under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) or under the criterion at 8 C.F.R. §214.2(h)(4)(iii)(A)(*4*).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position – is not a factor. Because the proffered position is being offered for the first time, the petitioner

cannot demonstrate a hiring history for this particular position. Also, no weight was accorded the generalized and undocumented statements from counselor and the petitioner that the proposed duties "are presently performed by 4 existing employees" each of whom "*has a bachelor's degree or the equivalent in experience.*" (Italics in counsel's brief, at page 7.) Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In summary, the director was correct to deny the petition on the basis that the petitioner failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

The director was also correct in his decision to deny the petition for failure of the evidence to establish that the beneficiary is qualified to serve in a specific specialty in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> (*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
>
> (*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
>
> (*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner must demonstrate that the beneficiary meets the criterion at section *4*, because there is no evidence relevant to the other three sections.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*) shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

As there is no evidence of record regarding sections *2* or *4,* only sections 1, 3, and 5 will be addressed.

The AAO has discounted the Morningside Evaluations and Consulting (MEC) evaluation by Dr. Iztkowitz as evidence under both sections *1* and *3*.

The MEC evaluation letter is not appropriate for consideration under section *1* because the evidence of record does not establish that Dr. Itzkowitz is "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience."

CIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution on the basis of training or work experience. There is no such evidence in the record.

The letter from Professor Goldberg, Chairman of the Mathematics Department at Queens College of the City University of New York, endorsed Professor Dr. Itzkowitz as a faculty member "authorized to *evaluate*

transfer credits in Mathematics and Applied Mathematics, and related fields, such as Economics, Computer Science, Management Information Systems, Engineering, and other Sciences." (Italics added) By its own terms, this letter is insufficient to establish that Dr. Itzkowitz has authority to *grant* college-level credits on behalf of Queens College. In addition, Professor Goldberg's letter is not accompanied by any evidence that he is authorized to represent Queens College's position with regard to the granting of college-level credits. Furthermore, a November 7, 2001 letter to the Texas Service Center from the Assistant Vice President and Special Counsel to the President of Queens College states, in pertinent part, "Dr. Itzkowitz does not have the authority to grant college-level credit at Queens College of the City University of New York."

As Dr. Itzkowitz presented his letter as an evaluation by a foreign educational credit evaluation service, MEC, the AAO also reviewed the evaluation to see if it meets the criterion at section *3* for "[a]n evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials." It does not. By its terms, section *3* only applies to "an evaluation of education," but the MEC evaluation is based upon both education and experience.

Furthermore, the MEC evaluation does not present a sufficient factual basis for its determination of the educational equivalent of the beneficiary's work experience. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Also, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Accordingly, the AAO only accepted the education-based portion of the evaluation – that the beneficiary has attained the equivalent of one year of U.S college coursework – but it rejected the MEC determination that the beneficiary has attained the equivalent of a U.S. baccalaureate in mechanical engineering by nine years of work experience and the equivalent of one year of U.S. college coursework.

Next, the record does not establish that application of section *5* yields the remaining years of educational equivalency that the petitioner needs to establish by a combination of the beneficiary's training or work experience.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[2];

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The slim documentation of the beneficiary's work history does not meet the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) that the record clearly demonstrate that "the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation" and that "the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation."

Furthermore, to the extent that the beneficiary's work history is documented, it appears to have exclusively involved non-engineering work, such as refrigeration installation, welding, equipment maintenance and repair, and metal fabrication for mechanical maintenance.

Finally, there is no evidence relating to the type of professional recognition required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (*i*) to (*v*).

In summary, the director was correct in denying the petition because (1) the proffered position does not meet the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is not qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C). Therefore, the director's decision shall not be disturbed.

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.

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[2] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).