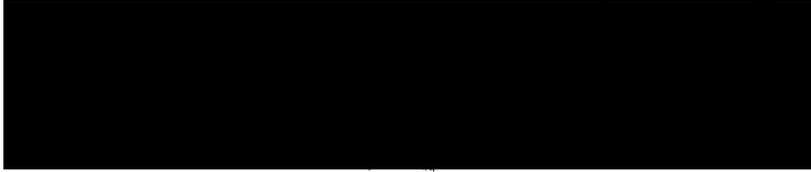


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Services

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MAR 30 2005

FILE: EAC 04 096 51933 Office: VERMONT SERVICE CENTER Date:

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.

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 The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a military defense contractor whose pilots use Swedish-made Draken and Israeli-made Kfir supersonic aircraft to perform military contracts for training, technology testing, and development. It seeks to employ the beneficiary as its Draken program specialist managing and directing the use and maintenance of the petitioner's two Draken aircraft in air-to-ship and air-to-air warfare exercises with the U.S. military. 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

On appeal, counsel contends that the director erred by: failing to adequately consider the specialization and complexity of the proposed duties; focusing on a specialty occupation criterion that the petitioner did not assert; rejecting expert evidence submitted on the specialty occupation issue; and improperly characterizing the job performance requirements.

Contrary to the director's decision, the petitioner has established that the proffered position is a specialty occupation. Therefore, the director's decision is withdrawn. However, the evidence of record does not establish that the beneficiary possesses the credentials that Citizenship and Immigration Services (CIS) regulations require to establish that the beneficiary is qualified to serve in the pertinent specialty occupation. As the issue of the beneficiary's qualifications has not been raised previously, the petition will be remanded for the entry of a new decision.

The AAO bases its decision upon its consideration of the entire record before it, including: (1) the petitioner's 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 (with its annotations by counsel), and counsel's brief.

The petitioner's establishment of the proffered position as a specialty occupation will be addressed first.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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. (Italics added.)

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 has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

At the outset, the AAO finds that the petitioner has satisfactorily explained the differences between the duty descriptions in the present petition and the one that had been previously denied.

In its February 11, 2004 letter filed with the Form I-129, the petitioner described the proffered position as follows:

The duties of the Draken Program Specialist involve the provision of technical assistance concerning the company's Draken aircraft program, presently consisting of two Swedish-made Draken F-35 supersonic aircraft. The Specialist will manage and direct use of the aircraft to ensure that implementation of the program for prescribed use of the aircraft is

carried out in accordance with company objectives and standards, and regulations concerning flight operations. The position requires conferring with company executives to establish usage parameters for the Draken aircraft based on company financial targets, aircraft tolerance and performance standards, access to parts and supplies, and safety considerations. The Specialist will determine and oversee the use, maintenance and repair of the Draken aircraft (including engines, airframes, electrical systems, and hydraulic systems), in order to meet financial, contract and flight operations targets set by company executives. The Specialist will utilize his or her knowledge of principles of electronics, electrical systems, engineering, airframe structure, aeronautics, and aircraft propulsion to develop methods and procedures for Draken aircraft maintenance, parts procurement, and repair.

Furthermore, the Specialist will be required to confer with, and provide technical assistance to, the company Maintenance Supervisor to ensure understanding of Draken aircraft program requirements, standards, and safety considerations. The Specialist will review reports and records prepared by maintenance personnel and provide feedback and technical guidance as required. The Specialist also will translate Draken aircraft manuals from Swedish to English . . . and disseminate technical information to company maintenance personnel.

The Specialist will confer with, and provide technical assistance and training to, company pilots to ensure understanding of Draken aircraft performance parameters. The Specialist will also de-brief pilots on in-flight performance of Draken aircraft. The Specialist will confer with, and provide technical assistance and training to, U.S. military base fire rescue and safety personnel on Draken aircraft crew rescue procedures, emergency egress equipment, aircraft hazardous materials, and ejection seat procedures.

Moreover, the Specialist will chart performance of Draken aircraft, compile production records and time-cost statistics, and recommend program adjustments to company executives, pilots, and the Maintenance Supervisor as needed to increase efficiency and to enhance safety. The Specialist is also required to source and coordinate parts procurement for Draken aircraft in accordance with budget constraints and needs of flight operations.

The position involves a high level of responsibility, independence in judgment, and discretion. Most tasks may be initiated and carried out by the Draken Program Specialist with little or no day-to-day direction or supervision from the upper management of [the petitioner].

The AAO concurs with counsel that the director erred by according "little weight" to the "Expert Opinion Evaluation" document submitted by an associate professor of Global Aviation, Turbine Engines, and Aircraft Systems and Components at the Prescott, Arizona campus of Embry-Riddle Aeronautical University (ERAU). The AAO does not agree with the director's view that this professor's opinion is devalued by the fact that ERAU offers a program for the type of bachelor's degree that this faculty member asserts that the proffered position requires. The AAO also finds that the evidence of record about the petitioner's industry does not rebut this professor's opinion that the proffered position "requires that the candidate have at least a Bachelor's degree in Aeronautical systems maintenance or a related field."

On the basis of a list of duties that substantially conform to the duties described in the petitioner's February 2004 letter of support, the professor stated, in part:

[T]he skills required to direct and manage the company's Draken aircraft program, confer with company executives to establish usage parameters for Draken Aircraft, and determine and oversee the use, maintenance, and repair of Draken Aircraft, are often taught in courses in Aeronautics, Electronic Flight Management, Maintenance Management, Project Management, Project Management in Aviations Operations, Crew Resource Management, Avionics Repair Operations, and related areas. Additionally, the skills required plan and coordinate Draken aircraft maintenance, confer with, and provide technical assistance to the Company Maintenance Supervisor, and provide technical assistance to company pilots and base military fire rescue and safety personnel are often taught in courses in Aerospace Education Technology, Aviation/Aerospace Simulation Systems, System Safety Aviation, Network Configurations, Multi-Engine Class Rating, and related fields. This level of skill in the Area of Aeronautical Systems Maintenance requires at least college-level academic training, including knowledge that is acquired in Aeronautical Systems Maintenance classes offered at a bachelor's level.

In the context of the entire record, including the other expert evidence submitted by the petitioner, this associate professor's evaluation establishes that the duties of the particular position proffered here are sufficiently specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree. Therefore, the petitioner has satisfied the specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petition may not be granted, however, as the evidence of record does not establish that the beneficiary possesses the credentials required for the specialty occupation as described in the record of proceeding as required by the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). As the director has not ruled on this issue, the petition will be remanded for the entry of a new decision.

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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (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's February 11, 2004 letter of support described the beneficiary's qualifications as follows:

[The beneficiary] is highly qualified for the job of Draken Program Specialist due to his education and work experience. [The beneficiary's] work experience dates to August 1989 and continues to the present. He has recent experience as an aircraft maintenance contractor/consultant, providing consultations on Draken maintenance programs, and as a platoon/station group chief technician for an aircraft maintenance crew in the Swedish military, in direct command of a platoon regulating quality control and maintenance checks on Draken and Viggen aircraft launch and the landing maintenance crew.

Also while in the Swedish military, [the beneficiary] worked as a turnaround platoon/station group technician for an aircraft maintenance crew, acting as part of an advanced ground crew responsible for preparation, maintenance and launch of pre-flight aircraft and maintenance of post-flight Draken and Viggen Aircraft.

[The beneficiary] has extensive military education as an officer. He has been trained in leadership, defense knowledge, tactics, and airplane technology, as well as hydraulic systems, fuselage, avionic systems, armament ammunition, and flight control systems. He is certified to operate the SAAB Draken J35J, AJ/AJS37 Attack Viggen, SK35C KLARG Training Model Draken, SK37 Training Model Viggen, and SK 60A-E KLARG Saab 105 School Aircraft, among others. According to the attached letter by an Instructor of the Swedish Military Academy, [named], the education and certifications obtained by [the beneficiary] are equivalent to a bachelor degree in a U.S. university and the U.S. Federal Aviation Administration's highest maintenance rating, entitling him to the "Inspection Authorization Certificate."

Due to his combined education and work experience, [the beneficiary] has the equivalent of a bachelor[s] degree in aircraft maintenance technology from an accredited college or university in the United States, as evaluated by a professional evaluator, the Foundation for International Services [FIS]. We consider [the beneficiary] to be highly qualified for the job.

The documentary evidence of record about the beneficiary's qualifications is limited to copies of: (1) the beneficiary's resume; (2) the aforementioned letter from a Swedish military instructor; (3) documents relating to the beneficiary's Swedish military coursework; (4) the beneficiary's Military Roll Call/Resume document; (5) and the aforementioned FIS opinion, in the form of an evaluation report on the beneficiary's "educational background and employment experience." The AAO finds that these documents have not established that the beneficiary is qualified to perform services in the specialty occupation by possessing education, work experience, and/or training that is the equivalent of at least a U.S. baccalaureate degree in a specific specialty, as required by the Act and the relevant CIS regulations.

The first two criteria of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) are not relevant to this proceeding, as the evidence of record indicates that the beneficiary does not hold either (1) a U.S. baccalaureate or higher degree required by the specialty occupation or (2) a foreign degree determined to be equivalent to such a U.S. degree. The third criterion is not relevant because there is no evidence of state licensure, registration or certification that would establish that the beneficiary holds the equivalent of the specialized bachelor's degree that the petitioner asserts that the proffered position requires. This leaves 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and the related provisions of 8 C.F.R. § 214.2(h)(4)(iii)(D).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) requires the petitioner to satisfy two criteria, namely, that the beneficiary possesses (1) "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 (2) "recognition of expertise in the specialty through progressively responsible positions directly related to the specialty."

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) would require 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;¹
- (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;

¹ As noted later in this decision, in compliance with this provision the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

- (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. . .

The provisions of 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(2) and (4) are not relevant, as the record contains no evidence relating to college-level equivalency examinations, special credit programs, or certification or registration of competence from a nationally-recognized professional association or society.

None of the documents in the record satisfies 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1) by being “an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited [U.S.] college or university which has a program for granting such credit based on an individual’s training and/or work experience.” As the Swiss military instructor is not such an official, his opinion about degree equivalency has no weight under this regulatory criterion.² The ERAU associate professor states that he has the authority to “evaluate whether the school is to grant college-level credit for experience, training, and/or courses taken at other U.S. or international universities.” However, authority to evaluate for potential credit is not the same as authority to grant that credit. Furthermore, CIS will not accept a faculty member’s opinion as to the college-credit equivalence 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 *both* that the college or university has a program for granting college credit in the pertinent specialty *and* that the official is authorized to grant such academic credit for that institution. In any event, the associate professor has not presented an evaluation of the educational equivalency of the beneficiary’s training or work experience.

The FIS evaluation report does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). FIS is a credentials evaluation service that specializes in evaluating foreign educational credentials. However, by its express terms, this regulatory provision recognizes educational equivalency opinions rendered by such a service only to the extent that it is based on an evaluation of *education alone*. Here, FIS states that its opinion is based upon a combination of education and experience (“educational background and employment experiences”), but it fails to explain how it calculated credit for education. Accordingly, the FIS opinion has no weight as an educational equivalency evaluation.

Also, the FIS opinion has no merit because of its lack of content. FIS fails to substantiate how it arrived at its conclusion. For its basis, the FIS opinion only refers, without comment, to the beneficiary’s resume and record of military education. The closest approach to analysis is this perfunctory and conclusory statement, which follows immediately after the general reference to the two documents:

In summary, it is the judgment of [FIS] that [the beneficiary] has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university level credit), an educational background the equivalent of an individual with a bachelor’s degree in aircraft maintenance technology from an accredited college or university in the United States.

² The AAO accords no weight to this person’s opinion as to the equivalency of the beneficiary’s Swiss aviation to U.S. Federal Aviation Authority (FAA) certification. This witness has no authority to speak on behalf of the FAA, which is the sole arbiter of its qualifications for licensing and certifications.

Even when rendered under the authority of a particular CIS regulation, evaluations and opinions - including those rendered by credential evaluation agencies and officials authorized to grant college credit - merit weight only to the extent that they clearly document and explain the factual basis upon which they are founded.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). According to the express terms of this provision, to satisfy this CIS-determination criterion a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision imposes strict evaluation standards, stating:

[I]t must be *clearly demonstrated* [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] 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 [3] 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 occupation³;
- (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.

[Italics added.]

The evidence of record to date does not satisfy this regulatory provision.

On remand, the director may afford the petitioner a reasonable time to provide evidence pertinent to the issue of whether the beneficiary possesses the credentials specified at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the new decision is adverse

³ *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).

to the petitioner, the director shall certify it to the AAO for review. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's June 4, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.