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U.S. Citizenship and Immigration Services

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[redacted]

FILE: LIN 03 273 51319 Office: NEBRASKA SERVICE CENTER Date: OCT 18 2005

IN RE: Petitioner: [redacted]
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:

[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.

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 appeal will be dismissed. The petition will be denied.

The petitioner, a corporation engaged in information technology and solutions, employs the beneficiary as an electronics engineer, as authorized by a previously approved petition to employ the beneficiary as an H-1B 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). In order to continue this employment beyond the period approved in the initial petition, the petitioner endeavors to continue the beneficiary's H-1B classification and extend his stay.

The director denied the petition on the basis that the petitioner had failed to establish that the beneficiary would actually perform the work in the proffered position, which the petitioner asserts to be that of an electronics engineer. The director focused on deficiencies in the petitioner's response to the director's request for additional information (RFE). The director noted that the petitioner failed to describe the projects upon which the beneficiary would work, and failed to provide related work orders or contracts. The director stated, in part: "Absent the actual contracts with work orders, the Service cannot find that the beneficiary will be performing any of the duties claimed." Also, the director declared that the evidence of record did not establish that the petitioner had sufficient office space to employ the beneficiary in-house at the beneficiary's corporate headquarters.

On appeal, counsel submits an eight-page brief and ten exhibits.

Counsel first focuses on the fact that the Form I-129 and accompanying letter of support describe the proposed duties as including "research, design, development, and testing of computer systems and networks, [and] analysis of resolution of operational problems," as well as "the supervision of the installation and maintenance of these networks." (Brief, at page 2.) Counsel asserts that "a technical description of the position lies beneath the surface of the individual terms themselves," and that the petitioner's description of the position "tracks the language" of the Department of Labor's (*DOL*) *Dictionary of Occupational Titles* (*DOT*) on electronics engineers and the DOL's *Occupational Outlook Handbook (Handbook)* on electrical and electronics engineers.

Counsel provides a copy of the January 2004 "Installation Services Subcontract Agreement" (contract) between the petitioner and a client, [redacted] but counsel declines to provide the "precise duties" involved in the work for this client: "Certainly, given the copious and complex nature of the duties of a[n] Electronics Engineer, it would be inappropriate to include the precise duties of the position within this particular agreement." (Brief, at page 4.)

Counsel submits other documents, such as spreadsheets and accompanying invoices for off-site work throughout the country, in part to counter the director's perception that there is insufficient office space for all the people that the petitioner states that it employs:

> Thus, it is certainly not the case that the petitioner will have hundreds of employees working at its corporate headquarters on one of seven work stations suggested in the denial. These numerous employees are deployed throughout the U.S. to work at client sites; however, given the wireless nature of the computing field, much work may be performed from the headquarters using laptop computers, networks, and the internet . . . .
>
> [Brief, at pages 4 and 5.]

To support his contention that the petitioner hires only persons with at least a bachelor's degree in engineering, counsel cites a statement to that effect in the September 22, 2004 letter from the petitioner's administrative manager that is submitted as an appellate exhibit.

Counsel asserts that the proffered position is one that normally requires at least a bachelor's degree in engineering, as the *Handbook* reports that entry-level electrical and electronics engineer positions require this credential: "The option of being an electronics or electrical engineer without a formal education is not even entertained as it is simply not the industry standard to permit anything less than a bachelor's degree in this field." [Brief, at page 6.]

Counsel submits a number of job advertisements from other firms to support his contention that an engineering degree is a requirement for positions in the petitioner's industry that are parallel to the one proffered here. Counsel asserts that "no professional organization of any size would entertain the possibility of hiring an Electronics Engineer without at least a Bachelor of Science in computer science, engineering, or related field." (Brief at page 6.) Counsel also asserts that, as the petitioner's clients "require the highest level of expertise," it would be a breach of contract and "an exercise of poor business judgment to hire anyone without a degree." (Brief, at pages 6 and 7.)

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's RFE; (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents submitted with the brief.

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)(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.

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.

Citizenship and Immigration Services (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.

The burden of proof in these proceedings rests solely with the petitioner, section 291 of the Act, 8 U.S.C. § 1361, and the burden does not shift because the prior petition was approved. Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval constituted material and gross 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. Just as district court decisions do not bind a court of appeals, service center decisions do not control the AAO. Even if a service center director had approved the nonimmigrant petition that is the subject of this appeal, the AAO would not be bound to adopt that decision as precedent. *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).

As discussed below, neither counsel nor the petitioner has provided evidence that substantiates the contention that the proffered position qualifies as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 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).

On the Form I-129 and in its September 17, 2003 letter of support, the petitioner described the proposed duties as follows:

> Research, design, develop, and test computer systems and networks, solve operating problems, and supervise its installation.

In response to the portions of the RFE that requested "a detailed description of the specific projects that require the beneficiary's services," the petitioner listed a total of 19 "External Projects" divided among ten firms, and three of its own "External Projects." The petitioner introduces the list with a generalized statement that conveys nothing specific about the proposed duties:

> The beneficiary was hired because of his exceptional ability on [the] area of system design, analysis, and development. As such, the beneficiary is primarily tasked to perform maintenance and revisions of the following internal and external projects undertaken in-house for the past six months.

The specific nature of the related "maintenance and revisions" is not discussed. For each project, the petitioner provided only brief, generalized information related to: Company, Location, Systems/Application, Platforms/Languages Used, Operating System, Database System, System Description, System URL, and System Status. This information has little probative value, as it contains no specific details about the work entailed on any of the projects. Information about the nature of the related work is limited to this generalized comment at the System Status section on every project: "Maintenance and modification required."

The AAO will now discuss the evidentiary deficiency of these documents submitted with the appellate brief: (1) the aforementioned September 22, 2004 letter from the petitioner in support of the appeal; (2) the beneficiary's curriculum vitae; (3) excerpts from the *DOT* and the *Handbook*; (4) copies of other employers' job advertisements for electronics engineers; (5) printouts of information about the petitioner from its Internet site; (6) copies of the following documents related to the client [redacted] a contract for the petitioner to install and service voice and data telecommunications equipment; invoices and [redacted] checks for the petitioner's services; and related spreadsheets (identifying the petitioner's employees who provided the services, and the dates, location, and type of system for which the services were provided).

The petitioner's September 2004 letter asserts that the proffered position requires a degreed "Electronics/Electrical Engineer," but it provides no evidence of specific duties or how the duties substantiate this claim.

The beneficiary's curriculum vitae has no evidentiary value. The beneficiary has been working for the petitioner for approximately three years. Yet this document provides no specifics about what the beneficiary has been doing. It only states that the beneficiary has been a project manager since May 2001.

The AAO is not persuaded by counsel's assertion that the brief and generalized duty description of the Form I-129 and its accompanying letter of support establish that the proffered position comports with the electronics engineer occupation as described in the *DOT* and the *Handbook*. Any similarity between the petitioner's generalized job description and the language of the *DOT* or *Handbook* only demonstrates that the petitioner is able to generally describe the position in terms used by the two DOL resources. In the absence of details about the beneficiary's specific tasks, such similarity in general wording does not justify a deduction that the beneficiary will be performing the work of an electronics engineer.

The job advertisements from other employers are not probative, as the record does not establish that the specific duties of the advertised positions are substantially similar to those of the proffered position, which are not developed in the record. While the advertisements reflect the fact that engineering is a specialty occupation, they are not a measure of the accuracy of the petitioner's assertion that it is proffering an engineer position.

The information from the petitioner's Internet site indicates that the petitioner provides services in field support, data communication, networking, structured cabling, software development, and contract personnel. The Internet site also indicates that the petitioner provides "[n]etwork design, installation, and administration, including cabling, network operating system (NOS) installation, NIC/hub/switch/router installation and configuration"; "network installation and maintenance"; and "VSAT (Very Small Aperture Terminal) Satellite Communications Systems Maintenance." This abstract information about areas of the petitioner's business conveys nothing about the beneficiary's specific duties or about the educational credentials that he would need to perform them.

The QualxServ documents also provide only general information about the petitioner's business, but no information from which the AAO can conclude that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

Aside from the evidentiary deficiencies just discussed, the credibility of some assertions in the record is questionable. The AAO notes that the petitioner's only representation about the qualifications of its employees for the [redacted] contract is that they are "qualified to install and service voice and data telecommunications equipment" (contract, at page 1), and that they shall be "HNS certified for Satellite Repair work" (Exhibit A of the contract, at page 1). This contract is inconsistent with counsel's contention that a degree in engineering or a related specialty is a contractual requirement or at least a client expectation. Further, it is remarkable that, after employing the petitioner for more than three years by the time of the appeal, the petitioner has provided no documentation or descriptions of the specific work that the beneficiary has performed. The AAO also notes that, despite the criticality of such information, counsel and the petitioner have displayed a continuous reluctance to specify any of the particular duties and tasks in which its employees hired as engineers engage. Also, the AAO finds unconvincing counsel's explanation of how the petitioner's workspace would accommodate the beneficiary and the petitioner's many other employees.[1] In addition, there is a material inconsistency between the "research, design, develop" duty components on the Form I-129 and the contradictory RFE reply information (at page 1 of the document "1.0 Responses to Requests Nos. 1 and 2") that the "beneficiary is primarily tasked to perform maintenance and revisions." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

The skeletal nature of the evidence submitted with regard to the actual work involved in the proffered position is insufficient to satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), as the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. The evidence does not substantiate the accuracy of the petitioner's assigning the position the title of electronics engineer. The generalized nature to which the petitioner has limited the information about the proffered position and its duties does not establish that the position exceeds the electrical and electronics installers and repairers occupational category, to which the 2004-2005 edition of the *Handbook* (at pages 526-528) ascribes the duties of installing, maintaining, and repairing complex pieces of electronic equipment. According to the *Handbook,* this occupational category does not require a bachelor's degree in a specific specialty.

To the extent that the petitioner will be contracting out the services of the beneficiary, the record must contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the

1 The AAO notes that according to LexisNexis Internet reports on the petitioner, the petitioner also operates as an employment agency.

petitioner to show that the entities ultimately employing the proposed beneficiaries require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the beneficiaries to the United States for employment with the agency's clients. Thus, without such a job description, the petitioner has not demonstrated that the beneficiary will perform work at the external job sites in a specialty occupation.

The petitioner had not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which assigns specialty occupation status to a proffered position if it has a requirement for at least a bachelor's degree in a specific specialty, and if that requirement is common to the industry in positions which are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava,* 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). The evidence of record does not contain these any of these factors. As already discussed, the job advertisements from other firms are not probative, due to the lack of evidence that the performance requirements of the advertised position are substantially similar to those of the proffered position.

As limited as it is to generalized information, the evidence does not establish that the proffered position and its duties are especially complex, specialized, or unique. Accordingly, the petitioner had not satisfied either the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) (which provides that "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") or the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) (for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty).

Finally, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in engineering or a related specialty. As earlier noted, undocumented assertions are not sufficient to satisfy any evidentiary criterion. Furthermore, even if the petitioner had documented such a hiring history, it would not satisfy this criterion unless it were also established that such hiring was necessitated by the position's actual performance requirements. A petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), 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. Accordingly, the appeal will be dismissed.

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