



U.S. Citizenship
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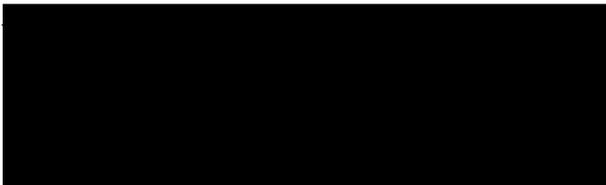
Date: DEC 13 2007

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.

Robert P. Wiemann

Robert P. Wiemann, Chief
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 is an air conditioning and refrigeration business that seeks to employ the beneficiary as an operations manager/energy management division. 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 because the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

An 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 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) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary's services as an operations manager/energy management division. Evidence of the beneficiary's duties includes: the petitioner's April 1, 2006 letter in support of the petition and the petitioner's April 16, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

1. Meet the customers and design engineers to discuss design plans;
2. Inspect customers' physical equipment or if new equipment is to be installed, read plans and equipment schedules to determine requirements;
3. Build flow charts to lay out planned operation of controlled system;
4. Determine what control hardware is needed based on information gathered;
5. Create design drawings and submittals to show intended equipment and operation of system;
6. Create software application to provide control of hardware;

7. Test individual equipment to insure correct operation;
8. Enhance current operations and technical service offers and develop new ones; and
9. Troubleshoot any equipment not functioning as designed and rectify any malfunction.

The director found that the proposed operations manager duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the petitioner's new position of operations manager/energy management division qualifies as a specialty occupation. According to counsel, the petitioner has satisfied at least three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, the degree requirement is common to the industry in parallel positions among similar organizations, and 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. Counsel states further that the record contains two expert opinions and job announcements with "almost identical" duties as supporting documentation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is a specialty occupation. A review of the Heating, Air-Conditioning, and Refrigeration Mechanics and Installers job description in the *Handbook*, 2006-07 edition, finds that the job duties parallel the responsibilities of a technician with supervisory duties.

The *Handbook* states:

Technicians must be able to maintain, diagnose, and correct problems throughout the entire system. To do this, they adjust system controls to recommended settings and test the performance of the entire systems using special tools and test equipment.

Advancement usually takes the form of higher wages. *Some technicians, however, may advance to positions as supervisor or service manager.* (Emphasis added.)

No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for heating, air-conditioning, and refrigeration mechanics and installers jobs. Employers prefer to hire individuals with technical school training or those who have completed an apprenticeship, though some mechanics and installers still learn the trade on the job. In addition, the AAO finds that the petitioner has not substantiated its business operations, including its proposed expansion, its number of staff and the division of their duties. Nor has the petitioner provided evidence of particular projects associated with the proposed position that substantiates the incumbent in the position must possess a bachelor's degree in a specific discipline. In the petitioner's response to the RFE, the petitioner's president stated: "There are no courses or training specifically dedicated to this field." The record also contains no documentation in support of the petitioner's claim regarding its plans for expansion, thereby necessitating the services of an operations manager/energy management division. Information on the petition reflects that the petitioner was established in 1991, has 10 employees and an approximate gross annual income in excess of \$1 million. The record, however, contains no evidence in support of these claims, such as quarterly wage reports and federal income tax returns. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for operations managers. The listings do not indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Moreover, due to the deficiencies in the record discussed above, the duties listed in the advertisements may not be established as parallel to those outlined by the petitioner. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to 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. On appeal, counsel states that the proffered position is a new position. The evidence of record thus does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel asserts, on appeal, that the record contains two expert opinions that qualify the proffered position under the fourth criterion. The position evaluation reports from a university professor and an executive director of a foreign credential evaluation firm are noted. Both writers assert that the proffered position requires a bachelor's degree in engineering or a related field. The record, however, does not indicate that the writers have adequate knowledge of this matter. The opinions do not include a discussion of the proposed duties and/or the actual work that the beneficiary would perform within the context of this particular petitioner's business. The writers do not demonstrate knowledge of the petitioner's particular business operations. They do not relate any personal observations of those operations or of the work that the beneficiary would perform. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for their conclusions about the educational requirements for the particular position at issue. 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). As the opinions of the writers are not based on a factual foundation, the AAO does not find them probative in this matter. Further, as indicated earlier in this decision, the petitioner's unsupported claims regarding the basic information of its business do not establish a requirement for the level of knowledge requisite for this criterion.

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.

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