



U.S. Citizenship
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FILE: EAC 05 193 53188 Office: VERMONT SERVICE CENTER

Date: JUN 05 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 a retail management business that seeks to employ the beneficiary as a full-time civil engineer. 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 based on his determination that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) 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) 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 a full-time civil engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s June 23, 2005 cover letter in support of the petition; and counsel’s October 1, 2005 response to the director’s request for evidence. As stated by the petitioner’s president in his June 23, 2005 cover letter, the proposed duties are as follows:

[P]lanning, designing and overseeing construction and maintenance of building structures and facilities such as roads, rail roads, airports, bridges, harbors, water and sewage systems and waste disposal units.

In his October 1, 2005 response to the director’s request for additional evidence, counsel stated, in part, as follows:

The employer in this case is a consulting company, which provides specialized professional services to businesses around the country for a fee. In this case, they require a “Civil Engineer” for a New Jersey oil company, which requires the services of the beneficiary. A copy of the work order and the job description has been provided to demonstrate the professional service required. Please note that this employer does not employ any other “Civil Engineers”. They employ engineers in other fields but none in the civil engineering field. To establish the legitimacy of their client, the

employer has submitted the tax returns of that company also.

The following job description was included with the petitioner's response to the director's request for additional evidence:

Civil Engineer

1. Analyze survey reports, maps, drawings, blueprints, and other topographical or geologic data to plan projects;
2. Plan and design dispensing systems and structures, following construction and government standards, using books, design software and drawing tools;
3. Compute load and grade requirements, liquid gasoline flow rates, and material stress factors to determine design specifications;
4. Inspect project sites to monitor progress and ensure conformance to design specifications and safety standards;
5. Direct construction, operations, and maintenance activities at project site;
6. Estimate quantities and cost of materials, equipment, or labor to determine project feasibility;
7. Prepare or present public reports, such as bid proposals, deeds, environmental impact statements, and property and right-of-way descriptions;
8. Provide technical advice regarding design, construction, or program modifications and structural repairs to industrial and managerial personnel; and
9. Conduct studies of traffic patterns or environmental conditions to identify engineering problems and assess the potential impact of projects.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In her denial, the director found that the proffered position was not a specialty occupation because there is insufficient evidence of a bona fide job offer for a civil engineer. The director found further that the evidence in the record indicates that the petitioner is a small convenience store with few employees, as opposed to a business that provides consulting services. The director also found that the work order, which reflects that the petitioner would provide the civil engineer services to a client named [REDACTED] was dated after the director's response for additional evidence, and that this client's business code number, as reflected on its federal income tax return, indicates that it is a gasoline station/convenience store, as opposed to an oil company, as asserted by the petitioner. The director found further that the petitioner had not submitted the requested documentation related to the educational requirements of its employees. 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 as the petitioner intends to file future H1B petitions, it seeks to expand and amplify its business plans and its need for the beneficiary's services. Counsel states further that the information on the petitioner's tax returns reflecting its classification as a convenience store was not current, and that the petitioner had undergone significant restructuring of its business activities after hiring an H1B business analyst. Counsel states further that, in addition to having retail gas stations, the petitioner's client [REDACTED] has entered into agreements with Exxon to convert all their stores into convenience/food stores. Counsel submits the following supporting documentation: a revised job description for the proffered position from the petitioner; a letter, dated January 16, 2005, from the petitioner's president to the petitioner's CPA regarding its business analyst position; a letter, dated November 3, 2005, from the petitioner's CPA to the petitioner's president regarding the petitioner's business analyst position; a copy of the petitioner's Certificate of Incorporation filed on January 4, 2001; the petitioner's federal quarterly tax return for the third quarter of 2005; a vision statement for the petitioner; and a contract between the petitioner and [REDACTED] signed on May 1, 2005.

The information and evidence provided by counsel on appeal regarding the petitioner's business analyst position, its quarterly tax return, its vision statement; and its contract with [REDACTED] are noted. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In her request for additional evidence, dated July 8, 2005, the director requested, in part, as follows: "Submit brief job descriptions for the majority of positions within your employ and approximately how many individuals occupy such positions (to include job titles, duties and educational requirements)." As noted in the director's October 17, 2005 decision, the petitioner did not provide this information. The director also requested as follows: "Please provide a copy of your company's latest United States income tax return filed by your company and at least one of the following: a complete copy of your Form 941, Employer's Quarterly

Tax Return, for the last two quarters; i.e. six months including all schedules; or a copy of your firm's latest Form W-3"; "Submit documentation highlighting the nature, scope, and activity of your business enterprise(s) in order to establish the beneficiary will be employed with the duties you have set forth"; and "Submit copies of recent contracts that your company has held showing your company's need for a civil engineer . . ." In response to this request, the petitioner submitted its quarterly tax return for only one quarter, a work order without the correspondent contract, and no business plan or vision statement. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence regarding the petitioner's quarterly tax return, its contract with [REDACTED] its vision statement, and its business analyst position submitted on appeal. Furthermore, even if the AAO were to accept the evidence regarding the petitioner's business analyst position submitted on appeal, the director's decision does not indicate whether she reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute 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).

Also noted is that the Vendor Service Agreement Master Contract, on page 17, is signed by representatives of the petitioner and [REDACTED] on May 1, 2005, which is inconsistent with information reflected on page 1 of the contract, namely that the agreement was made on August 28, 2005. The record contains no explanation for this consistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 concur with the petitioner that the proffered position is a specialty occupation. Although a review of the Engineers training requirements in the *Handbook*, 2006-07 edition, reflects that a civil engineer may qualify as a specialty occupation, the AAO does not concur with the petitioner that the proffered position is a specialty occupation, or that the petitioner will employ the beneficiary in a specialty occupation. In this case, information on the petitioner's 2004 federal income tax return reflects its business activity as "newspaper stand" and its product or service as "candy, newspaper, magazines, cigarettes." Further, given the information reflected on the 2003 federal income tax return of the petitioner's client [REDACTED], reflecting its principal business activity as "retail sales," its principal product or service "gasoline sales," and only \$44,832 paid in salaries and wages, it is not clear that this client is an "oil company" that requires the services of a civil engineer, as asserted by counsel in his October 1, 2005 response to the director's request for additional evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as discussed by the director in her decision, the work order, which was submitted in response to the director's request for additional evidence, was signed on September 20, 2005, more than two months after the director requested the additional documentation, and almost three months after the filing of the petition. The petitioner, however, must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). It is additionally noted that although information on the petition that was signed by the petitioner's president on June 23, 2005 reflects that the petitioner has four employees, the petitioner's quarterly federal income tax return for April, May, and June 2005, reflects only two employees. The record contains no explanation for this inconsistency. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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)).

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from professional associations regarding an industry standard, or

documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (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. In his October 1, 2005 response, counsel asserts, in part, as follows: “Please note that the employer does not employ any other ‘Civil Engineers’. They employ engineers in other fields but none in the civil engineering field.” Counsel’s assertions are noted. The record as it is presently constituted, however, contains no evidence that the petitioner employs any engineers. 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). In this regard, the petitioner fails to establish that the proffered position entails the theoretical and practical application of a body of highly specialized knowledge attained by a bachelor’s degree, or the equivalent, in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(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.

On appeal, the petitioner submits a job description for a senior civil/structural engineer to “[s]upervise the detailed engineering and construction of the civil and structural aspects of retail gas stations and convenience and food stores” for its client [REDACTED]. As indicated in the discussion herein, the record of proceeding contains inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In view of the foregoing, the petitioner has failed to establish that it will employ the beneficiary as a full-time civil engineer, and that the beneficiary will be coming to perform services in a specialty occupation, in accordance with Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 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.