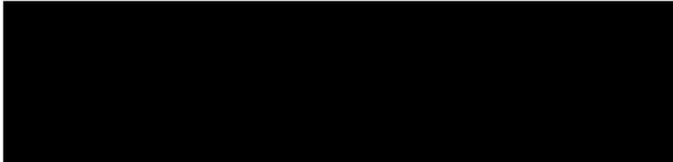


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FILE: SRC 06 119 50723 Office: TEXAS SERVICE CENTER Date: SEP 07 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner sells and distributes personal and commercial mobility equipment for the physically impaired, claims to employ ten personnel, and claims to have a gross annual income of \$1,500,000 when the petition was filed. It seeks to employ the beneficiary as an operations manager of overseas sales. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed March 28, 2006 with supporting documentation; (2) the director's April 17, 2006 request for further evidence (RFE); (3) counsel for the petitioner's June 28, 2006 response to the director's RFE; (4) the director's July 20, 2006 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's 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 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.

On the Form I-129, the petitioner provided the non-technical job description of the proffered position as "[o]versee delivery, installation, tech work for overseas." In an undated letter appended to the petition, the petitioner stated:

[The beneficiary] will be responsible for directing and coordinating sales in the U.S. and particularly overseas. He will oversee the installation of some products, oversee technical support for some products, maintain a customer and contact database, oversee the movement of products sold to the customer, make recommendations for new products, prepare sales reports for upper management.

The petitioner added that it needed an individual with the beneficiary's background (a bachelor's degree in engineering) as evidenced by the technical and mechanical nature of the products it sold.

In a June 28, 2006 response to the director's RFE, counsel for the petitioner noted that the petitioner will rely on the individual assuming the position of overseas operations manager to continue its expansion plans in the Middle East. Counsel noted further that the position would involve effective communication using specialized technical terms meeting each individual product criteria and standards, thus knowledge of the Arabic culture and engineering would come into play.

Counsel also provided a summary report on general and operations managers from the Department of Labor's *Online O*NET (O*NET)* and noted the JobZone classification of 4 for such positions. Counsel noted further that a JobZone classification of 4 is an indication that most of these occupations require a four-year bachelor's degree.

On July 20, 2006, the director denied the petition determining: that the *O*NET* did not indicate that a bachelor's degree in a specific academic concentration is the minimum education required for entry into the position of operations manager; that the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not report that a bachelor's degree in a specific discipline is the minimum education required for entry into the position of an operations manager; that the nature of the position for the petitioner did not qualify as a specialty occupation; and that the record did not establish that a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the position of operations manager, that a bachelor's degree is common to the petitioner's industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that only an individual with a degree could perform the duties of the position. The director concluded that the petitioner had not established that the position satisfied any of the criteria of a specialty occupation.

On appeal, counsel for the petitioner asserts that the job duties and responsibilities of the petitioner's operations manager are at such a level of complexity that the person performing the duties should minimally have a bachelor's degree. Counsel asserts that the technologies and processes that the petitioner is dealing with are not the normal antiquated systems but are highly advanced, technologically complex systems. Counsel stated generally that the duties of an operations manager position are:

- Direct and coordinate sales in the U.S. and particularly overseas;
- Determine which products or services best fits clients' needs;
- Determine how products and services can be fashioned or customized to best suit the needs for the customers;
- Make recommendations for new products;
- Advise customers on how to make the best use of the products provided;
- Oversee the installation and technical support of some products, using [his] technical knowledge;
- Maintain customer and contact database;
- Oversee the movement of products sold to the customer;
- Prepare sales reports for upper management.

Counsel asserts an operations manager is a professional position requiring a bachelor's degree or its equivalent and thus is a specialty occupation and that it is the industry standard to require at least a bachelor's degree. Counsel contends that although the petitioner has identified the position as an operations manager, the description of duties is more analogous to that of a sales engineer or a sales manager. Counsel claims that because of the complexity of the petitioner's mobility equipment "it is important that the Operations Manager be extremely knowledgeable in the mechanical and technical nature of the products so that he can effectively market, install, repair, analyze, improve and maintain the product for customers." Counsel references the *Handbook's* report on sales engineers and sales managers and avers that the proffered position encompasses a variety of position descriptions, all of which normally require at least a bachelor's degree. Counsel asserts it is evident that the

beneficiary's skill in mechanical engineering, familiarity with the Middle East, and language capabilities are not only required, they are crucial in order to assist the petitioner in its effort to expand its operations in the Middle East.

Counsel also submits ten job advertisements for positions titled sales engineer or operations manager and indicates that although the companies advertising are not identical to the petitioner, the duties listed for each of the positions are similar to those required to perform the proffered position.

The AAO does not find counsel's assertions or evidence persuasive. The AAO turns first to the description of the duties of the proffered position.

The *Handbook* discusses the occupation of sales engineer as follows:

Many products and services, especially those purchased by large companies and institutions, are highly complex. Sales engineers – who also may be called *manufacturers' agents*, *sales representatives*, or *technical sales support workers* – work with the production, engineering, or research and development departments of their companies, or with independent sales firms, to determine how products and services could be designed or modified to suit customers' needs. They also may advise customers on how best to use the products or services provided.

* * *

Most sales engineers have a bachelor's degree in engineering, and many have previous work experience in an engineering specialty. Engineers apply the theories and principles of science and mathematics to technical problems. Their work is the link between scientific discoveries and commercial applications. Many sales engineers specialize in an area related to an engineering specialty.

* * *

Many of the duties of sales engineers are similar to those of other salespersons. They must interest the client in purchasing their products, many of which are durable manufactured products such as turbines. Sales engineers often are teamed with other salespersons who concentrate on the marketing and sales, enabling the sales engineer to concentrate on the technical aspects of the job.

In this matter, the petitioner has not adequately explained how its mobility equipment requires the technical expertise of an engineer to explain or otherwise demonstrate the benefits of the equipment to prospective purchasers. The petitioner has not explained how or why fashioning or customizing the product to best suit the needs of its customers requires the technical expertise of an engineer. The petitioner has not provided information on why the petitioner must advise its customers on how to make the best use of the products. The AAO notes that counsel's elaboration of the duties on appeal adds in three distinct elements: (1) Determine which products or services best fits client's needs; (2) Determine how products and services can be fashioned or customized to best suit the needs for the customers; and (3) Advise customers on how to make the best use of the products provided. The AAO notes that each of these elements corresponds to the *Handbook's* report of the duties of a sales engineer.

The AAO finds that repeating a portion of the *Handbook's* generalized statements regarding an occupation is insufficient to establish a position as a specialty occupation. Rather, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In addition, the AAO cautions that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not provided evidence that the incumbent in the proffered position will apply the theories and principles of science and mathematics to technical problems or that the incumbent's work is the link between scientific discoveries and commercial applications. 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)).

Although the petitioner's product may have mechanical or technical characteristics, the record does not provide any evidence that these mechanical or technical attributes require the services of an engineer to understand and to communicate those particular facets of the product to prospective purchasers. The responsibilities associated with coordinating sales, recommending new products, maintaining a customer and contact database, and preparing sales reports are similar to the duties of a salesperson described in the *Handbook's* discussion of retail salespersons who may require special knowledge or skills to convey the complexity or sophistication of a particular product to purchasers. Labeling a position a "sales engineer" and reciting general statements from the *Handbook's* report on sales engineers is insufficient to establish the position as a specialty occupation.

The *Handbook* indicates that general and operations managers "plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources." The AAO does not find the petitioner's general description of the beneficiary's duties sufficient to conclude that the proffered position is that of an operations manager. The AAO agrees with counsel's statement that not every operations manager, sales manager, or sales engineering position may be a specialty occupation but that such fact does not preclude CIS from determining that a particular position may require a bachelor's degree. However, in this matter, the generality of the petitioner's description is insufficient to demonstrate that the individual in the proffered position will do more than sell mechanical equipment and provide after market services. The petitioner in this matter has failed to provide evidence of the daily tasks it requires from the proffered position, but instead has provided a general overview of a sales position. The record is insufficient to show that the duties of the position require the theoretical and practical application of a body of highly specialized knowledge, and the 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 AAO acknowledges counsel's assertion that the beneficiary's skill in mechanical engineering, familiarity with the Middle East, and language capabilities will assist the petitioner's efforts to expand its operations in the Middle East. However, 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 matter the petitioner has not provided documentary evidence of its expansion plans. Again, 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. at

158. Further, the AAO notes that it is not a beneficiary's skill or language capabilities that make a position a specialty occupation but rather that the duties to be performed encompass the duties of a specialty occupation.

The AAO also acknowledges counsel's reference to the *O*NET*; however, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A JobZone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

The *Handbook* does not report that the educational requirements to perform the duties of a salesperson or an operations manager are equivalent to a bachelor's degree or higher. The petitioner has not described a position that encompasses the theoretical and practical application of a body of highly specialized knowledge that requires the attainment of a bachelor's or higher degree in a specific specialty. The petitioner in this matter has not provided sufficient detailed information to enable the AAO to conclude that the proffered position is that of a "sales engineer," "operations manager," or any other occupation that requires a baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the position. Thus, the petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner submitted ten job announcements to demonstrate that a sales engineering position and an operations manager position are specialty occupations. Counsel for the petitioner acknowledges that the companies advertising for the positions are not similar to the petitioner's business of sales and distribution of mobility equipment, but asserts that the job duties of the advertised positions are similar to the proffered position. The AAO finds, however, that when the record lacks a meaningful description of the proffered position, the petitioner cannot demonstrate that an equally general description found in a job announcement incorporates the duties of a specialty occupation. The AAO is unable to conclude that the duties of the proposed position in the instant petition are similar in context and nature to the advertised positions.

Moreover, of the ten job advertisements submitted, six indicate a bachelor's degree is required but do not indicate that the degree must be in a specific discipline; two of the job advertisements submitted indicate that a range of degrees either in business, logistics, engineering, accounting, computer science, or finance may be suitable for entry into the position; and only two of the job advertisements submitted indicate that a degree in engineering or related field is necessary for the advertised position. When a job can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must

establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Again, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative the petitioner may demonstrate that the proffered position is so complex or unique that only an individual with a degree can perform the duties of the position. In this matter, the description does not evidence the uniqueness or complexity of the duties of the position. Again, the petitioner has not provided sufficient detail regarding the daily duties of the position; has not described how the daily duties incorporate engineering skills attained only through a four-year course of university-level study; and has not provided evidence that demonstrates the petitioner's product is so engineering dependent that the individual selling, installing, and providing after sales services must have an engineering degree. The petitioner has not distinguished the proffered position as more complex or unique than similar, but non-degreed, employment, as required by the second prong of the second criterion. The record does not contain evidence that establishes either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and whether the petitioner normally requires a degree or its equivalent for the position. The AAO acknowledges the petitioner's statement that the person filling the proffered position must have a four-year degree (or its equivalent) in an engineering field. The AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this matter, the record does not contain evidence that the petitioner previously employed anyone in the position of operations manager/sales engineer/sales manager. The AAO notes that a petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. Again, the critical element is not the title of the position or 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. Further, if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The petitioner has not presented evidence that satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the description of the duties in the record does not demonstrate that the duties are sufficiently specialized or complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. As observed above, the description of duties is more akin to that of a salesperson selling mechanical equipment. The petitioner does not provide evidence, a detailed description, or other information demonstrating that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Upon review of the duties as depicted in the record, the petitioner has not explained and substantiated that the routine duties associated with the proffered position are duties that encompass the theoretical and practical application of the specialized knowledge attained through a four-year course of university-level study in the field of engineering. The record is simply deficient in this regard. Accordingly, the

petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The AAO observes that the beneficiary's classification in H-1B status expired February 28, 2005, that a Form I-140 petition was filed October 26, 2004 by a different petitioner and denied on February 22, 2005, and that the instant petition was filed March 28, 2006. The AAO also acknowledges counsel's request that this petition be approved *nunc pro tunc*, so that the beneficiary would not have a break in his status. The AAO is without authority to address this issue.

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 met that burden.

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