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U.S. Citizenship
and Immigration
Services



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FILE: WAC 02 258 51419 Office: CALIFORNIA SERVICE CENTER Date: 11/11/09

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is in the business of building and operating hotels. It seeks to employ the beneficiary as a project manager and to classify him 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 ground that the record did not establish that the proffered position is 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.

As provided in 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 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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's requests for evidence (RFEs); (3) the petitioner's responses thereto; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a hotel building and operating company, established in November 2000, that was in the process of completing a 100-room Holiday Inn Express in Garden Grove, California. The petitioner stated that it required the services of a project engineer and wished to hire the beneficiary under the title of project manager. The proffered position was described by the petitioner as follows:

[The beneficiary] will provide analysis and review of proposed plans to ensure compliance with safety and functional standards; inspect existing structures and advise regarding needed changes or upgrades; devise and conduct test control procedures to ensure compliance with project requirements and safety standards. His position also requires him to assign technical tasks to personnel, and supervise and review their work to ensure compliance with set standards and plans; coordinate construction and engineering activities; provide on-site supervision; evaluate the function and efficiency of electrical systems, advise on project costs and feasibility; and propose and implement means of improving efficiency.

The petitioner declared that the position was professional in nature and required at minimum a bachelor's degree in engineering. The beneficiary earned a bachelor of science degree in electrical engineering from the University of San Jose-Recoletos, in the Philippines, on March 24, 1990. According to an educational credentials evaluation by Global Education Group, Inc. of Miami Beach, Florida, the beneficiary's degree is equivalent to a bachelor of science in electrical engineering from a regionally accredited university in the United States.

In response to the director's initial RFE, the petitioner provided additional details about the proffered position:

While [the beneficiary's] position involves coordination of construction and engineering services, his technical responsibilities relate specifically to electrical engineering. He will personally perform supervisory engineering analysis to ensure compliance with electrical safety and functional standards. When dealing with existing structures, he will inspect and examine the property and propose electrical upgrades or modifications consistent with the client's intended use and the overall project. He will conduct rigorous testing of all electrical circuitry and design self-testing mechanisms, and other safety features within the system.

As project manager [the beneficiary] will hire other engineering professionals, generally coordinate engineering and construction activities, and advise the company regarding project costs and feasibility

Since our company handles large commercial projects, for which clients often employ more than one engineering firm, [the] beneficiary may work as part of a team of project managers.

The director found that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). In the director's view, the duties did not show a professional complexity associated with electrical engineering and encompassed managerial and

supervisory aspects of overseeing an office and business. The director cited the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which states that persons in managerial positions are not normally required to have a degree in a specific specialty, and noted that CIS generally does not consider a position involving managerial or executive duties to be a specialty occupation unless the duties of the position include supervision of other individuals in specialty occupations or exceed the scope and complexity of duties normally encountered in the occupational field. The director concluded that the petitioner had not demonstrated that a baccalaureate or higher degree is the normal requirement for entry into the occupation, that the petitioner normally requires a specialty degree for the position, or that the duties and responsibilities of the position indicate a level of complexity or authority beyond that normally encountered in the occupational field.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel points out that the *Handbook*, 2002-03 edition, at page 104, states that a bachelor's degree in engineering is required for almost all entry-level engineering jobs, making the engineering profession a specialty occupation under the Act. Since engineering is at the heart of the project manager position at issue in this case, the petitioner asserts that its minimum educational requirement is likewise a bachelor's degree in engineering. The petitioner asserts that the director relied on the wrong occupational category in the *Handbook*, mischaracterized the proffered position as essentially an office or business manager, and ignored the petitioner's description of the job, in its labor certification application as well as in the letters submitted in support of the instant petition, as an engineering position.

In determining the nature of a particular position and whether it is a specialty occupation, the duties actually performed are determinative, not the title of the position. In its petition, the AAO notes, the petitioner stated that it had ten employees, projected gross annual income of \$3 million, and an ongoing project building a Holiday Inn. Those statements, however, were not supported by any documentary evidence. To give the petitioner the opportunity to demonstrate the scope of its business operations and thereby substantiate the duties and bona fides of the project manager position, the director requested in his second RFE that the petitioner submit such evidence as its organizational chart, a list of employees, quarterly wage reports, payroll summaries, federal and state income tax returns, bank statements, major sales invoices, and documentation of the company's business premises. The only pertinent evidence submitted in response to the RFE were photocopies of the petitioner's articles of incorporation, an investment and cooperation agreement among the companies involved in the Holiday Inn project in Garden Grove, California, and bank statements connected with the Holiday Inn project. Also submitted were an organizational chart and a list of employees of the Holiday Inn Express. But no organizational chart or list of employees was submitted for the petitioner showing the hierarchy of the company or the names and titles of its employees. Nor were any tax returns or sales invoices submitted by the petitioner,

documenting the company's income, or evidence of its business premises such as photographs, a lease agreement, or a title document. All of the foregoing types of evidence were specifically listed and requested by the director in his second RFE. Thus, the record contains little evidence as to the scale and complexity of the petitioner's business, or the extent of its engineering activities beyond the Holiday Inn project. Accordingly, the AAO is not persuaded that the beneficiary would actually be performing the duties of an electrical engineer, or any other specialty occupation, requiring the theoretical and practical application of a body of highly specialized knowledge and a baccalaureate degree or its equivalent in the specialty. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972).

For the reasons discussed above, the record fails to establish that a baccalaureate or higher degree in electrical engineering or any other specialty is normally required for entry into the proffered position. Therefore, the position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, the record does not establish that a bachelor's degree in engineering is common to the industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). On appeal counsel has submitted a series of job announcements for engineering project manager positions, all of which specify that a bachelor of science in engineering is required. Those advertisements simply confirm that engineering positions require a bachelor's degree in an engineering specialty. In the instant petition, however, the evidence does not establish that the beneficiary would actually be performing the services of an electrical engineer in the proffered position. Thus, the proffered position is not parallel to the advertised positions and does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in engineering or a related specialty, as required to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot show that it normally requires a bachelor's degree in engineering for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in accounting or a related field. Based on the documentation of record, the AAO is not persuaded that the duties of the position could not be performed by an experienced individual with less than a bachelor's degree in electrical engineering.

Thus, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

In addition, section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), requires that an alien seeking H-1B classification have “full state licensure to practice in the occupation, if such licensure is required to practice in the occupation.” California, the state of intended employment, requires engineers to be licensed. Absent any evidence in the record that the beneficiary is licensed to practice electrical engineering in the State of California, the AAO determines that the beneficiary is not qualified to perform the services of the specialty occupation. The instant petition is deniable on this ground as well.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

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