

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: SRC 03 229 50341 Office: TEXAS SERVICE CENTER Date: NOV 02 2005

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, Director
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 condominium association, with 33 employees. It seeks to employ the beneficiary as a technical writer/translator 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 she determined the record did not 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 September 29, 2003 request for evidence; (3) counsel's responses to the director's September 29, 2003 and January 20, 2004 requests for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief, and new and previously submitted evidence. The AAO reviewed the record in its entirety before reaching 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 must examine the ultimate employment of the alien. 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 duties of the position actually require 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 states that it is seeking the beneficiary’s services as a technical writer/translator. Evidence of the beneficiary’s duties includes: the Form I-129, with an August 6, 2003 letter of support from the petitioner; and counsel’s December 29, 2003 response to the director’s request for evidence.

As of the time of filing, the petitioner stated that, based on its involvement in many financial and legal transactions and its international clientele, it required the beneficiary’s services to:

- Write and translate in full technical language materials such as contracts, bylaws, corporate documents, financial documents, legal documents, and correspondence to and from the English, Spanish and Portuguese languages;
- Receive assignments from the supervisor;
- Organize material and complete writing assignments according to set standards regarding terminology, clarity, conciseness and style, paying particularly special attention to culture specific and idiosyncratic nuances, word meanings, sentence structure, grammar, punctuation and mechanics;
- Review published materials and recommend revisions or changes in scope, context, and content;
- Translate or write articles and announcements for public, client or employee releases; and
- Translate, edit, and standardize material prepared by other writers.

The petitioner’s description of these duties was subsequently amended and clarified by counsel’s responses to the director’s two requests for evidence. In response to the director’s first request for evidence, counsel expanded upon the list of technical documents to be written and translated by the beneficiary, adding association and condominium rules, legal notices, notices to evict and notices for the demand of rent. His response to the director’s second January 20, 2004 request for evidence limited the above description of the technical language materials to be drafted by the beneficiary to those that would not require a law license. Although counsel did not specify which of the petitioner’s documents would fall within this category, he

offered the petitioner's board minutes and resolutions as an example of the technical writing that would be performed by the beneficiary.

In her denial, the director found the proffered position to reflect the employment of a translator, rather than a technical writer/translator, and concluded, based on her reading of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, that this occupation did not impose a degree requirement on the beneficiary. The AAO does not agree. The duties of the proffered employment, as described, indicate that the beneficiary would not only perform as a translator, but undertake the drafting of certain financial and corporate documents, as well as the writing and editing of unspecified materials published by the petitioner. Further, although the director concluded that employment as a translator could be obtained on the basis of on-the-job training, the 2004-2005 edition of the *Handbook*, at page 263, indicates that a baccalaureate degree is generally required for employment as a translator, although it need not be a degree in a directly-related field. Accordingly, the AAO withdraws the director's finding that the proffered position is solely that of a translator, as well as that which found the occupation of translator to impose no degree requirement. The withdrawal of the director's findings does not, however, establish the proffered position as that of a technical writer/translator, nor as a specialty occupation.

As previously discussed, one of the factors considered by CIS in determining whether a particular job qualifies as a specialty occupation is the nature of the petitioning entity's business operations. In the instant case, the petitioner, a condominium association of 320 apartments, has indicated that it is involved in many legal and financial transactions related to its international clientele and, therefore, requires the beneficiary's skill to draft and translate certain corporate and financial documents, as well as translate a range of legal documents prepared by the petitioner's corporate counsel and other attorneys. However, the petitioner has offered no evidence to establish the international nature of its association membership. Nor has it discussed or provided evidence of the legal, corporate and financial transactions to which it refers, or any documentation indicating the nature and extent of its involvement with these transactions, including its organizational responsibility to provide drafting and translation support in the completion of such transactions or its history of doing so.

The petitioner has also submitted no evidence to establish that the association engages in activities that require the beneficiary's services to draft and translate articles and announcements for release to the public, clients or employees, or to translate and edit materials prepared by other writers. The record does not indicate what type of articles and announcements, if any, the condominium association is required to publish or normally publishes, nor in what context the beneficiary would be required to translate and edit the work of other writers. There is also no indication that the petitioner's operations include the regular, routine publication of printed materials. Although the AAO notes the petitioner's submission of a copy of the "Tiara Times," the record does not indicate that the beneficiary would be involved with this publication, nor whether it is regularly published. Accordingly, the record does not establish that, at the time of filing, the petitioner's operations included the drafting and translation of corporate, financial and legal documents or the publication of materials requiring the beneficiary's services.

Without documentation to establish those operations and responsibilities requiring the services of the beneficiary, the record does not establish that the petitioner would employ the beneficiary as a writer, editor and translator. Going on record without supporting documentary evidence is not sufficient for the 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)). Therefore, the AAO

does not find the duties listed in the record to constitute a reliable description of the proffered position for the purposes of establishing the proffered position as a specialty occupation under any of the four alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not established that the tasks the beneficiary would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent, as required by the first criterion. Neither has it satisfied either prong of the second criterion – the degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can only be performed by a degreed individual – as, without a reliable job description, it cannot establish either that the proffered position is parallel to other degreed employment or that its tasks make it particularly complex or unique. Further, the petitioner has not proved that it has a history of employing degreed individuals to perform the duties, as required by the third criterion, or established these duties as being so specialized and complex that the knowledge required to perform them is usually associated with a degree, the requirement set forth in the fourth criterion.

Accordingly, the petitioner in the instant case cannot establish that it sought the beneficiary's services to perform in a specialty occupation. At the time of filing, a petitioner must prove that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has failed to establish that the proffered position qualifies as a specialty occupation.

In reaching its decision, the AAO has considered the evidence submitted by the petitioner to establish the proffered position as a specialty occupation under the first and second criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the petitioner has submitted extensive documentation to establish the proffered position of technical writer/translator as a specialty occupation based on its degree requirement, including materials from the *Handbook*, the Department of Labor's *Dictionary of Occupational Titles (DOT)* and *Occupational Information Network (O*Net)*. He also contends that the AAO has previously found the position of a technical writer/translator to qualify as a specialty occupation.

However, the proffered position described by the petitioner is not that of a technical writer/editor. Even if the record of evidence established that the petitioner would employ the beneficiary as a writer, the duties of the proffered position, as listed at the time of filing and amended by counsel, do not reflect the work of technical writers who draft such materials as equipment manuals, appendices or operating and maintenance instructions (*Handbook* at page 274). Although counsel's response to the director's second request for evidence stated that the beneficiary would draft financial and corporate documents, he offered no examples of such writing beyond the drafting of the petitioner's board minutes and resolutions. While this type of writing may be viewed by the petitioner as technical in nature, it is not comparable to the work performed by technical writers. Further, the record offers no evidence to establish that the proffered position's translation duties are those of a technical translator. While the AAO agrees that translation of corporate documents, particularly those drafted by attorneys, would require familiarity with certain specialized terminology, it finds no evidence on which to base a finding that the complexity of such documents would be commensurate with the type of technical writing discussed by the *Handbook*, and, therefore, require a technical translator.

As the discussion of the proffered position's duties in the record does not establish the proffered position as that of a technical writer/translator, neither the *DOT* or *O*Net* materials, nor counsel's citations of previous AAO decisions related to technical writers/translators are probative for the purposes of these proceedings. Further, the AAO does not consider the *DOT* or the *O*Net*, which has replaced it, to be persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both provide 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. With regard to counsel's contention that the AAO has approved H-1B petitions for employment similar to that of the proffered position, the AAO notes that approval of what appears to be a similar case does not provide a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

The petitioner has also submitted evidence, more than 20 Internet job advertisements, to establish the proffered position as a specialty occupation under the first prong of the second criterion – a degree requirement is common to the industry in parallel positions among similar organizations. However, these on-line announcements do not respond to the requirements of the first prong. None are published by or on behalf of organizations similar to the petitioner, a condominium association. Most of the announcements come from private sector businesses, such as manpower search firms, translating services, consulting businesses, technology firms, and computer/electronics retailers, while several were published by government offices. Others fail to identify the organizations seeking the advertised employment. Moreover, the announcements either describe employment that is not parallel to the proffered position or fail to provide a meaningful description of the work to be performed. Accordingly, the petitioner cannot establish the proffered position as a specialty occupation based on a standard degree requirement within its industry.

Counsel asserts that it is improper for CIS to take into account an employer's size and scope in determining whether the proffered position is a specialty occupation. While the size and scope of a petitioner's organization is not a factor in determining its need for a specialty occupation, it is appropriately considered when a petitioner contends that a degree requirement for a proffered position is standard within its industry. In such cases, the language of the second criterion specifically states that the degree requirement be proved to exist not only within the petitioner's industry, but also in parallel positions among similar organizations. In the instant case, the Internet advertisements submitted by the petitioner do not raise issues of size or scope. They fail to establish an industry-wide degree requirement because they do not come from organizations in the petitioner's industry, nor describe duties parallel to those described by the petitioner.

Counsel has also indicated his concern, which he expresses on appeal and throughout the record, regarding CIS' use of all four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to assess the proffered position. While counsel is correct that a petitioner need meet only one of the criteria to establish a proffered position as a specialty occupation, he has overlooked CIS' obligation to consider all four criteria before determining that a position does not qualify as a specialty occupation. For example, a position that does not meet the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) may yet qualify under one of the remaining three. As a result, CIS must alternatively explore all four regulatory avenues open to a petitioner before it may conclude that a petitioner has not met its burden of proof.

The AAO notes that the basis for its decision in the instant case differs from that of the director. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO, even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

For reasons previously discussed, the petitioner has not established the proffered position as a specialty occupation. Accordingly, the AAO will 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.