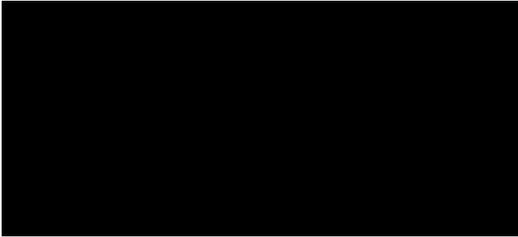


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U.S. Citizenship  
and Immigration  
Services

*DI*



FILE: EAC 04 032 54315 Office: VERMONT SERVICE CENTER

Date: NOV 21 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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the Vermont 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 sales and marketing company specializing in the repair and refurbishment of electronic products that seeks to employ the beneficiary as an electrical engineer 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition because the proposed position does not qualify as a specialty occupation.

The record 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 for evidence; (4) the director's denial letter; (5) counsel's motion to reopen/reconsider with supporting documentation; and (6) Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proposed position qualifies as a specialty occupation. To meet its burden of proof, a 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 proposed position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. CIS considers the specific duties of the proposed position along with the nature of the petitioning entity’s business operations. 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 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position, but whether the position actually requires 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 as the minimum for entry into the occupation.

The petitioner seeks the beneficiary's services as an electrical engineer. The petitioner originally listed the duties of the proposed position in the Form I-129 and the November 15, 2003 letter. In its response to the director’s request for evidence, the petitioner provided an amended list of duties, which counsel repeated in its motion to reopen and/or reconsider. According to the original petition, the beneficiary would perform the following duties: quality assurance, coordinating technical updates and quality control of computer monitor refurbishing and facility equipment, oversight of the collection, review, and analysis of repair and testing data, conducting monthly meetings with corporate representatives to present reports regarding production line to improve productivity.

In a request for further information, the director asked the petitioner to submit the following additional evidence: a detailed job description; evidence that a bachelor’s degree for the proposed position was an industry standard; the job posting for this position; the educational requirements of the person presently holding the position, and the names and educational backgrounds of all those who have held the position to demonstrate a company standard. In addition, the director requested an evaluation of the beneficiary’s credentials containing formal education only, not work experience.

In response, the petitioner submitted an amended list of job duties, a page from the Department of Labor (DOL) *Occupational Outlook Handbook (Handbook)* with the entry for electrical engineers, four of its job ads for the position of electrical engineer, an H-1B application with supporting documents and approval notice for an individual employed by the petitioner as an electrical engineer as well as three of that individual’s W-2 forms, the petitioner’s tax documents for 2002, a copy of the labor condition application, and a credentials evaluation that included education and experience.

The director determined that the proposed position was not a specialty occupation. The director found that the record did not establish that the proposed duties are so specialized or complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in electrical engineering.

On appeal, the petitioner asserts that the proposed position is a specialty occupation and submits additional evidence including: copies of contracts with three companies to refurbish and sell electronic products, W-2’s for two other individuals that the petitioner state it employs as electrical engineers, and the approval notice, the H-1B petition with supporting documentation, and W-2’s for an individual employed by the petitioner as an electrical engineer.

Based on the record, the AAO finds that the proposed position is not a specialty occupation. In addition, the AAO finds that the beneficiary is not qualified to perform the duties of a specialty occupation.

The petitioner has failed to establish that its proposed position meets any of the four criteria outlined in 8 C.F.R. §214.2(h)(4)(iii)(A). Therefore, the position is not a specialty occupation.

In its response to a request from the director for further detail regarding the duties of the proposed position, the petitioner did not provide sufficient detail and clarification to establish that the position is a specialty occupation. The duties the petitioner initially listed were general and not seemingly related to an electrical engineering position. The petitioner failed to explain what it meant by “quality control of computer monitor refurbishing” and “conducting monthly meetings with corporate representatives” and how these relate to what electrical engineers do. Instead, the petitioner added new duties it had not mentioned before, such as: applying “electrical engineering knowledge to the design and development of new products,” and “contributing to the intellectual property position of the company via invention and patent application.” It also added duties equally vague but with the words “electrical engineering” in them, such as: “solve electrical engineering problems at the component through system level,” “provide electrical engineering and technical support of products introduced into both the domestic and international markets,” and “provide electrical engineering support in the resolution of product complaints and/or safety issues.” In its motion to reopen/reconsider, the petitioner also expanded the nature of its business to include the “manufacture of numerous electronic products.” Up until this point, the petitioner had held itself out as a sales and marketing company that refurbished and repaired electronic products, but never as a manufacturing company. None of the evidence it submitted supports the petitioner’s assertion that it manufactures electronic products.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director’s request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

The AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) - a bachelor’s or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor’s degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Based on the record, the AAO finds that the proposed position is not that of an electrical engineer, but instead is that of an electrical and electronics engineering technician. The *Handbook* lists the following as duties performed by electrical and electronics engineering technicians:

Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control – inspecting products and processes, conducting tests, or collecting data...[they] help to design, develop, test, and manufacture electrical and electronic equipment such as communication equipment...and computers. They may work in product evaluation and testing, using measuring and diagnostic devices to adjust, test and repair equipment.

*Handbook* at 143-144.

These duties are similar to the following duties of the proposed position 1) quality assurance; 2) coordinating technical update; 3) quality control of computer monitor refurbishing and facility equipment; 4) oversight of collection, review, analysis of repair and testing data.

With respect to the educational requirements for engineering technicians, the *Handbook* states:

Although it may be possible to qualify for certain engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology.

*Id.* at 144.

Therefore, there is insufficient evidence in the record to establish that a bachelor's degree in electrical engineering is the normal requirement for entry into the proposed position.

The proposed position does not meet the two alternative prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - the 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. The petitioner has not provided any evidence that the requirement of a bachelor's degree is common in the electronics repair and refurbishing industry in parallel positions among similar companies. In addition, the employer has not shown that this particular engineering technician position is so complex or unique that only an individual with a bachelor's degree can perform it.

There is insufficient evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) - the petitioner normally requires a specific degree for the position. The petitioner submits the W-2 forms for two individuals that it states are employed as electrical engineers as well as the approval notice and corresponding H-1B petition for an individual employed by the petitioner as an electrical engineer. Since this documentation relates to electrical engineers and not engineering technicians, it does not establish that the petitioner normally requires its engineering technicians to have bachelor's degrees in electrical engineering.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that the petitioner establish 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. The duties originally listed for the proposed position parallel those in the *Handbook* for electrical and electronics engineering technicians. The petitioner has not established that the duties are more specialized and complex than what is normally encountered in the field. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree. The petitioner therefore fails to establish the fourth criterion.

The petitioner asserts that it employs other H-1B visa holders as electrical engineers and therefore, the instant petition should be granted. The AAO notes that the H-1B petition submitted on behalf of Chang Seon Choi is for an electronic production engineer. While the petitioner submitted the supporting letter filed with that case, the AAO does not have the complete record of proceeding. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO cannot determine whether the prior case was similar to the proposed position or was approved in error without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of the prior petition would have been erroneous. CIS is not required to approve 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).

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). In response to the director's request for more information, the petitioner submitted an educational equivalency evaluation. Even though the director specifically requested an evaluation that considers only formal education and not experience, the petitioner nevertheless submitted an evaluation that considered both. The evaluation states that the beneficiary's studies at a university in Korea are equivalent to two and one-half years of undergraduate study in the United States but that 14 years of work experience coupled with that education equals a bachelor's degree in industrial management and electrical engineering in the United States. No weight can be given to this evaluation since there is no evidence that the evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(I).

The petitioner has failed to establish that the proposed position is a specialty occupation and that the beneficiary is qualified to perform 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.