



U.S. Citizenship
and Immigration
Services

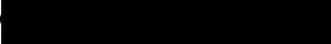
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FILE: WAC 03 174 52680 Office: CALIFORNIA SERVICE CENTER Date: **SEP 19 2005**

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 materials 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 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 a federal contractor licensed to sell goods and services to U.S. government agencies. It seeks to employ the beneficiary as a bidding analyst 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 qualifies as 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.

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 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 request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

On Form I-129 and an accompanying letter the petitioner described itself as a federal contractor, established in 1998, with 36 employees and gross annual income of over \$20 million. The goods and services provided by the petitioner include such items as electrical components and equipment; medical and surgical instruments, equipment and supplies; Army and defense equipment; accounting and calculating machines; and office supplies and devices. To facilitate further business growth the petitioner stated that it was seeking to hire the beneficiary as a bidding analyst. The duties of the position, and the percentage of the beneficiary's time they required, were listed by the petitioner as follows in its response to the RFE:

- 35%** Formulate policies and procedures for bid proposals and procurement of goods and services. Analyze price proposals, financial reports and other data and information to determine reasonable prices. Review orders or bid proposals and review requisitions for goods and services. Conduct cost factors used for preparing estimates for management and determining cost effectiveness.
- 25%** Participate in the formulation, development and/or recommendation to management of systems and/or programs. These include, but are not limited to, requests for quotes, bids and proposals from software and hardware manufacturers, suppliers and wholesalers. Prepare and receive bidding documents ready before the bidding date and have them sent to the corresponding federal agency. Consult with clients and vendors to discuss and formulate estimates and resolve bidding issues.
- 25%** Direct and coordinate workers' activities involving bid proposals and procurement of goods and services. Evaluate and monitor contract performance to determine need for changes and to ensure compliance with contractual obligations. Confer with the contract specialist or the person in charge of the order from the federal agency about the solicitation or proposal.
- 15%** Monitor or ask the federal agency's contact person about the progress of the bidding one week after the bidding date. Coordinate with the bank in reference to the bidding, transaction for the early release of funds and telegraphic transfer of the payment from the Department of the Treasury.

The petitioner stated that the beneficiary was qualified for the job by virtue of his bachelor of science in civil engineering from Far Eastern University in Manila, the Philippines, granted on May 25, 1983.

The director found that the position offered to the beneficiary did not qualify as a specialty occupation. The director determined that the duties of the proffered position fit within the occupational category of purchasers and buyers, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The director quoted information in the *Handbook* indicating that a baccalaureate level of training is not a normal industry-wide requirement for entry into the occupation. The evidence of record did not establish that the petitioner normally required applicants for the position to have at least a baccalaureate degree in the field, the director stated, or that the duties of the position and its level of responsibility indicated a complexity or authority beyond that normally encountered in the occupational

field. The director concluded 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 determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also scrutinizes 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, Inc. v. Reno, id.*, at 1165-66.

On appeal counsel states that the petitioner is diversifying its business operations by including engineering services and materials required in their various contracts, and therefore needs an individual with an academic and employment background in engineering – like the beneficiary – to perform the job of an "engineering materials bidding analyst." The job would entail researching available materials on the market, testing and analyzing them, performing cost comparisons, and purchasing appropriate products, counsel indicated, as well as setting up systems for billing and collections and budget planning and control. According to counsel, the director misinterpreted the DOL *Handbook's* information about the educational requirements of purchasing managers, buyers, and purchasing agents. In counsel's view, the *Handbook* confirms that the occupation requires a college degree. Counsel also submits a list of eleven individuals with baccalaureate degrees in various disciplines whom he asserts are current employees of the petitioner with "previously approved cases" for "the same or related positions."

Counsel's description of the proffered position as an "engineering materials bidding analyst" (emphasis added) and the additional duties discussed in the appeal, such as setting up systems for billing and collections and budget planning and control, represent an expansion of the position and its duties from what was described in the initial petition and in the petitioner's subsequent correspondence with the service center. CIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A petitioner may not make material changes to its petition in an effort to make a deficient petition conform to legal requirements. See *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998). "The AAO cannot consider facts that come into being only subsequently to the filing of the petition." *Id.* at 176. If significant changes are made to the petition and new facts come into play, therefore, a new petition must be filed.

The AAO agrees with the director that the duties of the proffered position reflect those of a purchaser or buyer, as described in the DOL *Handbook's* occupational category of "purchasing managers, buyers, and purchasing agents." As explained in the *Handbook*, 2004-05 edition, at 61:

Purchasing managers, buyers, and purchasing agents seek to obtain the highest quality merchandise at the lowest possible purchase cost for their employers. In general, *purchasers* buy goods and services for use by their company or organization, whereas *buyers* typically buy items for resale. Purchasers and buyers determine which commodities or services are best, choose the suppliers of the product or service, negotiate

the lowest price, and award contracts that ensure that the correct amount of the product or service is received at the appropriate time

Purchasing managers, buyers, and purchasing agents evaluate suppliers on the basis of price, quality, service support, availability, reliability, and selection Once all of the necessary information on suppliers is gathered, orders are placed and contracts are awarded to those suppliers who meet the purchaser's needs.

With respect to the educational requirements of the occupation, the *Handbook* states the following:

Qualified persons may begin as trainees, purchasing clerks, expeditors, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesaling and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.

Educational requirements tend to vary with the size of the organization. Large stores and distributors, especially those in wholesale and retail trade, prefer applicants who have completed a bachelor's degree program with a business emphasis. Many manufacturing firms put yet a greater emphasis on formal training, preferring applicants with a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences. A master's degree is essential for advancement to many top-level purchasing manager jobs.

Id. at 62-63. Thus, the *Handbook* indicates that a variety of backgrounds can be suitable for a purchaser or buyer, depending on the particular position. Smaller companies tend to be more flexible. They may "prefer" a college degree, but do not always require one, or may not require a degree in a specific specialty. Furthermore, the *Handbook* describes other possible routes to a purchaser or buyer position, such as promotion through the ranks after initial employment at a lower position that does not require a degree. The AAO notes, in this regard, that the proffered position in this case is not managerial in nature, but rather an entry-level position alongside four other bidding analyst positions already in existence in the petitioner's organization as part of its "purchasing operations." (*See* petitioner's organizational chart.)

Based on the foregoing analysis, the AAO determines that a baccalaureate or higher degree in a specific specialty is not the minimum requirement for entry into the proffered position. Accordingly, 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 to qualify as specialty occupation, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor has the petitioner shown that the bidding analyst position is so complex or unique that it can only be performed by an individual with a degree in a specific specialty. Thus, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner has furnished the names of eleven individuals it claims are employees with “previously approved cases” for “the same or related positions.” There is no documentation in the record, however, to substantiate any of the petitioner’s assertions. There is no documentary proof that the listed individuals are employees of the petitioner, that they were approved for H-1B classification, that their positions are the same or similar to the proffered position in this case, or that they have the educational degrees identified by the petitioner. Simply going on record without supporting documentary evidence does not satisfy the petitioner’s burden of proof. *See 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)). Moreover, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO determines that record fails to show that the petitioner normally requires a degree in a specific specialty 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 record does not establish that the duties of the bidding analyst position are so specialized and complex that they require knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the proffered position does meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The record does not establish 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).

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.