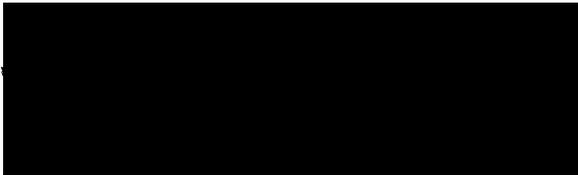




U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: LIN 04 144 51710 Office: NEBRASKA SERVICE CENTER Date: **AUG 25 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. The director subsequently issued a notice of intent to revoke and, after the petitioner failed to respond, issued a decision revoking the approval of the 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 describes itself as a mechanical engineering company. It seeks to employ the beneficiary as a mechanical 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director revoked approval of the petition on the ground that the petitioner failed to resolve discrepancies in the record as to when its business began operations and whether the work the beneficiary would be doing 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.

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 notice of intent to deny; (3) the director's decision revoking the previously approved petition; and (4) Form I-290B, a letter from the petitioner, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its Form I-129 the petitioner described itself as a mechanical engineering company, established in 1993, with 20 employees and gross annual income of \$800,000. The petitioner indicated that it wished to hire the beneficiary for three years, at an annual salary of \$44,595, as a mechanical engineer. The duties of the position were listed as follows:

- Develop the mechanical HVAC [heating, ventilation, air conditioning] systems, including the geothermal heating and cooling system.
- Make sure the HVAC systems perform as designed to maintain space temperature and humidity set points, and meet ventilation (fresh air) requirements.
- Recommend design modifications to eliminate machine or system malfunctions.
- Investigate equipment failures and difficulties to diagnose faulty operation and to make recommendations to maintenance crew.

The beneficiary is qualified for the proffered position, the petitioner declares, by virtue of his bachelor's degree in mechanical engineering, solid design, from Shahid Bahonar University in Iran on August 28, 2002. According to the report of an academic credentials evaluation service in Miami Beach, Florida, the beneficiary's education is equivalent to a bachelor's degree in mechanical engineering from a U.S. college or university.

After initially approving the petition in April 2004, the director sent the petitioner a notice of intent to revoke in February 2005 stating that additional information had been received from the U.S. Consulate in Dubai, U.A.E. which conflicted with information provided in the petition. The director cited as an example the certificate of incorporation provided at the beneficiary's consular interview indicating that the petitioner was incorporated in May 2004, which conflicted with the petitioner's statement in the Form I-129 that it was established in 1993 and had 20 employees at the time of filing in April 2004. The petitioner was advised to submit additional evidence within 30 days demonstrating its business activities – including photos of the premises; copies of its business permit(s); copies of its federal quarterly tax returns (Form-941) showing that it has employees; a copy of its previous year's state unemployment compensation report form; and a detailed description of the duties of the proffered position, including whether they would be performed in-house or for outside clients, and whether they meet one of the criteria of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner did not respond to the notice of intent to revoke within the required 30 days, whereupon the director issued a new decision on April 1, 2005 revoking the previous approval.

The petitioner has filed a timely appeal. In general, the director's decision to revoke the approval of a petition will be affirmed, notwithstanding the submission of evidence on appeal, when a petitioner fails to offer a timely explanation or rebuttal to a properly issued notice of intent to revoke. *See Matter of Arias*, 19 I&N Dec. 568, 569 (BIA 1988). In the instant appeal the petitioner addresses the merits of the notice of intent to revoke, but offers no explanation for its failure to address these issues in a timely response to the director's notice. Nevertheless, the AAO will consider the evidence submitted on appeal.

The petitioner's president states in his appeal letter that his business is engaged in selling and repairing Kirby products, that he needs a supervisor to head the repair department, and that he needs a mechanical engineer "to provide creative inputs and design to share with the factory in order to promote the quality of products and . . . lighter materials." The petitioner submits copies of 22 "Kirby Independent Dealer Agreements," eleven of which are dated between November 2004 and March 2005 and the other eleven of which are undated,

which describe the petitioner as an independent factory distributor of Kirby vacuum cleaners, accessories and attachments to independent Kirby dealers, who resell them to consumers under the terms of the dealer agreements. Also submitted on appeal is an undated statement from an accounting company that the petitioner was incorporated in December 1993 and has been in business continually since then, as well as copies of the first page of the individual federal income tax returns of the petitioner's president from 1994 through 2004. Only the returns from 1994 to 1999 include W-2 forms identifying the petitioner as the president's employer.

The evidence submitted on appeal conflicts with the information originally furnished in the petition about the nature of the petitioner's business activities and the duties of the proffered position. Whereas the petitioner described itself as a mechanical engineering company in the petition, the materials submitted on appeal show that it is a vacuum cleaner distributor. Whereas the petitioner stated in the petition that the beneficiary would be designing and maintaining heating, ventilation, and air conditioning systems, on appeal the petitioner indicates that the beneficiary would have supervisory responsibility for the repair of Kirby vacuum cleaners and suggesting design improvements to the manufacturer. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner to clarify the nature of its business and the duties of the proffered position. Moreover, doubt cast on any aspect of the petitioner's evidence reflects on the reliability of the petitioner's remaining evidence. *See id.*

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (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*, 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, Inc. v. Reno, id.*, at 1165-66.

As described in the *Handbook*, 2006-07 edition, at 133-36, engineering is a broad occupation with numerous specialty areas – including mechanical engineering:

Engineers apply the principles of science and mathematics to develop economical solutions to technical problems

Engineers consider many factors when developing a new product

In addition to design and development, many engineers work in testing, production, or maintenance. These engineers supervise production in factories, determine the causes of component failure, and test manufactured products to maintain quality. They also estimate the time and cost to complete projects

Engineers use computers extensively to produce and analyze designs; to simulate and test how a machine, structure, or system operates; and to generate specifications for parts. Many engineers also use computers to monitor product quality and control process efficiency

Most engineers specialize

Mechanical engineers research, develop, design, manufacture, and test tools, engines, machines, and other mechanical devices. They work on power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines, as well as power-using machines such as refrigeration and air-conditioning equipment, machine tools, material handling systems, elevators and escalators, industrial production equipment, and robots used in manufacturing. Mechanical engineers also design tools that other engineers need for their work Mechanical engineers may work in production operations in manufacturing or agriculture, maintenance, or technical sales; many are administrators or managers.

Mechanical engineers require a degree in engineering, the *Handbook* indicates, which makes them a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). *See id.* at 137.

The evidence of record, however, does not establish that the duties of the proffered position fit the *Handbook's* description of a mechanical engineer. As originally described in the petition, the duties of the proffered position appear to accord with the *Handbook's* description of a heating, air-conditioning, and refrigeration mechanic and installer. That occupation is described, in pertinent part, as follows:

[H]eating, air-conditioning, and refrigeration mechanics and installers – also called technicians – install, maintain, and repair such systems

[T]echnicians must be able to maintain, diagnose, and correct problems throughout the entire system. To do this, they adjust system controls to recommended settings and test the performance of the entire system using special tools and test equipment.

Technicians often specialize in either installation or maintenance and repair, although they are trained to do both. They also may specialize in doing heating work or air-conditioning or refrigeration work

Technicians follow blueprints or other specifications to install oil, gas, electric, solid-fuel, and multiple-fuel heating systems and air-conditioning systems

After a furnace or air-conditioning unit has been installed, technicians often perform routine maintenance and repair work to keep the systems operating efficiently

Handbook, 2006-07 edition, at 562. With respect to the educational requirements of the occupation, the *Handbook* states as follows:

Because of the increasing sophistication of heating, air-conditioning, and refrigeration systems, employers prefer to hire those with technical school training or those who have

completed an apprenticeship. Some mechanics and installers, however, still learn the trade informally on the job.

Many secondary and postsecondary technical and trade schools, junior and community colleges, and the U.S. Armed Forces offer six-month to two-year programs in heating, air-conditioning, and refrigeration

Id. at 563. Thus, it is clear that a baccalaureate degree in engineering or a related specialty is not the normal minimum requirement for entry into the occupational field of heating, air-conditioning, and refrigeration mechanics and installers, as required for it to meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The evidence submitted on appeal appears to indicate that the proffered position is involved with vacuum cleaner repair and design. The information provided by the petitioner is so vague and conflicting, however, that it is impossible to gauge exactly what tasks the beneficiary would perform in the context of the petitioner's vacuum cleaning wholesale business. In the RFE the director advised the petitioner to submit a detailed description of the proffered position's duties and whether they would be performed in-house or for outside clients. The petitioner's reply, on appeal, is not responsive to the RFE. It does not specify whether the duties are to be performed in-house or for outside clients, and its short description of the job duties confuses rather than clarifies the nature of the work. In particular, the petitioner has failed to show that the duties require a degree in engineering or a related specialty to perform.

In determining the nature of a particular position and whether it qualifies as a specialty occupation, the duties actually performed are determinative, not the title of the position. While the petitioner claims that a baccalaureate degree in mechanical engineering is required for the proffered position, the petitioner must establish that its degree requirement is required by the performance demands of the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). In this case the evidence fails to demonstrate that the performance demands of the proffered position require the beneficiary to have a degree in mechanical engineering.

For the reasons discussed above, the record does not establish that a baccalaureate degree in a specific specialty is the normal minimum requirement for entry into the proffered position, as required for it to 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, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a bachelor's degree requirement in mechanical engineering is common to the petitioner's 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). 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 mechanical engineering, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to 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 mechanical engineering or its equivalent for the proffered position, as required for the position 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 documentation of 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 engineering. As previously discussed, the petitioner has not provided a sufficiently detailed and consistent description of the proffered position's duties to demonstrate that the beneficiary would actually perform the services of a mechanical engineer. As far as the record shows, the duties of the position could be performed by an individual without a baccalaureate level knowledge of 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).

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.