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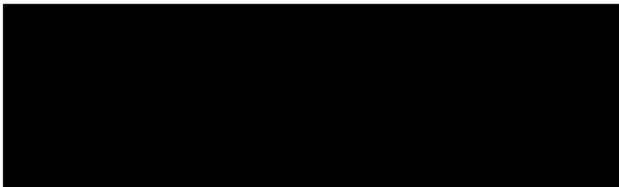
FILE: SRC 04 168 50342 Office: TEXAS SERVICE CENTER Date: OCT 05 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 provides custom-designed, manufactured, and installed metalwork products. It seeks to employ the beneficiary as an ornamental metalworker designer. Accordingly, the petitioner endeavors to classify the beneficiary 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).

On February 24, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the director erred when making her decision. The issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation.

The record contains: (1) the Form I-129 filed May 27, 2004 and supporting documentation; (2) the director's September 24, 2004 request for evidence (RFE); (3) counsel's December 7, 2004 response to the director's RFE with documentation; (4) the director's February 24, 2005 denial decision; and, (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

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.

The petitioner seeks the beneficiary's services as an ornamental metalworker designer. In a May 21, 2004 letter appended to the Form I-129 petition, the petitioner indicated that the beneficiary would have the following duties:

Designs ornamental metal items and tooling for fabrication, utilizing knowledge of properties of metal, fabrication techniques, principles of design, and artistic talent. Select[s] designs from pattern book, alters[,] or originates designs according to customer specifications. Draws detail sketches and prescribes fabricating techniques. Forges tools, such as peening hammers, bending jigs, and scroll forms, using forge, machine tools, welding equipment, and hand forming tools. May sculpture [sic] plastic patterns to form molding castings. Builds products from original design or working models.

The petitioner's Form I-129 indicated that it had been established in 2004 and employed one person.

On July 21, 2004, the director observed that the ornamental metalwork designer position that the petitioner described is not a specialty occupation. The director requested, among other things, that the petitioner submit evidence that it is the industry standard among similar organizations to require a baccalaureate degree and that the petitioner had hired individuals in the past to perform this position and had required a baccalaureate degree to perform the duties of the position.

In a December 7, 2004 response, counsel requested that the director note that the education for the position of commercial and industrial designers as listed in the *Occupational Information Network* indicated that most of these occupations require a four-year bachelor's degree, but some do not. Counsel also indicated that the petitioner had not been in business for a year when the petition was filed, implying that the petitioner had not previously hired personnel for the position. Counsel also attached a copy of the petitioner's bank statement, photographs of the petitioner's premises and equipment, and a list of the petitioner's suppliers.

On February 24, 2005, the director denied the petition. The director observed that counsel's response to the RFE did not provide evidence of the industry standard among similar organizations for the position of

ornamental metalworker designer. The director determined that the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* referenced the position of ornamental ironworkers in its section on structural and reinforcing iron and metal workers. The director noted that the *Handbook* reported that most employers recommended a three or four year apprenticeship and evening classroom instruction as the best way to learn this trade and that a high school diploma may be preferred. The director also determined that the duties depicted in the record did not appear so specialized and complex as to require a baccalaureate or higher degree in a specific specialty. The director also noted that the petitioner had not established that it normally requires a bachelor's degree to perform the duties of an ornamental metalwork designer. The director concluded that the petitioner had failed to establish that the proffered position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the director should have focused on the *DOT's* description for an ornamental-metalworker designer or the *Handbook's* description of a commercial or industrial designer instead of focusing on the *Handbook's* description of structural and reinforcing iron and metal working positions. Counsel contends that the director neglects to consider the element of designing in the proffered position. Counsel provides the description from the *DOT* found at 142.061-034 that includes the same language the petitioner listed as the duties of the proffered position.

Counsel's assertions are not persuasive. Preliminarily, the AAO notes that it does not consider the *DOT* or *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *DOT* and *O*NET* 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. Moreover, the AAO observes that the petitioner's use of the *DOT's* description for the position of an ornamental metalwork designer as the description of the proffered position does not provide the necessary insight into the actual duties of the proffered position. Repeating the same general terms as those used by the *DOT* does not sufficiently describe the actual position or adequately relate the duties specifically to the petitioner's particular business interests. Describing a trade or occupation is insufficient to establish that the duties of the proffered position as it relates to the petitioner's business require the attainment of a baccalaureate or higher degree in a specific field of study.

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed for this position rather than describing the occupation.

The director determined that the proffered position is similar to the description found in the *Handbook* for ornamental ironworker who: "install stairs, handrails, curtain walls (the nonstructural walls and window frames of many large buildings), and other miscellaneous metal after the structure of the building has been completed." Counsel contends that this description does not include the design element of the proffered position and contends that the *Handbook* description of a commercial or industrial designer is a better fit for the proffered position. The *Handbook* reports that a commercial or industrial designer will: "combine the fields of art, business, and engineering to design the products used every day by businesses and consumers. These designers are responsible for the style, function, quality, and safety of most manufactured goods."

As observed above, however, the petitioner recites the elements of the *DOT's* description of the occupation of an ornamental-metalworker designer and does not provide further descriptive language of the proffered position's actual duties. The record does contain the first page of the petitioner's 2004 business plan that includes photographs of handrails, gates, and iron fences as examples of the petitioner's products. The photographs depict simple ornamental designs. The AAO declines to speculate on the origin of those designs, whether the designs are original, or whether the metalwork in the pictures pertains to the proffered position. The record is insufficient to establish that the duties of the proffered position, including any potential design duties, are more similar to the *Handbook's* description of the occupation of a commercial or industrial designer than that of the occupation of an ornamental metalworker.

The *Handbook* reports that most employers recommend a three or four-year apprenticeship consisting of on-the-job-training and evening classroom instruction as the best way to learn the trade of ornamental-metalworker. Upon review of the totality of the record, including the generic description of the proffered position's duties, the petitioner has not established that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. The petitioner has not provided any evidence of an industry-wide educational standard for parallel positions among similar organizations. Neither has the petitioner provided documentary evidence that the occupation is distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. The record is simply deficient in this regard. Going on the record without supporting documentary evidence is not sufficient for 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 190 (Reg. Comm. 1972)). The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(2).

As counsel notes, the petitioner has only been operating a year and as the Form I-129 indicates has only one employee. The petitioner does not claim that it has a history of recruiting and hiring degreed candidates for the proffered position. As such, the AAO cannot review the petitioner's past employment practices to determine that the petitioner normally requires a degree or its equivalent for the position. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's description of the duties of the proffered position parallels the description of duties of an ornamental metalwork designer provided by the *DOT*. The lack of a meaningful description for the proffered position precludes the petitioner from establishing that any tasks associated with the proffered position require the application of specialized or complex knowledge associated with the attainment of a baccalaureate degree or higher degree. In this matter, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petitioner has not established that the proffered position is a specialty occupation.

Although a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation, the AAO will briefly address the beneficiary's qualifications. The AAO finds that the record is insufficient to establish that the beneficiary has attained the equivalent of a baccalaureate degree. The director referenced the lack of the beneficiary's qualifications to perform services in a specialty occupation, noting that the beneficiary's prior employment letters and the beneficiary's resume did not show that the beneficiary held positions including progressively more responsible work experience. The director noted that the beneficiary's resume indicated that the beneficiary had performed basically the same duties for the last 36 years. On appeal, counsel for the petitioner takes issue with the director's determination, noting that the petitioner had provided an evaluation from Foundation for International Services, Inc. (FIS), a reputable credentials evaluation service. Counsel further contends that a November 13, 1995 memorandum issued by the Office of Examinations to all Service Center directors indicated that credential evaluations from reputable services should not be challenged unless the evaluation contained obvious errors.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through

progressively responsible positions directly related to the specialty.

The petitioner in this matter does not claim that the beneficiary meets the criteria found at 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1), (2), or (3), but instead has qualified by meeting the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Counsel in this matter relies on the May 18, 2004 evaluation report issued by FIS. The evaluator in this instance reviewed the beneficiary's resume, a document listing the beneficiary's work experience from 1973 to 2002, and recommendation letters. The evaluator found that as a result of the beneficiary's work experience, the beneficiary had attained an educational background equivalent to that of an individual with a bachelor's degree in fine arts with a specialization in metals. The evaluator specifically noted that the evaluation was for immigration purposes only and was not intended for continuing education or other uses.

However, when attempting to establish that a beneficiary has the equivalent of a degree based on his or her combined education and employment experience (or in this matter work experience alone) under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational

credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The FIS evaluation does not include evidence that the evaluator is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. Instead, the evaluator seems to suggest that she does not have such authority as she notes that the evaluation cannot be used for continuing education or anything other than immigration. Thus, the evaluation submitted in this matter is not evidence that the beneficiary has a degree equivalent based on his work experience.

The AAO is left to consider whether the beneficiary's work experience is sufficient to establish that he is qualified to perform the duties of the specialty occupation. In this matter it is not. When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. The record contains no such evidence. The petitioner has not provided documentary information sufficient to establish that the beneficiary has the equivalent of a four-year degree in the specialty.

The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.