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FILE: WAC 02 175 52872 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 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 denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or consider. The motion will be granted. The petition will be denied.

The petitioner operates a nursing facility for developmentally disabled adults. It seeks to employ the beneficiary as a mechanical engineer. The petitioner, therefore, seeks 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).

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, received at the service center on May 2, 2002; (2) the director's November 5, 2002 request for additional evidence; (3) the petitioner's December 26, 2002 response to the director's request; (4) the director's March 3, 2003 denial letter; (5) the Form I-290B, received at the service center on April 2, 2003; (6) the AAO's June 2, 2004 summary dismissal of the appeal; and (7) the petitioner's July 12, 2004 motion to reopen or consider and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO summarily dismissed the appeal on June 2, 2004, citing 8 C.F.R. § 103.5(a)(1)(v), which states that an appeal shall be summarily dismissed if the party fails to specifically identify any erroneous conclusion of law or statement of fact for the appeal. The AAO noted that the record contained no appellate brief or any other additional evidence. As such, the AAO found that counsel had failed to specifically identify any erroneous conclusion of law or statement of fact and summarily dismissed the appeal.

Counsel filed the Form I-290B on April 2, 2003, indicating in section two of the form that she would send a brief and/or evidence to the AAO within 30 days. Counsel sent the brief to the California Service Center, and the brief was not matched to the file.<sup>1</sup> On motion, counsel submits a copy of the brief she sent to the California Service Center, along with tracking information from Federal Express to confirm that the service center received it on April 30, 2003. The AAO will accept counsel's submission and adjudicate the petition on its merits.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. In denying the petition, the director likened the duties of the proposed position to those of an engineering technician.

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 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:

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<sup>1</sup> The version of the Form I-290B in use at the time the appeal was filed instructed the appellant to file any brief filed after the filing of the Form I-290B directly with the AAO.

[A]n 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 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 proposed position.

The petitioner seeks to employ the beneficiary as a mechanical engineer. According to the petitioner's April 24, 2004 letter of support:

[The petitioner] is engaged in the business of [running an] intermediate and skilled nursing facility for developmentally disabled adults. Our corporation [has] just acquired the 24,384 square feet [sic], 120-bed capacity building and facility. The 2 storey [sic] building was originally built in the early 1950s. It is now old and dilapidated. It is in immediate need of general renovation and repair. Its mechanical and electromechanical systems are outmoded and require upgrading and/or replacement with modern applications. . . .

We are now in need of the full[-]time services of a Mechanical Engineer to handle the renovation of our building facility, particularly the mechanical and electromechanical systems of the project.

The petitioner stated that the beneficiary would be responsible for the total conversion of heating and air conditioning systems of the renovation project.

In its December 26, 2002 response to the director's request for additional evidence, the petitioner offered additional evidence regarding the beneficiary's specific duties during the proposed three-year renovation project. According to this letter, the beneficiary would spend 25 percent of his time researching, planning,

designing, and implementing the mechanical and electromechanical systems of the project, including the schematic transformation of electrical and fire safety devices; 25 percent of his time researching and analyzing data, such as design proposals and specifications, in order to determine the feasibility of designs or applications; 20 percent of his time directing and coordinating activities involved in the operation, application, installation, and repair of mechanical and electromechanical systems; 15 percent of his time overseeing the installation, operation, maintenance, and repair of equipment for centralized heat, gas, water, and steam systems; and 15 percent of his time directing and coordinating the installation activities so as to ensure conformance with engineering design and management specifications.

In determining whether a proposed 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 baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. In its adjudication of this appeal, the AAO consulted the 2006-2007 edition of the *Handbook*.

In reaching its conclusion regarding the degree requirements of the proposed position, the AAO has compared the proposed position's duties against those described for a range of professions. The AAO disagrees with the petitioner's characterization of the duties of its proposed position as those of a mechanical engineer.

According to the *Handbook*, engineers apply the principles of science and mathematics to develop economical solutions to technical problems. Regarding the duties of mechanical engineers, the *Handbook* states the following:

**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 engineering is one of the broadest engineering disciplines. Mechanical engineers may work in production operations in manufacturing or agriculture, maintenance, or technical sales; many are administrators or managers.

The duties proposed here do not rise to the level of those performed by mechanical engineers. Assuming responsibility for the conversion of heating and air conditioning systems of a building undergoing renovation, the duties, are not the duties of a mechanical engineer. As noted by the *Handbook*, mechanical engineers research, develop, design, manufacture, and test mechanical devices. While the beneficiary would have some research and testing duties, they would not involve the type of original researching and testing contemplated by the *Handbook*.

As noted previously, in reaching its conclusion regarding the degree requirements of the proposed position, the AAO has compared its duties against those described for a range of professions. This review

has found that the duties of the proposed position are listed among the duties of construction managers and heating, air conditioning, and refrigeration technicians.

In pertinent part, the *Handbook* states the following regarding the duties of construction managers:

Construction managers plan, direct, and coordinate a wide variety of construction projects . . . Construction managers may oversee an entire project or just part of a project and, although they usually play no direct role in the actual construction of a structure, they typically schedule and coordinate all design and construction processes. . . .

The *Handbook* offers the following information regarding the duties of heating, air conditioning, and refrigeration technicians:

Heating and air-conditioning systems control the temperature, humidity, and the total air quality in residential, commercial, industrial, and other buildings . . . Heating, air-conditioning, and refrigeration mechanics and installers—also called technicians—install, maintain, and repair such systems.

Thus, based upon its reading of the *Handbook*, the AAO concludes that the proposed position, as described by the petitioner in its letter of support and in response to the director's request for additional evidence, combines the duties of construction managers and heating and heating, air conditioning, and refrigeration technicians.

Having concluded that the duties of the proposed position combine those of construction managers and heating and heating, air conditioning, and refrigeration technicians, the AAO next turns to the *Handbook* to determine whether these occupations normally require applicants for employment to have the minimum of a baccalaureate or higher degree, or its equivalent. The *Handbook* states the following regarding the educational requirements for construction managers:

Persons interested in becoming a construction manager need a solid background in building science, business and management, as well as related work experience within the construction industry. . . .

For construction manager jobs, employers increasingly prefer to hire individuals with a bachelor's degree in construction science, construction management, or civil engineering, as well as industry work experience. Practical industry experience is very important, whether it is acquired through an internship, a cooperative education program, or work experience in a trade or another job in the industry.

Traditionally, persons advanced to construction management positions after having substantial experience as construction craftworkers—carpenters, masons, plumbers, or electricians, for example—or after having worked as construction supervisors or as owners of independent specialty contracting firms overseeing workers in one or more construction trades. However, as construction processes become increasingly complex, employers are placing a growing importance on postsecondary education.

The statement that employers “increasingly prefer” a bachelor’s degree is not synonymous with the “normally required” standard imposed by the first criterion. Nor does the statement that employers are placing a growing importance on postsecondary education satisfy the first criterion, either, as postsecondary education does not necessarily equate to a bachelor’s degree; the *Handbook* notes that a number of 2-year colleges offer construction management programs.

For heating, air conditioning, and refrigeration technicians, the requirements as discussed by the *Handbook* are 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.

In that the *Handbook* finds no baccalaureate or higher degree, or its equivalent, to be required for employment in any of the occupations whose duties comprise the proposed position, the AAO concludes that the position does not qualify as a specialty occupation on the basis of a degree requirement under the first criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as 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 normally requires a degree or its equivalent for the position; or 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.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by the petitioner, which counsel contends establish the petitioner’s degree requirement as the normal minimum entry into the position. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

Counsel has submitted no evidence to demonstrate that any of these job postings are from companies “similar” to the petitioner, a company that operates a nursing facility for developmentally disabled adults with 14 employees and an undisclosed annual income. For example, there is no evidence that the advertisers are similar to the petitioner in size and scope of operations, business efforts, and expenditures. Simply going on 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 Dec. 190 (Reg. Comm. 1972)).

Carter & Burgess is a construction management company. According to its posting, Mitsubishi Electric & Electronics USA, Inc., is “a world leader in the research, engineering, manufacturing, and marketing of electrical and electronic equipment.” MASS Systems manufactures lightweight high discharge fire extinguishing systems and aftermarket products for military and commercial aircraft. DRS Technologies supplies electronic defense systems. MKK is a mechanical and electrical design and consulting services firm.

No information was submitted regarding the business operations of the Shupack & Michaels Group, Inc., Wyeth, Murry Ridge, Yoh Engineering, the unnamed company in Tempe, Arizona advertising its vacancy through “General Employment,” the unnamed company in the Anaheim-Huntington Beach, California, area, the unnamed company in Newberg, Ohio, or the unnamed company in Nashua, New Hampshire.

Thus, while relevant to this proceeding, these job postings submitted by the counsel are insufficient to establish the petitioner’s degree requirement as an industry norm in parallel positions among similar organizations, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of the second criterion requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. However, there has been no demonstration that the proposed position is more complex or unique than the general range of construction managers and heating, air conditioning, and refrigeration technician positions in other, similar organizations, which would not require a degreed individual. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from or more complex than the general range of such positions.

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner’s ability to meet the third criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas.

However, no such evidence has been presented. Accordingly, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position’s duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty occupation. The AAO notes that there is no evidence of record establishing the renovation project or the complexity of the duties in relation to the project. Simply going on 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 Dec. 190 (Reg. Comm. 1972)).

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of construction managers and heating, air conditioning, and refrigeration technicians in other, similar organizations.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will not disturb the director's denial of the petition. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial.

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 motion is dismissed. The petition is denied.