

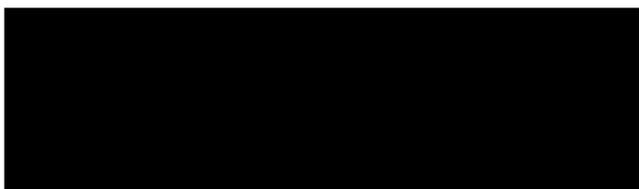
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U.S. Citizenship
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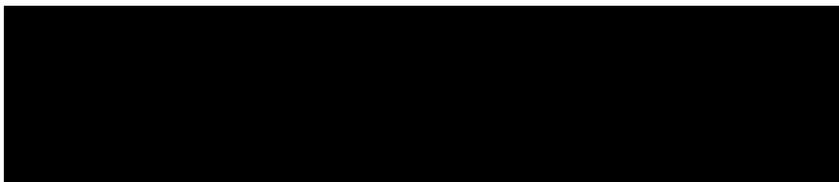
FILE: WAC 06 261 50258 Office: CALIFORNIA SERVICE CENTER Date: **JAN 25 2008**

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, California Service Center, denied the nonimmigrant visa petition. 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 plumbing services. It claims to employ four personnel and to have \$533,184 in gross annual income. It seeks to extend the employment of the beneficiary as a service mechanic. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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, determining that the proffered position is not a specialty occupation. On appeal, counsel for the petitioner asserts that the director's decision is in error as the beneficiary was previously approved for H-1B classification and there has been no material change in the proffered position.

The record of proceeding before the AAO contains: (1) the Form I-129 filed August 23, 2006 with supporting documentation; (2) the director's December 5, 2006 request for additional evidence (RFE); (3) counsel for the petitioner's February 19, 2007 response to the director's RFE; (4) the director's March 19, 2007 denial letter; and (5) the Form I-290B, with counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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 a service mechanic. The petitioner outlined the job duties of the position in an August 2, 2006 letter appended to the petition. The petitioner indicated that the beneficiary would: "continue his responsibilities of assembling, installing, and repairing pipes, fixtures of heating, water, and drainage according to specification and plumbing codes, under the direction of and supervision of a licensed plumber."

In response to the director's RFE, the petitioner stated:

First and foremost, he performs plumbing installation, pipelaying, and maintenance at our customers' locations. As he is not a licensed plumber in the State of Maryland, he works under the supervision of a Master Plumber. In addition to his primary responsibilities, [the beneficiary] carries out minor repairs for [the] company's motor pool, consisting primarily of service vans.

* * *

Furthermore, he acts in a managerial role, which he performs as a *de facto* supervisor of two employees. [The beneficiary] is also involved with preparing estimates for our clients and inventory control to ensure supply availability for the company's job orders.

On March 19, 2007, the director denied the petition. The director noted that the petitioner's description of duties corresponded to the duties of a plumber. The director referenced the Department of Labor's *Occupational Outlook Handbook's (Handbook)* discussion of educational requirements for the position of a plumber and the *Handbook's* indication that a baccalaureate level of education in a specific specialty is not a normal, minimum requirement for entry into the occupation. The director noted that the petitioner had not submitted evidence to show that a degree requirement is common to the industry in parallel positions among similar organizations and had not provided detail as to any unique or complex elements of the proffered position. The director acknowledged the petitioner's desire to hire an individual with a bachelor's degree but found that the petitioner's description of duties did not demonstrate that the position required the theoretical and practical application of a

body of highly specialized knowledge. The director also determined that the petitioner had not provided evidence that the nature of the duties of the proffered position is more complex or specialized than the routine duties of a plumber. The director concluded that the petitioner had not satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner asserts that the prior approval of the beneficiary in an H-1B classification as a service mechanic requires the approval of the extension of the beneficiary's status. Counsel references an April 23, 2004 memorandum authored by William R. Yates, USCIS Associate Director for Operations, on the subject of extensions to support his assertion.

Counsel's assertion is not persuasive. The AAO notes that prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The referenced memorandum does not require an approval of an extension petition when the facts of the record do not demonstrate eligibility pursuant to the statute and regulations. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the prior approval would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. CIS is not required to approve applications or 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Although counsel for the petitioner's only basis for appeal is the prior approval of the beneficiary in H-1B classification, the AAO will briefly address the deficiencies of the petition in this matter. To determine whether a particular job qualifies as a specialty occupation, CIS does not rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, 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 the minimum for entry into the occupation, as required by the Act.

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. As the director noted, the 2006-2007 edition of the *Handbook* reports:

Pipelayers, plumbers, pipefitters, and steamfitters enter into the profession in a variety of ways. Most residential and industrial plumbers get their training in career and technical schools and community colleges and from on-the-job training. Pipelayers, plumbers, pipefitters and

steamfitters who work mainly for commercial enterprises are usually trained through formal apprenticeship programs.

The petitioner's general overview of the proffered position is that of a plumber, an occupation the *Handbook* indicates does not require a four-year university-level degree in a specific discipline. Rather, the *Handbook* reports that an individual who performs the duties of a plumber may acquire the necessary training through vocational or community colleges or through an apprenticeship program. The position as described does not normally require a baccalaureate or higher degree or its equivalent as the minimum for entry into the particular position. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The petitioner does not offer evidence that the plumbing industry has made a degree a minimum entry requirement for the position of service mechanic, a title the petitioner explains is used interchangeably with that of "plumber." Nor does the petitioner offer letters or affidavits from firms or individuals in the industry attesting 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)). The record does not contain evidence of an industry-wide education standard for plumbers as required to establish the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative the petitioner may offer evidence to establish that the proffered position is so complex or unique that only an individual with a degree can perform the position. In this matter, the petitioner has not explained how the duties of the proffered position differ from the routine duties of a typical plumber's position. The petitioner has not provided evidence that the proffered position is a specialty occupation by distinguishing the position from similar, but non-degreed employment based on its unique nature or complexity. The petitioner has not submitted evidence sufficient to satisfy either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) whether the employer normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this matter, although the petitioner has been established since 1999, the petitioner has not provided evidence that it has previously hired an individual to fill the proffered position. The AAO observes, in addition, that while a petitioner may believe that a proffered position requires a degree or desires that an individual with a degree hold the position, the petitioner's opinion and desire do not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The AAO next considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) whether the nature of the specific 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. The AAO acknowledges the petitioner's indication that the beneficiary not only performs the duties of a plumber under the supervision of a licensed plumber, but also performs minor repairs on the company's service vans, acts as a supervisor, prepares estimates for clients, and is involved in inventory control. The petitioner, however, has not provided evidence that any of these duties contain complex or specialized elements that elevate the proffered position to that of a specialty occupation. The record does not contain documentary evidence that the duties of the proffered position contain elements significantly different from those of a skilled service mechanic, an occupation that does not require a bachelor's degree in a specific discipline to perform. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical skilled service mechanic. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.