

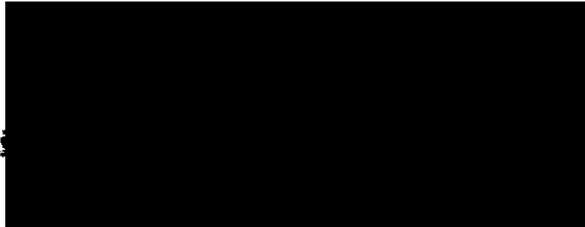


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 99 032 50939 Office: Vermont Service Center Date:

AUG 4 2000

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)

IN BEHALF OF PETITIONER: Self-represented

Public Copy
Verifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. D...
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner, Examinations, on appeal. The appeal will be dismissed.

The petitioner is engaged in the installation, servicing and maintenance of residential and industrial equipment and machinery. The firm maintains boiler and air conditioning systems for several organizations in the New York area. It seeks to employ the beneficiary as a quality control engineer for a three-year period. The director determined that the petitioner had not submitted sufficient evidence to clearly establish the firm is a viable business capable of offering the beneficiary a qualifying specialty occupation position.

On appeal, the petitioner states that the director failed to consider important evidence establishing that the company is a viable on-going business entity engaged in continuous and systematic business activity. The petitioner further states that in its initial request for additional information, the director did not require the company's 1977 U.S. tax return and that the company had satisfied the requirements outlined because the firm's 1998 U.S. Corporation Income Tax Return was submitted with all other evidence. The petitioner indicates that the company currently demonstrates operating revenue of \$286,983.90 with total operative revenue of \$274,711.90. The petitioner submits evidence that the company has obtained four contracts issued in 1998 for the maintenance of boiler equipment from the Housing Authority of the City of New York and the U.S. Postal Service.

Although not addressed by the director in his order, the petitioner has an initial requirement which has not been met in this case. The petitioner was required by regulation to provide either an approved labor condition application from the Department of Labor or certification that such application had been filed. Neither document was initially submitted. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, it is concluded that the petition may not be approved.

The record also shows that the director requested the petitioner to submit a copy of the company's income tax return and W-2 and W-3 forms for 1997 to establish that the company was operating in that year as claimed. This was a reasonable request bearing directly on the issue of the validity of the petition. As the petitioner has not provided the information requested and required for the adjudication of this petition, it may not be approved for this additional reason.

The term "specialty occupation" is 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 to fully perform the occupation in such 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.

The duties of the offered position are described as follows:

In the scope of his employment, the beneficiary will test, inspect and oversee service and maintenance process of equipment services to ensure its proper functioning in compliance with standards and practices of the industry, safety standards, and appropriate regulations. Beneficiary will also compile and evaluate data for maintenance reports to validate maintenance and service procedures. He will also recommend and coordinate appropriate preventive and corrective measures for the equipment/utilities maintained. Beneficiary will also analyze and recommend additional facilities, design and oversee/control of their installation to meet

requirements of the new and/or current loads, and system improvements.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

In these proceedings, the duties of the position are dispositive and not the job title. The offered position appears to combine the duties of a general manager with those of a stationary engineer who inspects and oversees the service and maintenance process of equipment services. The Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at pages 50-51 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a general manager. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background. Also, the Handbook at page 468 indicates that employers generally require a high school diploma for stationary engineers. Most stationary engineers acquire their skills through a formal apprenticeship program or through informal on-the-job training which usually is supplemented by courses at trade or technical schools. In addition, a good background can be obtained in the Navy or the Merchant Marine because marine engineering plants are similar to many stationary power and heating plants. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.