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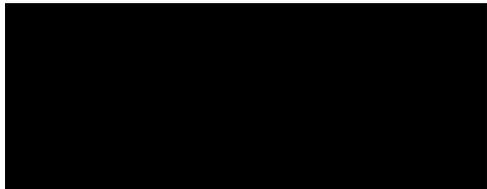
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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Services

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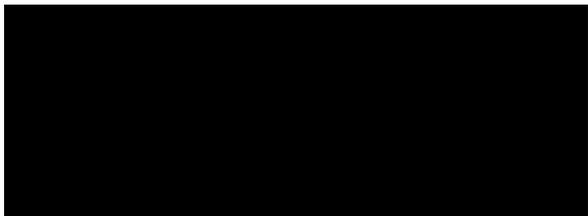


FILE: WAC 04 052 50765 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2005

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 is a general building contractor that seeks to employ the beneficiary as a project engineer. The petitioner, therefore, 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a project engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail directing and coordinating construction projects; administering and ensuring contracts are proper and comply with clients' requirements; monitoring amendments and contractual changes; supervising field construction and providing technical guidance to ensure projects are completed timely, on budget, and according to design specifications; consulting with architects, builders, and contractors regarding specifications, plans, construction schedules, and design; conducting construction meetings during the pre-construction and construction phases of the project to discuss a project's status; resolving scheduling conflicts; providing technical guidance in interpreting specifications; reviewing job plans, methods, equipment, staffing, and productivity, and detecting potential problems in conforming with established schedules or specifications; reviewing and resolving problems with clients and subcontractors; reading building plans and specifications to ensure construction and installations are in accordance with plans and specifications; providing subcontractors and trades people with approved shop drawings for reference during construction; identifying and reporting discrepancies in original designs or contract documents; inspecting construction sites to monitor progress and ensure conformity to engineering plans, specifications, construction, and safety standards; supervision of construction workers and subcontractors at the construction site and in the office; devising work schedules; inspecting and supervising the work of trades people; coordinating resources for newly assigned construction projects; planning and organizing the construction schedule and subcontractor's activities; providing guidance to subcontractors regarding scheduling, procedures, and scope of work; advising and recommending schedule changes; preparing weekly status reports; monitoring and ensuring project quality control and safety; reviewing, evaluating, and estimating items of additional work; preparing an estimate of change order items for additional billing; and determining the percentage of work completed and causes of delay due to change orders. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in the technical sciences in the fields of engineering or architecture.

The director determined that the proffered position is not a specialty occupation. The director stated that the proposed position more closely reflects a construction manager as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), rather than an occupation in engineering or architecture. According to the director, the *Handbook* reveals that baccalaureate-level training is increasingly preferred, but it is not a normal, industry-wide minimum requirement for entry into the occupation. The director found the submitted evidence did not indicate that the petitioner normally requires applicants to possess a baccalaureate or higher degree in the field. The director determined that in the context of the petitioner's small-scale construction projects, the beneficiary's proposed duties and stated level of responsibility did not indicate complexity or authority that is beyond what is normally encountered in the occupational field, and would not require an applicant with a baccalaureate-level education. The director emphasized that the *Handbook* indicates that a large general contractor with sizeable projects prefers, but does not require, a bachelor's degree for a construction manager.

On appeal, counsel states that the proposed position is a specialty occupation, and that CIS had previously approved the H-1B petition submitted by the petitioner on the beneficiary's behalf. Counsel asserts that CIS' determination about whether a position is a specialty occupation should not be based on a petitioner's size; it should be based on the position's duties. Referring to the *Handbook*, counsel states that it reveals that the duties of construction managers, constructors, project engineers, and project managers are complex, and therefore, are specialist responsibilities. Counsel references the DOL's *Career Guide to Industries (CGI)* to state that persons with any college degree occupy management trainees and construction manager assistant jobs; that those with degrees in construction science begin as field engineers, schedulers, or cost estimators; and that persons without degrees may get into a construction management position such as a project engineer, but they must possess training, skills, and expertise, and have several years of experience; counsel asserts that a person with this background has the equivalency to a bachelor's degree in construction or construction management. Counsel states that the *Handbook* and the *CGI* convey that employers require at least a baccalaureate degree for a position in construction management; that the *Handbook* states that employers prefer persons with a degree and industry work experience and that it does not indicate that employers simply prefer a degree. Counsel narrates passages about the educational requirement of positions in the field of construction from the *Handbook* and the *CGI*. Counsel discusses evidence from the Associated Builders and Contractors, Inc.; a letter from a general contractor located in California; and job postings and an advertisement.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel states that CIS had approved another petition that had been previously filed on behalf of the beneficiary by the petitioner.

The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO 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)

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa petition 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 AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; 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)).

In determining whether a 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

The proposed position's duties are encompassed within the occupational classification of a construction manager as described in the *Handbook* and a superintendent as described in the *CGI*. The *Handbook* reports the following are the position's educational requirements:

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. They need to understand contracts, plans, and specifications, and to be knowledgeable about construction methods, materials, and regulations. Familiarity with computers and software programs for job costing, online collaboration, scheduling, and estimating also is important.

Traditionally, persons advance 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, employers—particularly large construction firms—increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering. Practical industry experience also is very important, whether it is acquired through internships, cooperative education programs, or work experience in the industry.

In light of the above passage, the *Handbook* indicates that persons advance to construction management positions based on their experience as craftworkers or after working as a construction supervisor or owner of specialty contracting firms, and that large construction companies prefer, but do not require, persons who combine work experience with a bachelor's degree in construction science, construction management, or civil engineering. Based on the above discussion, the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry into the particular position.

It is noteworthy that the petitioner's organizational chart reveals that it has employees occupying five positions: a project manager, an accountant, plumbing/electrical, carpentry/drywall, and skilled labor. Thus, it does not qualify as a large construction firm, which the *Handbook* describes as a business that prefers a bachelor's degree and experience.

The *CGI's* description of a superintendent in the construction industry is analogous to the proposed position. It states that superintendents are:

responsible for getting a project completed on schedule by working with the architect's plans, making sure materials are delivered on time, assigning work, overseeing craft supervisors, and ensuring that every phase of the project is completed properly and expeditiously. They also resolve problems and see to it that work proceeds without interruptions. Superintendents may advance to large projects as general managers and top executives.

The educational requirement of a superintendent is described in *CGI* as follows:

Persons can enter the construction industry with a variety of educational backgrounds. Those entering construction right out of high school start as laborers, helpers, or apprentices. Those who enter construction from technical or vocational schools also may go through apprenticeship training; however, they progress at a somewhat faster pace because they already have had courses such as mathematics, mechanical drawing, and woodworking. Skilled craftworkers may advance to supervisor or superintendent positions, or may transfer to jobs such as construction building inspector, purchasing agent, sales representative for building supply companies, contractor, or technical or vocational school instructor. In order to advance to a management position, additional education and training is recommended.

Managerial personnel usually have a college degree or considerable experience in their specialty. Individuals who enter construction with college degrees usually start as management trainees or construction managers' assistants. Those who receive degrees in construction science often start as field engineers, schedulers, or cost estimators. College graduates may advance to positions such as assistant manager, construction manager, general superintendent, cost estimator, construction building inspector, general manager or top executive, contractor, or consultant. Although a college education is not always required,

administrative jobs usually are filled by people with degrees in business administration, finance, accounting, or similar fields.

The above passage from *CGI* relays that employers do not require a baccalaureate or higher degree or its equivalent in a specific specialty as the normal minimum requirement for entry into a superintendent position, which is similar to the proposed position. Those with a degree in construction science start as field engineers, schedulers, or cost estimators. However, skilled craftworkers advance to supervisor or superintendent positions, and persons with a college degree, though not in a specific specialty, start as management trainees or construction manager assistants and advance to positions as assistant manager, construction manager, general superintendent, cost estimator, and general manager, among others.

The submitted documents entitled "Chart 1" and "Chart 2" from the Associated Builders and Contractors, Inc. (ABC) illustrate the career path leading to a superintendent job. They also show that a superintendent is not required to possess a baccalaureate degree.

For various reasons, the evidence of an advertisement, job postings, and a letter from ARCOST CPM Group, Inc. are not persuasive in establishing the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a specific degree requirement is common to the industry in parallel positions among similar organizations. The advertiser is a large general contractor. It seeks an assistant project manager, and indicates that a degree in construction management or civil engineering is desirable, and that other business-related disciplines will be considered. The contractor finds specific degrees "desirable," but this does not establish that it *requires* a specific degree. Furthermore, the advertisers willingness to consider other business-related disciplines does not demonstrate a requirement of a specific degree. The job postings are from employers that are dissimilar in size or scope, or both, from the petitioner, a small general building contractor, or they do not describe the nature of the employer. Bernards Bros. Construction Management is a large construction manager/general contractor; JW Resources represents a manufacturer of modular building components; PCL Construction has over \$3 billion in revenue; G. Peterson Consulting Group represents a \$200 million dollar heavy highway construction company; and Heery International, Inc. has over 1,000 employees. The letter from the president of ARCOST CPM Group, Inc. indicates that the company has fewer than 42 employees, and requires a bachelor's degree in engineering or architecture for project engineers and construction project managers. Although the letter is relevant, the educational requirement of one company is insufficient to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The submitted evidence therefore fails to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

No evidence shows the proffered position as so complex or unique as to be performed only by an individual with a degree. Again, the DOL publications disclose that the proposed position is performed by a construction manager and superintendent, which are occupations that do not require a specific bachelor's degree.

Nor is there evidence to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. No evidence establishes that the beneficiary's duties are so specialized and complex, requiring a specific baccalaureate degree. As already discussed, the *Handbook*, *CGI*, and the ABC reveal that the proposed position is performed by occupations that do not a specific bachelor's degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.