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FILE: WAC 04 246 51080 Office: CALIFORNIA SERVICE CENTER Date: DEC 11 2007

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 Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision will be affirmed and the petition will be denied.

The petitioner provides termite inspections and repairs. It seeks to extend the employment of the beneficiary as a cost estimator 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 petitioner failed to establish that the proffered position was a specialty occupation. On September 25, 2006, the AAO affirmed the director's decision.

On October 26, 2006, the California Service Center received a motion to reopen and reconsider the AAO's September 25, 2006 decision. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." The petitioner has submitted new information that will be considered by the AAO.

The record of proceeding before the AAO contains: (1) the Form I-129 filed September 7, 2004 with supporting documentation; (2) the director's January 11, 2005 request for additional evidence (RFE); (3) counsel for the petitioner's March 16, 2005 response to the director's RFE; (4) the director's April 12, 2005 denial letter; (5) the Form I-290B, with counsel's brief and supporting documentation; (6) the AAO's September 25, 2006 decision dismissing the appeal; and (7) counsel's motion to reopen and reconsider and supporting documentation. 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 cost estimator. Evidence of the beneficiary's duties includes the petitioner's undated letter in support of the petition. The petitioner outlined the job duties of the proffered position as including, but not limited to the following:

- Analyze reports and other documentation to prepare time, cost, materials, and labor estimates;
- Assess cost effectiveness of products, projects or services, tracking actual costs relative to bids as the project develops;
- Consult with clients, vendors, personnel in other departments or construction foremen to discuss and formulate estimates and resolve issues;
- Confer with engineers, architects, owners, contractors and subcontractors on changes and adjustments to cost estimates;
- Prepare estimates used by management for purposes such as planning, organizing, and scheduling work;
- Prepare estimates for use in selecting vendors or subcontractors;
- Review material and labor requirements, to decide whether it is more cost-effective to produce or purchase components;
- Prepare cost and expenditure statements and other necessary documentation at regular intervals for the duration of the project;
- Prepare and maintain a directory of suppliers, contractors and subcontractors;
- Set up cost monitoring and reporting systems and procedures.

The petitioner submitted a Form ETA 9035E, Labor Condition Application (LCA) that identified the prevailing wage for the proffered position in the work location as \$13.39 per hour and the rate of pay for the proffered position as \$13 per hour.

On January 11, 2005, the director requested evidence to substantiate the information provided on the Form I-129 including the beneficiary's past wages. The petitioner provided the requested information. Based on a review of the requested information, the director determined that the petitioner did not present specific credible evidence that its organization had unique and specific needs for the beneficiary's services for the period of time it intended to employ the beneficiary. The director also noted that the beneficiary's Internal Revenue Service (IRS) Forms W-2, Statement of Income, showed that the beneficiary earned \$13,440 from the petitioner for the year 2004 and that the beneficiary's Form 1099, Miscellaneous Income, showed that the beneficiary received non-employee compensation from the petitioner of \$36,667 for the 2004 year. The director determined that it was not clear that the petitioner had offered a *bona fide* position and that the proffered position was not a specialty occupation.

In its September 25, 2006 decision, the AAO observed that counsel did not address the director's concern regarding the petitioner's failure to compensate the beneficiary as an employee, based on the beneficiary's Form W-2 and Form 1099. The AAO determined that the petitioner had not established that it had met the criterion of the required wage obligation as defined in 20 C.F.R. § 655.731(c) governing the LCA requirements regarding wages; and that the petitioner had not established that it had paid the required wage to the employee, cash in hand, free and clear, when due, except for deductions in accordance with the paragraph at 20 C.F.R. § 655.731(c)(9). The AAO also reviewed the record in detail regarding the duties of the proffered position, other evidence of the record, and other resources and concluded that the petitioner had not established that the duties of the proffered position in relation to the petitioner's business comprised the duties of a specialty occupation.

On motion, counsel for the petitioner asserts that a cost estimator is a professional position and takes issue with the AAO's interpretation of the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on cost estimators. Counsel also submits a September 13, 2005 letter authored by the staff director of technical operations of The Association of the Advancement of Cost Engineering International (AAACE International) that references a 2004 salary and demographic survey of project and cost professionals that the organization had conducted. Counsel also provides three Internet job advertisements for the positions of: (1) an estimator for an aerospace/aviation/defense company that lists a four-year college degree or its equivalent as the applicable education; (2) a construction estimator for a concrete and general contracting company that indicates candidates should have a minimum of two years experience and a bachelor's degree in civil engineering, structural engineering, construction management, industrial construction technology or similar discipline; and (3) a senior cost manager/estimator for an architectural service that lists the qualifications for applicants as including a BA/BS degree in construction or related field, seven to ten years experience in the construction industry and five years of estimating experience.

The petitioner also submits on motion, a January 19, 2005 letter indicating that a field representative's license had been placed on probation effective February 18, 2005. Counsel asserts that this letter is evidence that the petitioner was placed on probation because of reporting irregularities and that the petitioner needs a cost

estimator because under its prior structure it was having difficulty budgeting its costs to repair buildings in compliance with state codes. Counsel cites *Unico American Corp. v J.T. Watson, Jr.*, 1991 WL 11002594 (C.D. Cal. 1991) and asserts said decision directs CIS to defer to an employer's judgment rather than relying on generic governmental classification systems.

Preliminarily, the AAO notes that it did not rely solely on the *Handbook* or the Department of Labor's *Dictionary of Occupational Titles (DOT)*, even though the petitioner requested the AAO to consider the *DOT*, when making its determination. Rather, the AAO reviewed the petitioner's general description of the proffered position and the nature of the petitioner's business and did not find sufficient, consistent evidence to determine that the position described met any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO observed that it is the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations that are factors to consider. 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. Upon review of the record, including the evidence submitted on motion, the petitioner has failed to establish that the proffered position meets any of the criteria of a specialty occupation.

Turning to the first criterion, whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, the AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates: "[c]ost estimators develop the cost information that business owners or managers need to make a bid for a contract or to decide whether a proposed new product will be profitable." The *Handbook* states further:

Regardless of the industry in which they work, estimators compile and analyze data on all of the factors that can influence costs- such as materials, labor, location, and specialty machinery requirements, including computer hardware and software. Job duties vary widely depending on the type and size of the project.

The petitioner's general description of the duties of the proffered position corresponds to the *Handbook's* general discussion regarding cost estimators. Counsel for the petitioner takes issue with the AAO's previous interpretation of the *Handbook's* report on cost estimators. The AAO found that the *Handbook* reports that employers prefer but do not require applicants with bachelor's degrees for the position of cost estimator. Counsel contends that the *Handbook's* discussion of cost estimators in the construction industry¹ indicates that in this industry employers require degrees in a small range of categories.

¹ Counsel references the duties of the proposed position as including estimating costs associated with repair and treatment of structures with termite infestations, and as such would involve cost estimations associated with the construction industry.

The AAO observes that counsel has provided an excerpt from the *Handbook* regarding the educational requirements for the position of cost estimator and has highlighted the following sentence: "[i]n the construction industry, employers increasingly prefer individuals with a degree in building construction, construction management, construction science, engineering, or architecture." The AAO notes that the next sentence reads: "[h]owever most construction estimators also have considerable construction experience, gained through work in the industry, internships, or cooperative education programs." The *Handbook*, although noting an increasing preference for degrees in construction, engineering, or architecture, does not indicate that employers require a degree in a specific discipline to perform the duties of the proffered position. Employer preference is not synonymous with the "normally required" language of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Contrary to counsel's assertion, the *Handbook* does not indicate that a bachelor's or higher degree is required for the occupation of a cost estimator.

The AAO has also reviewed the September 13, 2005 letter interpreting the results of a 2004 survey submitted on motion to assist in determining whether a bachelor's or higher degree in a specific discipline is normally required for the position of a cost estimator.

Counsel highlights a portion of the September 13, 2005 letter that states: "a bachelor's degree is a virtual requirement for a position as a cost engineer." The author of the letter also indicates that 61 percent of cost estimators have bachelor's degree, nearly 20 percent have masters or higher degrees, and less than 10 percent have no university or college degrees. A review of the actual 2004 survey attached to the letter expands on the figures for cost estimators cited in the letter, showing that a little over nine percent of cost estimators have only an high school education and a little over 10 percent only have an associate's degree. Thus almost 20 percent of the 248 cost estimators surveyed have less than a bachelor's degree. Moreover, the survey does not indicate a specific type of degree for any of the individuals the surveyors found holding a bachelor's or higher degree. Thus, the survey is less than determinative in substantiating that a bachelor's or higher degree in a specific discipline is normally required for the proffered position. The survey does not include a large pool of individuals surveyed, finds that 20 percent of those surveyed had less than a bachelor's degree, and does not record specific fields of study for those cost estimators who held bachelor's degrees. The survey does not contain evidence that distinguishes the proffered position from the position of a cost estimator as described in the *Handbook*, a position for which employers increasingly prefer individuals with a bachelor's degree but also recognizes that experience may be sufficient to perform the duties of the position.

The AAO notes counsel's assertion that the position of a "cost engineer" qualifies as a specialty occupation; however, the proffered position is for the position of a cost estimator, not a cost engineer. The survey appears to make a distinction between these two occupations. In addition, neither counsel nor the petitioner provide a description of duties that involve development or design of products or systems; describe advanced methods the beneficiary would use to estimate the costs of structural repairs; or otherwise explain how the proposed position involves the theoretical and practical application of a body of highly specialized knowledge evidenced by the attainment of a bachelor's or higher degree in a specific specialty, information that would assist in assessing whether the position is that of a cost engineer. Further, a cost engineering position would not be an elaboration of the initially described duties but rather would be an attempt to expand upon the initially described position to create a specialty occupation. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N

Dec. 169, 176 (Assoc. Comm. 1998). The evidence submitted on motion is insufficient to establish that the petitioner's proffered position is a position that normally requires a baccalaureate or higher degree in a specific discipline to perform the duties of the position. The record does not demonstrate that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO next considers whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree, as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The AAO has considered the three Internet job announcements submitted on motion in this context and finds that the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. 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)). In addition, the record does not contain sufficient information regarding the proposed position to assess its similarity to the detailed description provided by the defense company. Moreover, the AAO notes that this advertisement does not indicate that the successful applicant must have a bachelor's degree in a specific discipline. The other two advertisements provide a general overview of the position of a construction estimator and a senior cost estimator without the necessary detail to accurately compare the positions to the proffered position. The record does not establish that the proffered position is sufficiently parallel to any of the three Internet job announcements or that the organizations advertising are sufficiently similar to the petitioner. Based upon a review of these advertisements, the petitioner has not established that a degree requirement in a particular discipline is common in the petitioner's industry for a position parallel to the proffered position.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The general description of the duties of the position does not exceed the scope of a typical cost estimator, a position that does not require a bachelor's degree in a specific discipline. The AAO does not find that the petitioner has provided evidence of particularly complex or unique duties that would elevate the proffered position to one that only an individual with a degree in a specific discipline could perform.

A review of the evidence of record finds it insufficient to establish that the proposed duties comprise a position that is identifiable with an industry-wide educational standard requiring a degree in a specific discipline, or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to 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 to assist in making this determination. In this matter, the petitioner has not provided evidence that it previously employed

anyone in this position. The AAO recognizes the petitioner's desire to employ a cost estimator to better budget costs to repair buildings in compliance with state codes; notes counsel's citation to *Unico American Corp. v J.T. Watson, Jr.*, 1991 WL 11002594 (C.D. Cal. 1991); and acknowledges counsel's assertion that said decision directs CIS to defer to an employer's judgment rather than relying on generic governmental classification systems. However, the petitioner's desire to employ an individual with a bachelor's degree does not alleviate the necessity of establishing that the proffered position is a specialty occupation. Again, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The evidence in the record shows that the proffered position is that of a typical cost estimator. The record does not provide detailed evidence regarding the proffered position or the petitioner's business that demonstrates that the proffered position is a specialty occupation. The petitioner has not established the proffered position is a specialty occupation pursuant to the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether 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 AAO acknowledges counsel's iteration of the beneficiary's duties and assertion that the petitioner needs a cost estimator to ensure compliance with state codes. Counsel explains that the beneficiary will research and review cost calculations prepared by the petitioner's 16 inspectors and carpenters and estimate the costs associated with repair and treatment of structures with termite infestations. Counsel indicates that the beneficiary will determine whether it is more cost effective for the company to hire licensed subcontractors to perform wood repairs or whether for some of the jobs it would be more cost effective for the company to buy the construction materials and perform the repairs itself, factoring in the requirements for compliance with local and state codes and regulations. The AAO finds that counsel's discussion of the beneficiary's duties corresponds generally to that of a cost estimator; the duties described are routine and do not contain a specialized element or component that elevates the position to one that requires a bachelor's degree in a specific discipline. Neither counsel nor the petitioner have described complex projects, represented that the nature of the position requires the beneficiary to have a unique set of skills beyond those of a general cost estimator, or otherwise described duties that are specialized or complex. The petitioner has not established that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the record, including the additional information and assertions submitted on motion, the petitioner has not established that the proffered position is a specialty occupation.

On motion, counsel also addresses an inconsistency in the evidence submitted on appeal. On appeal, the petitioner provided a letter from its certified public accountant commenting on the beneficiary's salary, an issue that the director raised in his decision. In the October 23, 2006 letter submitted on appeal, the

accountant indicates he referred to the beneficiary as a termite inspector in error and that the beneficiary had worked for the petitioner only as a cost estimator. The accountant further explains that the petitioner paid the beneficiary partially as a salaried employee and partly as an independent contractor in 2004 and that the petitioner intended to correct its 2004 tax return to clarify that the beneficiary had been employed full-time and was paid according to the prevailing wage. The AAO notes that the petitioner has adequately addressed the inconsistency in the accountant's letter but does not find the accountant's expression of the petitioner's intent to correct its 2004 tax return sufficient to establish the petitioner had paid the beneficiary as an employee according to the prevailing wage. The regulation at 20 C.F.R. §§ 655.731(c)(2)(i) and (ii) indicates that cash wages paid consist of those payments that are shown on the employer's payroll records as earnings for the employee and are payments reported to the IRS as the employee's earnings with appropriate withholding for the employee's tax paid to the IRS. In this matter the petitioner's payment to the beneficiary as an independent contractor is insufficient to establish that the petitioner paid the beneficiary cash in hand as set out in the above regulation. The employer's intent to amend tax records is not evidence and does not ameliorate the petitioner's failure to comply with the LCA. The petitioner has not submitted evidence that it amended its 2004 tax returns to reflect the beneficiary's status as an employee. For this additional reason, the petition will be denied.

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. Accordingly, the previous decision of the AAO will be affirmed and the petition will be denied.

ORDER: The decision of the AAO is affirmed. The petition is denied.