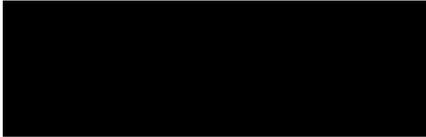


U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy



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

File: EAC-00-169-51050

Office: Vermont Service Center

Date:

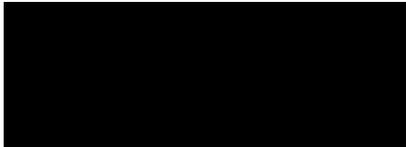
11 APR 2002

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:



Public Copy

INSTRUCTIONS:

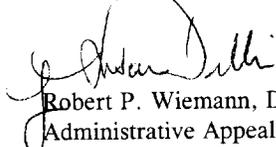
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a construction contractor with seven employees and a stated gross annual income of \$240,000. It seeks to extend the employment of the beneficiary as a program manager, construction, for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a statement.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the performance of proffered position's duties did not normally require a baccalaureate degree. On appeal, counsel states that the petitioner has previously shown that the proffered position is a specialty occupation. Counsel argues that the previous approval of a petition filed by the petitioner on behalf of the beneficiary warranted approval of the current petition for extension in the interest of consistent adjudication standards.

The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

...[the beneficiary] will direct and coordinate the planning, budgeting and contract performance for various structural carpentry and general construction projects on commercial, industrial and residential sites. [The beneficiary] will confer with clients, engineers and

architects on matters of design, budget, construction methods, scheduling and labor requirements. He will review and analyze site plans, working drawings, specifications and cost estimates for projects. He will work on-site to ensure compliance with specifications and relevant building and safety codes, approve quality of materials and work, oversee delivery and use of materials, and monitor work performance. He will supervise workers through subordinate supervisors and prepare progress reports. He will meet regularly with the project team to review progress and performance.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The proffered position appears to be that of a construction manager. The Department of Labor's Occupational Outlook Handbook, Handbook, 2000-2001 edition, at pages 31-32, states in pertinent part:

Construction managers plan and direct construction projects. They may have job titles such as *constructor, construction superintendent, general superintendent, project engineer, general construction manager, or executive construction manager.*

Managers and professionals who work in the construction industry, such as general managers, project engineers, cost estimators, and others, are increasingly called

constructors. Through education and past work experience, this broad group of professionals manages, coordinates, and supervises the construction process from the conceptual development stage through final construction on a timely and economical basis. Given designs for buildings, roads, bridges, or other projects, constructors oversee the organization, scheduling, and implementation of the project to execute those designs. They are responsible for coordinating and managing people, materials, and equipment; budgets, schedules, and contracts; and the safety of employees and the general public.

The Handbook lists no requirement of a baccalaureate or higher degree in a specialized area for employment as a construction manager. Although more and more employers, particularly, large construction firms, hire individuals who combine industry work experience with a bachelor's degree in construction or building science or construction management, individuals traditionally advance to construction management positions after having substantial experience as construction craft workers such as carpenters, masons, plumbers, or electricians, or after having worked as construction supervisors or as owners of independent specialty contracting firms overseeing workers in one or more construction trades. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

With respect to counsel's objection to denial of this petition in view of the previous approval of a petition filed by the petitioner on behalf of the beneficiary, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petition and its supporting documents. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F. 3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct. 51 (U.S. 2001).

The petitioner has submitted two letters in an attempt to establish that a bachelor's degree is a common requirement within the industry for parallel positions among similar organizations. In nearly identical letters, both [REDACTED] owners and operators of construction companies, state that their respective companies each currently employ two individuals with

bachelor of science degrees as project managers. However, the two letters are insufficient evidence of an industry standard. In addition, both of the writers have merely stated that they employed project managers possessing bachelor of science degrees, without specifying that a baccalaureate or higher degree in a specialized area is required for the offered position. Accordingly, it cannot be concluded that the petitioner has demonstrated that such a degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner did not demonstrate that the nature of the beneficiary's proposed 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, 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.