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U.S. Department of Justice
Immigration and Naturalization Service

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

PUBLIC COPY



File: WAC-01-039-54438

Office: California Service Center

Date: 18 DEC 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:



**Identifying 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 that 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 that 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 that 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 and development firm with nineteen employees and a stated gross annual income of \$495,685. It seeks to employ the beneficiary as a project manager 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, a separate statement from the petitioner's president, and additional documentation.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the performance of proffered position's duties does not normally require a baccalaureate degree. On appeal, counsel argues that the proffered position parallels that of an engineering manager and that this position is a specialty occupation with a minimum educational requirement of a bachelor's degree in engineering.

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 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's president described the duties of the offered position as follows:

...will perform designing, installation, commissioning and distribution systems for complex electro-mechanical and safety critical application in various configurations. Designing and detailing of project schedules, estimate of assigned tasks to support project schedules and budgets. Selection of materials locally available to suit with projects. Project management, monitoring and coordinating with sub-contractors, local tradesman, estimation quantity surveying and coordination of related services with each other during execution. Preparation of as-built drawings for handing over finally to the client.

In response to a subsequent Service request for additional information regarding the offered position, the petitioner described the duties of the position as follows:

- * Study the construction plan and prepare a bid.
- * Review and prepare a comparative statement of the bids submitted by the sub-contractors.
- * Procure building permits from the City Authorities.
- * Prepare progress schedules.
- * Supervise and co-ordinate all building trades.
- * Prepare periodic sub-contractors payment invoices.
- * Most of all keep a good rapport with the authorities, job workers and the suppliers.
- * Over all [sic] responsible for the execution of the project as per time schedule, specifications and plans.

- * The job requires minimum 40 hours a week schedule.
- * Supervise 6-8 sub-contractors and its [sic] laborers.

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.

In denying the petition, the director determined that the proffered position appears to be that of a construction manager. The Department of Labor's Occupational Outlook Handbook, Handbook, 2002-2003 edition, at pages 37-39, states in pertinent part:

Construction managers plan and direct construction projects....

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 proffered position entails duties of a project engineer/construction manager such as planning and overseeing building construction and estimating construction costs. However, the offered job also entails the design, inspection, and maintenance of structures and facilities, which are duties normally associated with a civil engineer. According to the DOL, an individual practicing as a civil engineer requires a bachelor's degree in civil engineering and state licensure. Furthermore, information in the Handbook at page 38 indicates that many construction managers have a bachelor's degree in construction science, construction management, or civil engineering, and related work experience in the construction industry. Thus, the petitioner has described a unique position that can be performed only by an individual with a degree in these specific specialties and related work experience in construction. Accordingly, the petitioner has satisfied the requirement in 8 C.F.R. 214.2(h)(4)(iii)(A), and the director's objection to the approval of the petition has been overcome. Nevertheless, the petition may not be approved.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through

progressively responsible positions directly related to the specialty.

According to the record the beneficiary possesses a bachelor of engineering (mechanical) degree awarded by Osmania University in Hyderabad, India. A credentials evaluation service found the beneficiary's foreign degree equivalent to a bachelor of science degree in mechanical engineering from a United States college or university. The conclusions of the evaluator appear reasonable and will be accepted.

As previously discussed, the Handbook indicates that many construction managers have a bachelor's degree in construction science, construction management, or civil engineering, along with related work experience in the construction industry. While the beneficiary holds the equivalent of a bachelor's degree in mechanical engineering, this degree is not in one of the specific specialties listed in the Handbook. Additionally, the record does not contain any evidence regarding any of the beneficiary's prior work experience in order to determine whether such experience is within the construction industry.

It must be noted that the record contains no evidence that the beneficiary has appropriate licensure in the state of California to practice civil engineering. According to California's Professional Engineers Act (Business and Professions Code sections 6700-6799), individuals practicing civil engineering must be licensed by the State. Civil engineering is defined at section 6731 and includes, but is not limited to, activities involved in "the supervision of the construction of engineering structures" and "the preparation or submission of designs, plans and specifications and engineering reports." As these two activities are directly related to the duties of the proffered position, the petitioner must establish that the beneficiary holds an unrestricted state license, which authorizes him to fully practice the specialty occupation and be immediately engaged in that specialty in the State of California as required by 8 C.F.R. 214.2(h)(4)(iii)(C)(3).

It must be further noted that the petitioner has also failed to provide any evidence that the beneficiary has appropriate licensure in the state of California to practice mechanical engineering. According to California's Professional Engineers Act (Business and Professions Code sections 6700-6799), individuals practicing mechanical engineering must be licensed by the State. While the beneficiary's foreign degree has been found to equate to a bachelor of science degree in mechanical engineering from a U.S. institution of higher learning, the beneficiary does not hold an unrestricted state license authorizing him to fully practice the specialty occupation of mechanical engineer and be immediately engaged in that specialty in the State of California as required by 8 C.F.R.

214.2(h)(4)(iii)(C)(3). As the proffered position more closely parallels that of a civil engineer rather than mechanical engineer, this issue need not be discussed further.

The beneficiary does not possess a bachelor's degree in construction science, construction management, or civil engineering. The record does not contain any evidence that the beneficiary has work experience in the construction industry or that he is licensed in the State of California as a civil engineer. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position; the petition must be denied.

The Associate Commissioner notes his authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within our power to formulate. Helvering v. Gowran, 302 U.S. 238 (1937); Securities Com'n v. Chenery Corp., 318 U.S. 86 (1943); and Chae-Sik Lee v. Kennedy, 294 F. 2d (D.C. Cir. 1961), cert. denied, 368 U.S. 926.

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.