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U.S. Department of Justice
Immigration and Naturalization Service

**Identifying data deleted to
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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: WAC 02 119 51554 Office: CALIFORNIA SERVICE CENTER Date: **NOV 20 2002**

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)

IN BEHALF OF PETITIONER:
[Redacted]

PUBLIC COPY

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

[Signature]
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal is dismissed. The petition is denied.

The petitioner is a construction company that employs five subcontractors and has a gross annual income of \$470,000. It seeks to employ the beneficiary as a project engineer for a period of three years. The director denied the petition finding that the proffered position was not a specialty occupation.

On appeal, counsel submits additional evidence.

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 the classification of qualified nonimmigrant 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 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.

8 C.F.R. 214.2(h)(4)(ii) further 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.

In the initial petition, the petitioner stated that the proffered position entailed the planning, design, and direction of its construction projects. The petitioner claimed that in order to perform the duties of the position, an individual would need a bachelor's degree in civil engineering. The director found the petitioner's initial evidence insufficient and on March 6, 2002, she requested additional evidence, which included, but was not limited to, a detailed job description, and an explanation of why the prospective employee must have a bachelor's degree or its

equivalent in a specific specialty.

The petitioner responded by stating that the prospective employee must apply the theories and principles of civil engineering in order to plan, design and oversee the construction and maintenance of structures and facilities. The petitioner further stated that some specific duties would include concrete calculations, cost estimates, and the inspection of existing structures. Finally, the petitioner stated that the prospective employee would not supervise any employees, that work experience was not required, and that a bachelor's degree in civil engineering was needed for public safety.

The director denied the petition on March 15, 2002. The director equated the proffered position to a project engineer/construction manager and found that a bachelor's degree would be a reasonable requirement if the employer were a large construction company. The director noted, however, that as a small construction firm involved in small residential projects, the petitioner had not shown that a bachelor's degree in a specific specialty was a reasonable requirement.

On appeal, counsel states that the director incorrectly assumed that a small corporation could not sustain a position for a project engineer. Counsel notes that the petitioner is a large construction company that is involved in large construction projects in Southern California. In support of this statement, counsel submits copies of several construction contracts between the petitioner and various corporations. The petitioner also submits a letter addressing the director's reasons for denial. According to the petitioner, it has experienced a 100% increase in its net income in the past two years and that this growth has led to the need for an experienced, full-time engineer.

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 are 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 described the proffered position as follows:

Apply theory and principles of civil engineering in planning designing and overseeing construction and maintenance of structures and facilities. Some of the job duties will include, but [will] not [be] limited to the following: concrete calculations, estimates labor, material, construction and equipment costs, inspects existing projects and recommends repair and replacement of defective member or rebuilding of entire structure using engineering knowledge, oversees [sic] and verifies that construction projects are done as stated in the planning designs.

The director classified the position as a project engineer/construction manager. In its Occupational Outlook Handbook (Handbook), 2002-2003 edition, the Department of Labor (DOL) states the following about this position:

Construction managers plan and direct construction projects. . . . Managers who work in the construction industry, such as general managers, project engineers, and others, increasingly are called *constructors*. Through education and past work experience, this broad group of managers 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 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 proffered position 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 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 civil engineering and with related work experience in construction. Accordingly, the petitioner has satisfied the requirement in 8 C.F.R. 214.2(h)(4)(iii)(A)(2), and the director's objection to the approval of the petition has been overcome. Nevertheless, the petition may not be approved.

8 C.F.R. 214.2(h)(4)(iii)(C) states:

Beneficiary qualifications. 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 holds a degree from the Universidad de Buenos Aires in Ingeniero Civil for studies completed in 1979. An educational evaluation service equated the beneficiary's credentials to a bachelor of science degree in civil engineering awarded by a regionally accredited college or university in the United States. While the beneficiary holds the requisite bachelor's degree, the record does not contain evidence that he has appropriate licensure in the state of California to practice as a civil engineer or work experience in the construction industry.

According to California's Professional Engineers Act (Business and Professions Code §§6700-6799), individuals practicing civil engineering must be licensed by the State. Civil engineering is defined at §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). The petitioner must also establish that the beneficiary has a bachelor's degree in civil engineering and related work experience in the construction industry.

On October 22, 2002 counsel forwarded additional evidence to the Administrative Appeals Office (AAO) regarding the beneficiary's qualifications. The evidence included a copy of the beneficiary's degree and his transcripts, the educational evaluation currently in the record, and the beneficiary's resume. Counsel did not forward, and the record does not contain, evidence of the beneficiary's licensure to practice as a civil engineer in the State of California. Additionally, although the beneficiary listed in his resume that he worked on several engineering projects from 1975 through 1984, the beneficiary did not submit any independent evidence to corroborate his assertions, such as letters from employers that detail the beneficiary's dates of employment and type(s) of work performed. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Accordingly, there is no evidence that the beneficiary is licensed in the State of California as a civil engineer or that he has worked in the construction industry. Thus, he is not 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.

As always, 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.