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U.S. Department of Justice
Immigration and Naturalization Service

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

[Redacted]

File: LIN-01-165-50871 Office: Nebraska Service Center

Date: NOV 25 2002

IN RE: Petitioner:
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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a general construction firm with 20 employees and a stated gross annual income of \$680,000. 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 and supporting documentation.

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) 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 the duties of the proffered position did not normally require a baccalaureate degree in a specific specialty.

On appeal, counsel argues that the regulations at 8 C.F.R. 214.2(h)(4)(iii)(A)(1) have no "second-tier" requirement of a baccalaureate degree in a specific specialty for a job to qualify as a specialty occupation. Counsel contends that the Service is subverting Congressional intent by instituting such requirement. Counsel further asserts that the degree requirement is common to the industry in parallel positions among similar organizations and

that the petitioner requires a civil engineering degree for the proffered position.

Counsel's arguments on appeal are not persuasive. The regulation cited above, which defines the term "specialty occupation," clearly lists a requirement 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 addition, section 214(i)(1) of the Immigration and Nationality Act, 8 U.S.C. 1184(i)(1), defines the term "specialty occupation" as an occupation that requires the 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. Therefore, it must be concluded that the Service possesses the statutory and regulatory authority to find that a baccalaureate degree in a specific specialty is required for a position to be considered a specialty occupation. In Defensor v. Meissner, the Fifth Circuit Court of Appeals observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and might also read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. 201 F.3d 384, 357 (5th Cir. 2000). The critical evaluation is not the title of the position, but whether the position qualifies as a specialty occupation under the statutory definition at section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1).

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:

- * Prepare and/or review shop drawings.
- * Prepare false work designs and drawings.
- * Communicate with project owner, engineers and consultants.
- * Coordinate work of [REDACTED] Construction crew with subcontractor crews.
- * Calculate cost of project based on analysis of collected data.
- * Prepare and follow progress schedule of project.

- * Review shop drawings to ensure conformance to project plans.

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 Service does not agree with counsel's assertion that the duties of the proffered position require the services of an individual with a bachelor's degree in civil engineering. The Department of Labor describes the work of engineers in the Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 103 as follows:

Engineers apply the theories and principles of science and mathematics to research and develop economical solutions to technical problems. . . .

The Handbook further describes the duties of civil engineers at page 109 as follows:

Civil engineers design and supervise the construction of roads, buildings, airports, tunnels, dams, bridges, and water supply and sewage systems.

In this case, the duties of the proffered position do not involve the design and planning of highways or bridges. Rather, the holder of this position will coordinate project duties between the parent company and the subcontractor company, perform cost analysis, monitor the progress of the project, and ensure conformance to

project plans. These duties parallel those of a construction manager rather than those of a civil engineer. The Handbook describes the duties of a construction manager at page 37 as follows:

Construction managers plan and direct construction projects. They may have job titles such as constructor, construction superintendent, general superintendent, project engineer, project manager, general construction manager, or executive construction manager. Construction managers may be owners or salaried employees of a construction management or contracting firm, or may work under contract or as a salaried employee of the owner, developer, contractor, or management firm overseeing the construction project. The *Handbook* uses the term "construction manager" to describe salaried or self-employed managers who oversee construction supervisors and workers.

In contrast with the *Handbook* definition, "construction manager" is defined more narrowly within the construction industry to denote a management firm, or an individual employed by such a firm, involved in managerial oversight of a construction project. Under this definition, construction managers usually represent the owner or developer with other participants throughout the project. Although they usually play no direct role in the actual construction of a structure, they typically schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors.

Managers who work in the construction industry, such as general managers, project engineers, and others, are increasingly 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 the safety of employees and the general public.

The Handbook lists no requirement of a baccalaureate or higher degree in a specific specialty 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 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 in a specific specialty is required for the position being offered to the beneficiary.

The petitioner asserts that the degree requirement is common to the industry in parallel positions among similar organizations. In support of this assertion, the petitioner has previously submitted ten job advertisements for project manager and similarly titled jobs. One of these prospective employers requires a baccalaureate degree, but does not specify that the degree must be in civil engineering. One of the advertised jobs, process control engineer, is not comparable to the proffered position in that this position requires a bachelor's degree in polymer engineering. Two of the jobs, environmental project manager and project management analyst, are not comparable to the proffered position in that a bachelor's degree in engineering is preferred, but not required. Two project manager positions require a bachelor's degree in civil engineering, but it is not possible to determine whether these jobs are comparable to the proffered position because no description of the duties of these jobs is provided. Sunland Engineering Company requires a bachelor's degree in civil engineering or a related field for its project manager position. However, this job is clearly that of a civil engineer rather than a construction manager because this job involves design of civil engineering projects as well as the oversight of such projects. The remaining three jobs are civil engineering jobs and as such require a bachelor's degree in civil engineering. In view of the foregoing, it is concluded that these job advertisements are not sufficient to show that the requirement of a baccalaureate degree in a specific specialty is an industry standard.

Although the petitioner states that it requires a bachelor's degree in civil engineering for the proffered position, the record does not contain any evidence that such degree was required as part of the hiring process.

Finally, 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 in a specific specialty.

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.