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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 MASS, 3/F  
425 I Street, N.W.  
Washington, DC 20536

NOV 10 2004

File: WAC 02 072 51240 Office: CALIFORNIA SERVICE CENTER Date:

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:

SELF-REPRESENTED

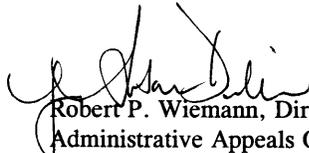
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Guam general contracting construction company. It has four employees and a gross annual income of \$609,939. It seeks to temporarily employ the beneficiary as a construction manager for a period of three years. The director determined that the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel asserts that the proffered position is a specialty occupation since a person entering into the construction manager field should have knowledge of engineering and should be able to manage others employed in specialty occupations under his supervision. Counsel also asserts that the beneficiary's academic qualifications from Korea are the equivalent of a professional engineer in the United States.

Section 214(i)(1) of the Immigration and Nationality Act (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 field 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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the California Service Center on December 20, 2001, the petitioner described the duties of the proffered position as follows: "Manages and directs and coordinates activities of construction dep[artment]of the company to obtain optimum efficiency and economy of operation and maximum profit." The petitioner also provided the following expanded job description:

Plans, directs, and coordinates activities of the construction business of the company to ensure that goals or objectives of the construction projects are accomplished within described time frame[s] and funding parameters; Reviews project proposal[s] or plan[s] to determine time frame[s], funding limitations, procedures for accomplishing projects, staffing requirements, and allotment of available resources to various phases of projects.

Establishes work plan and staffing for each phase of projects, and arranges for recruitment or assignment of projects personnel. Confers with project staff to outline work[]plan and to assign duties, responsibilities, and scope of authority. Directs and coordinates activities of project personnel to ensure projects progress on schedule and within prescribed budget. Reviews status reports prepared by engineers and modifies schedule[s] or plan[s] as required. Prepares projects reports for management and clients. Confers with project personnel to provide technical advice and to resolve problems.

Analyses the present construction contract value in total and in remaining vale [sic] and plans, researches and acquires new construction contracts to maintain and develop construction business of the company.

Manages manpower, equipment and materials to maintain competitive position in industry. Has authority to hire and fire employees under his direct supervision.

Exercises directions [sic] over the day-to-day operations of the activity of function [sic] for the department under his supervision.

On February 21, 2002, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested further evidence as to how the petitioner met the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). In particular, the director requested the employment histories of employees with baccalaureate degrees previously hired in the proffered position, including their names and dates of employment. The director also requested evidence that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position within the general contracting industry.

In response, the petitioner stated the following with regard to its business operations and the role played by the construction manager within its business structure:

We are a general contractor [company that] serves clients' needs as specified in the drawings and specifications prepared by professional engineering firms specialized in civil [engineering], architect[ural engineering], electrical [engineering], mechanical [engineering] and other fields related with the project. These professional firms are our clients or [are] a part of our clients. In order for us to understand and perform our work according to the drawings and specifications, we should have some personnel who can understand and perform our jobs. We also normally hire several subcontractors who are specialized in particular fields such as civil [engineering], architect[ural engineering], electrical [engineering], and mechanical construction. [A] [c]onstruction [m]anager is the one who is responsible for handling all the matters aforesaid.

The petitioner also submitted four vacancy announcements taken from Guam newspapers. One advertisement was for a job entitled "officer in charge of construction, Guam." A second advertisement was for a project engineer with Mobil Oil Guam, Inc., and a third advertisement was for a project engineer with Merz Pacific, a position that involved field direction of construction projects for petroleum marketing facilities. The fourth advertisement was for a project manager for an unidentified company in Guam that did not specifically identify the position as a construction management position. All four positions required a baccalaureate degree in engineering or in closely related fields.

In addition, the petitioner submitted information on the following three individuals:

[REDACTED] The petitioner submitted a certified translation of Mr. [REDACTED] diploma in architectural engineering, and noted on the diploma that the individual had been employed by the petitioner from 1996 to the present as a project manager.

[REDACTED] The petitioner submitted Mr. [REDACTED] resume that indicated he obtained a baccalaureate degree from the Philippines in civil engineering. The petitioner noted on the resume that Mr. [REDACTED] had been employed by the petitioner for four months in 1997.

[REDACTED] The petitioner submitted Mr. [REDACTED] resume and noted that he had worked for the petitioner for one year beginning in 1997. According to Mr. [REDACTED] resume, he obtained a baccalaureate degree in civil engineering (architectural/structural) from Feati University in the Philippines.

On June 4, 2002, the director denied the petition. The director noted that the proffered position appeared to be a managerial and supervisory position. The director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook) 2000-2001* edition, and stated that there is no requirement for a degree in a specific specialty in the general management field. In addition, the director determined that the duties listed in the job advertisements submitted by the petitioner were for project engineers "to provide maintenance and repair projects, and provide field direction in execution of construction projects ensuring environmental and safety policies." The director stated that the beneficiary would not be performing similar duties.

On appeal, the petitioner states that the proffered position is a specialty occupation because a baccalaureate degree is normally the minimum requirement for entry into the position of construction manager. The petitioner states that the manager should have knowledge of engineering and also should have the ability to manage people in other specialty occupations under his supervision as either company employees and/or subcontractors. The petitioner refers to the letter it submitted to Citizenship and Immigration Services (CIS) on May 20, 2002.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

**I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)**

CIS often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

The *Handbook*, 2002-2003 edition, on page 37, states the following with regard to construction managers:

Construction managers plan and direct construction projects. . . . 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. . . . They arrange for trade contractors to perform specialized craftwork or other specific construction work. . . . Large construction projects, such as an office building or industrial complex are too complicated for one person to manage. These projects are divided into many segments: Site preparation, including land clearing and earth moving; sewage systems; landscaping and road construction; building construction. . . erection of structural frameworks, floors, walls, and roofs. . . . Construction managers often team with workers in other occupations, such as engineers and architects. Construction managers evaluate various construction methods and determine the most cost-effective plan and schedule. . . . They determine the appropriate construction methods and schedule all required construction site activities into logical, specific steps, budgeting the time required to meet established deadlines.

They oversee the delivery and use of materials, tools and equipment, and the quality of construction, worker productivity, and safety. They are responsible for obtaining all necessary permits and licenses and, depending upon the contractual arrangements, direct or monitor compliance with building and safety codes and other regulations. . . . Construction managers regularly review engineering and architectural drawings and specifications to monitor progress and ensure compliance with plans and schedules. They track and control construction costs against the project budget to avoid cost overruns.

With regard to training and other qualifications, on page 38, the *Handbook* states:

Persons interested in becoming a construction manager need a solid background in building science, business and management as well as related work experience within the construction industry. . . . Traditionally persons advance to construction management positions after

having substantial experience as construction craftworkers--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. However, employers, particularly large construction firms, increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering.

The director in his decision described the position as a managerial and supervisory position without any further specificity. Upon review of the duties outlined by the petitioner, and of the *Handbook* description of construction manager, the proffered position is that of construction manager. Although the *Handbook* states that employers in construction firms increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering, it does not indicate that employers normally require a bachelor's degree for entry into the proffered position. Thus, it does not appear that a bachelor's degree in a specific specialty is the minimum requirement for entry into the construction management field. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position.

**II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)**

**A. Degree Requirement is Common to the Industry**

Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook's* conclusions about a degree requirement for a construction manager position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted four job advertisements from a newspaper in Guam with regard to recent openings for project managers, project engineers or construction managers either in Guam or Hawaii. All four job advertisements appear to be either for companies in specific industries such as the petroleum industry or companies in non-specified industries. No

advertisement appears to be for a general contracting or construction company. As such these advertisements do not establish the academic requirements for construction manager positions within companies similar to the petitioner.

In addition, the petitioner submitted no documentation that any professional construction management association has made a bachelor's degree a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

**B. Complexity and Uniqueness of the Proffered Position**

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner has submitted no documentation that the position of a construction manager within the petitioner's business operation would involve duties seen as either unique or complex that only an individual with a degree in a specific specialty could perform them.

**III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)**

The petitioner submitted the diploma for one individual and the resumes of two other individuals that it identified as present or former employees. This documentary evidence is problematic for two reasons. First, the diploma submitted for Sung Wook Jin does not establish that he was or is an employee of the petitioner, or that he works as a construction manager. Of more probative weight for the record would be documentary evidence, such as, payroll slips, employment records, or an employment contract between the petitioner and Mr. Jin. Second, with regard to Mr. De Los Reyes and Mr. Rivera, the length of their employment suggests that they were subcontractors as opposed to employees utilized full-time as construction managers. Without more persuasive evidence, the petitioner has not established this criterion.

**IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)**

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the proffered position. Although the petitioner described its business operation, it provided no evidence with regard to the volume or complexity of construction projects that it has recently undertaken. The record is also devoid as to how many subcontractors in the engineering specializations the beneficiary would be supervising at any given

time. Without more persuasive evidence as to the specialized or complex nature of the construction manager's job duties, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria 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.

Beyond the decision of the director, the petitioner provided no educational equivalency document that examined the foreign academic credentials of the beneficiary and their equivalency to similar studies at an accredited United States educational institution. 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). Without such a document, the issue of whether the beneficiary is qualified to perform the duties of the position is not resolved. As the appeal will be dismissed on other grounds, this issue need not be examined further.

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.