

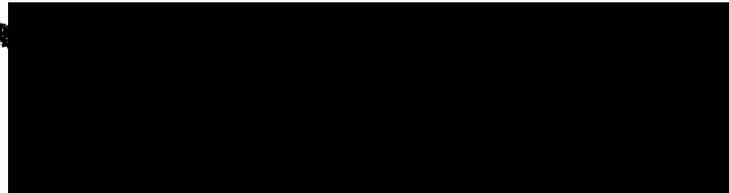
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U.S. Citizenship
and Immigration
Services

identify
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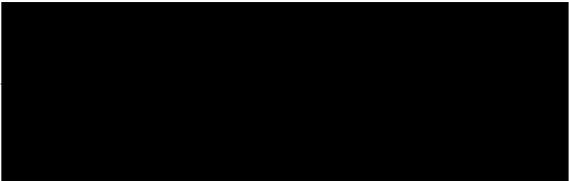


FILE: WAC 02 189 53578 Office: CALIFORNIA SERVICE CENTER Date: DEC 07 2004

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a construction firm. In order to employ the beneficiary as a cost estimator, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

On appeal, counsel submits two job vacancy announcements from other employers as evidence that "similar businesses require services of individuals in parallel positions to have a baccalaureate or higher degree. Counsel also maintains that, contrary to the director's finding, the Department of Labor's *Occupational Outlook Handbook (Handbook)* supports the petition by indicating that, in counsel's words, "the entry requirement for cost estimators in many industries like constructions [sic] and manufacturing would be a college degree." Counsel also argues that the job duties are so complex as to require a college degree or higher.

The AAO has determined that the director's decision to deny the petition was correct. The AAO based its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary evidence submitted with the brief.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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.” (Italics added.)

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.

Citizenship and Immigration Services (CIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner’s April 2002 letter of support included information that the petitioner, a construction firm in business since 1980, dealt with about 30 to 45 subcontractors, last grossed annual revenue of about \$780,000, and had two major construction projects pending, “with an amount ranging from \$2,000,000 to \$3,000,000. According to this letter, there was an urgent need for a cost estimator because of the petitioner’s growing business prospects.

The AAO’s review of all the evidence of record included all the information about the proposed duties and the business context in which they would be performed, such as “The Position Offered” section of the aforementioned letter; the “Job Description” and “Position Requirements” sections of the petitioner’s April 4, 2003 letter of reply to the RFE; and the following additional comments from the “Complexities of the Job” section of counsel’s brief, which advocates the need for at least a bachelor’s degree:

Earlier, the petitioner in its reply to the January 28, 2003 RFE, discussed in detail the general as well as the specific duties that a Cost Estimator does. In so doing, it overlooked to emphasize that the functions and duties of a cost estimator is a specialized and complex one,

that it would require a baccalaureate or higher degree for one to perform the job, although the job duties that have been discussed in the general and specific were evidently complex in nature. At this juncture, the petitioner would like to point out that cost estimators[,] whether in [the] construction or manufacturing industry [,] compile and analyze data on all factors that can influence the cost of the project. The factors would include materials, labor, location, [and] special machinery requirements including computer hardware and software. Cost estimators make decision[s] on equipment needs, sequence of operations, crew size, overhead, subcontracts, taxes, markup, allowance for waste materials, delays in shipping or transporting, weather and other factors that may affect the costs of the project or undertaking. They also prepare time-phase charts, networking, and learning curves. The words “cost estimate” alone involve complex mathematical calculations and advance mathematical techniques acquired only in a formal college education. The functions are definitely complex enough to execute that only a person armed with [a] theoretical body of knowledge can do the job effectively. That is why logic tells us that a college degree or higher degree in the field would be a necessity.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO considered the information on the cost-estimator occupation in the 2004-2005 edition of the *Handbook*. In doing so, the AAO determined that the relevant *Handbook* information is decisive in this proceeding. This is because the evidence about the duties of the proffered position substantially comports with the information that the *Handbook* provides about the cost estimator occupation (at 78-80). The *Handbook*'s analysis appears to have recognized all the dimensions that counsel stresses as defining the educational requirements of the cost estimator position proffered here, including the position's complexity and mathematical-analysis aspects.

The decisive fact is that the *Handbook* indicates that the employers of construction cost estimators do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty.

According to the *Handbook*, while employers of construction cost-estimators increasingly prefer persons who hold at least a bachelor's degree in a narrow range of construction-related specialties, they do not exclusively recruit and hire persons with such degrees. One of the “Significant Points” at the beginning of the *Handbook*'s discussion of cost estimators is:

- In construction and manufacturing, job prospects should be best for those with industry work experience and a bachelor's degree in a related field.

Page 79 of the *Handbook* includes this statement:

Job entry requirements for cost estimators vary by industry. In the construction industry, employers increasingly prefer individuals with a degree in building construction, construction management, construction science, engineering, or architecture. However, most construction estimators also have considerable construction experience, gained through work in the industry, internships, or cooperative education programs. Applicants with a thorough

knowledge of construction materials, costs, and procedures in areas ranging from heavy construction to electrical work, plumbing systems, or masonry work have a competitive edge.

This quoted material clearly indicates that employers are still hiring as construction cost estimators persons who do not meet the degree or degree-equivalent requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. Counsel's interpretation of the *Handbook's* information as indicating a specialty-degree requirement is incorrect, and the evidence of record does not refute the *Handbook* evidence that the cost estimator position is not one that normally requires a baccalaureate or higher degree, or the equivalent, in a specific specialty.

Next, the evidence does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), as it does not show a specific-specialty degree requirement that is common to the petitioner's industry in positions that are both (1) parallel to the one proffered here and (2) located among organizations similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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." See *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)).

As just discussed, the evidence does not establish the proffered position as one for which the *Handbook* reports a degree requirement in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. Finally, the two vacancy advertisements cited on appeal have little probative value under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), for several reasons. They are too few to be accepted as indicative of an industry-wide practice. This fact alone is decisive. Also, the record does not establish that the advertised position for marine construction is parallel to the one proffered here, as there is no meaningful information about the duty requirements of this advertised position. Furthermore, the City of Los Angeles advertisement does not specify a specialty degree requirement. It only indicates that courses in a related specialty can be substituted for experience.

The evidence of record fails to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by demonstrating that the proffered position requires a specialty degree because it is unique from or more complex than other cost estimator positions. Likewise, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the evidence does not establish that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. The *Handbook* has accounted for the levels of specialization and complexity conveyed in the record.

Finally, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor in this proceeding: there is no hiring and recruiting history for consideration, as this is the first time that the position has been offered.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. The petition is denied.