



U.S. Citizenship
and Immigration
Services



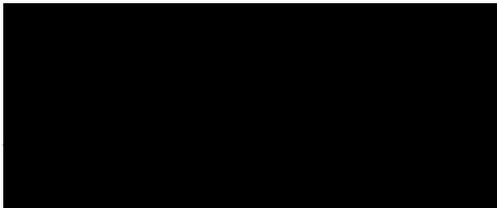
FILE: EAC 03 054 55287 Office: VERMONT SERVICE CENTER

Date: 11/17/11

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.

Mari Johnson
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 company that manufactures and installs gutters and leaders on buildings and construction projects. It seeks to employ the beneficiary as a part-time civil engineer. The petitioner, therefore, 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 because the proffered position does not appear to be a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation based on the duties of the position and refers to the classifications of engineer contained in the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and *Occupational Outlook Handbook (Handbook)*.

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.

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) interprets 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence; (4) the petitioner's letter that

responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a civil engineer. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; and the petitioner's letters in support of the petition and in response to the director's request for further evidence. According to the initial petition, the beneficiary would review blueprints and coordinate with licensed engineering firms for safety calculations and overall product design; analyze applicable materials to plan and design the petitioners' projects and bids; calculate costs and feasibility of all projects, using knowledge of engineering and advanced mathematics; prepare and modify reports, specifications, plans, construction schedules, environmental impact studies and designs for gutter installation projects; and inspect construction sites to monitor progress and ensure conformance to engineering specifications and construction safety standards.

In the petitioner's response to the director's request for further evidence, the petitioner provided the following breakdown of the beneficiary's work hours: 30 per cent of the beneficiary's time will be spent reviewing and analyzing reports and maps of construction sites, tests of water removal and drainage, and all applicable materials being used to construct a facility for which the petitioner has been contracted to install the gutters and leaders; 25 per cent of his time will be spent calculating materials, labor costs, and profitability of prospective projects; 25 per cent of his time will be spent preparing and modifying project status reports, construction and installation schedules, studies and overall design of gutter systems, and 15 per cent of his time will be spent inspecting construction sites. Although the director requested further information from the petitioner as to why one of the beneficiary's duties involved coordinating with licensed engineering firms for overall product design and safety calculations if the beneficiary would be performing the duties of an engineer, the petitioner provided no further information on this issue. The petitioner indicated in its letter of support that it was customary in the engineering and construction management industry to require a baccalaureate degree in civil engineering.

The director found that the proffered position was not a specialty occupation and stated that the duties of the position did not appear so complex, unique or specialize enough to qualify at the H-1B civil engineer level. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the petitioner's job description is identical to the civil engineer position description in the *DOT*. Counsel states that the petitioner would like to add an engineer to its staff to compete for larger projects and to assist in the opening of a new office. Counsel asserts that CIS should give deference to the employer's point of view.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, it appears that the petitioner altered the duties of the position after the director questioned the beneficiary's responsibilities in coordination of project design and safety standards through the use of licensed engineering firms. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. With regard to the instant petition, the petitioner's change in job duties is significant, as it involves the actual level of responsibility inherent in the proffered position, and raises questions with regard to possible licensure that the beneficiary might need to work in the capacity of a civil engineer. For this reason, only the original job description will be considered in this proceeding.

As both counsel and the director correctly pointed out, the classification of engineer is considered a specialty occupation. The *Handbook* clearly establishes that most entry-level engineering positions require a baccalaureate degree in engineering. The petitioner also submitted documentation from the American Society of Civil Engineers that suggests a higher level of engineering education is necessary in the present globalized market. What is less clear in the present proceeding is whether the proffered position is an engineering position. Based on the original job duties, it does not appear to be an engineering position. The fact that the petitioner would use licensed engineering firms with regard to project and safety design questions strongly suggests that the proffered position does not require a baccalaureate degree in engineering. The petitioner's own work experience suggests that the gutter and leader installation can be achieved by personnel who do not possess a baccalaureate degree in engineering. The fact that, on appeal, the petitioner indicates that the beneficiary is needed to help open a new office also suggests that the beneficiary's academic studies in business may be just as vital to the position as his engineering studies. Furthermore, the petitioner has not provided sufficient testimony to establish the specific engineering needs involved with the installation of the petitioner's product line.

With regard to parallel positions in similar businesses, the petitioner submitted seven job advertisements for engineering jobs with engineering and construction firms. As correctly noted by the director, these job advertisements do not document parallel positions in similar firms. The petitioner is not an engineering firm, but rather a construction subcontractor who sells and installs a specific product. Thus, the petitioner's documentary evidence is not viewed as persuasive. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or

uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated that it wanted to add the position of engineer to its staff. The petitioner also stated that the duties of the proffered position have been performed previously by the petitioner's owner. Although the owner stated that he had the equivalent of a baccalaureate degree in engineering, he provided no documentary evidence to further substantiate his assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. As previously stated, only the original job duties are examined in this proceeding. To the extent that they are depicted in the record, the duties appear routine. Although the petitioner has provided ample information as to its financial status, and to its various offices, it has not provided any evidence to establish the complexity or specialized nature of installing gutters and leaders. It has also provided no evidence to establish the complex or unique nature of the installation of the petitioner's product in large or small-scale projects. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner did not establish that the beneficiary is licensed to perform the duties of a civil engineer. To the extent that the beneficiary's work would constitute offering his services to the public, pursuant to 8 C.F.R. § 214.2(H)(4)(ii)(C)(3), he would be required to obtain licensure in the State of New Jersey, or to begin the licensure process as an engineer in training. As noted by the *Handbook*, all fifty States and the District of Columbia require licensure if the beneficiary is offering his services to the public. To the extent that this issue is not resolved in the proceeding, this is an additional reason why the petition may not be approved.

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. The petition is denied.