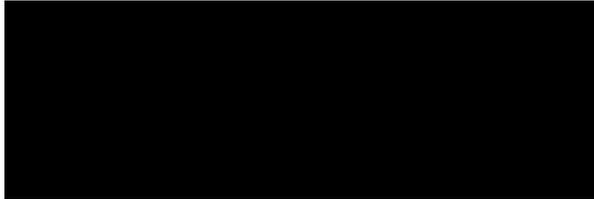




U.S. Citizenship
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Services

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FILE: WAC 03 257 52592 Office: CALIFORNIA SERVICE CENTER Date: **NOV 02 2005**

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:



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 fabricates and installs marble and granite. It seeks to employ the beneficiary as an industrial 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 is not a specialty occupation. On appeal, counsel submits a brief.

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.

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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) 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 an industrial engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning the use of equipment, materials, and personnel to improve the production and installation of marble for commercial and residential customers; implementing quality control to ensure product designs conform to customers' requirements and scheduling needs; overseeing the purchase of marble and raw material and equipment used in cutting, shaping, and polishing; writing evaluation reports, analyzing results, and offering corrective measures; and calculating fixed and variable production and installation costs. For the proposed position, the petitioner requires a bachelor's degree or its equivalent in industrial management, industrial engineering, or a related field.

The director stated that some of the proposed duties reflect those of an industrial engineer as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*); but that sole reliance on duties resembling those of an industrial engineer as that occupation is described in the *Handbook* and the *Dictionary of Occupational Titles* (DOT) is misplaced. When determining whether a position qualifies as a specialty occupation, the director stated that the specific duties combined with the nature of the petitioning entity are factors that CIS considers, and that each position must be evaluated based on the nature and complexity of the actual job duties. The director stated that the beneficiary's obtaining a degree in a related area does not guarantee the position is a specialty occupation. According to the director, the petitioner does not have the organizational complexity to require the services of an industrial engineer; and that even if the beneficiary performed some industrial engineer duties, they would be incidental to the primary duties, which are not those of a specialty occupation. The director found the proposed position similar to a construction manager, which is an occupation that the *Handbook* reveals does not require a baccalaureate degree. The director discussed *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), and its applicability to the proposed position's educational requirement. The director also discussed the discrepancies in the record involving the beneficiary's salary, and the relevance of *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

On appeal, counsel states that CIS previously approved a similar petition filed by the petitioner on behalf of the beneficiary; thus, the proposed position qualifies as a specialty occupation. Counsel asserts that the petitioner has over 100 employees and \$2 million in revenue. According to counsel, the proposed position is not analogous to a construction manager or a plant supervisor. Counsel states that the petitioner submitted its prior job announcements for the proposed position. Counsel maintains that the director failed to consider the submitted job postings representing other employers, and that job postings routinely do not describe a company's income, nature, and number of employees.

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.

Counsel noted that CIS approved another petition that had been previously filed by the petitioner on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO first considers 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The *Handbook* does not support counsel's assertion that the proposed position is analogous to an industrial engineer, as the beneficiary will not perform the duties of an industrial engineer, which is an occupation that the *Handbook* depicts as follows:

To solve organizational, production, and related problems most efficiently, industrial engineers carefully study the product and its requirements, use mathematical methods such as operations research to meet those requirements, and design manufacturing and information systems. They develop management control systems to aid in financial planning and cost analysis and design production planning and control systems to coordinate activities and ensure product quality. They also design or improve systems for the physical distribution of goods and services. Industrial engineers determine which plant location has the best combination of raw materials availability, transportation facilities, and costs. Industrial engineers use computers for simulations and to control various activities and devices, such as assembly lines and robots. They also develop wage and salary administration systems and job evaluation programs. Many industrial engineers move into management positions because the work is closely related.

The beneficiary is not portrayed by the petitioner as studying a product and its requirements, and using mathematical methods such as operations research to meet those requirements; or as designing manufacturing and information systems; or developing management control systems to aid in financial planning and cost analysis and design production planning and control systems to coordinate activities and ensure product quality. The beneficiary will not design or improve systems for the physical distribution of goods and services; determine which plant location has the best combination of raw materials availability, transportation facilities, and costs; or use computers for simulations and to control activities and devices, such as assembly lines and robots; nor will the beneficiary develop wage and salary administration systems and job evaluation programs.

The AAO finds that the director correctly concluded that the proposed position parallels a construction manager, and that the *Handbook* reveals that employers do not require a baccalaureate degree in a specific specialty for this occupation. The petitioner states that the beneficiary will plan the use of equipment, materials, and personnel to improve efficiency of the production and installation of marble; oversee the purchase of marble, raw material, and equipment; implement quality control; write evaluation reports, analyze results, and offer corrective measures; and calculate production and installation costs. Similar to this, the *Handbook* describes construction managers as overseeing the use of materials, tools, and equipment, and worker productivity; coordinating and managing people, materials, and equipment; preparing daily reports of progress and requirements for labor, material, machinery, and equipment; and overseeing the quality of construction. Given that the proposed position corresponds to a construction manager, which is an occupation that does not require a baccalaureate degree in a specific specialty, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel references job postings, and asserts that they routinely do not describe a company's income, nature, and number of employees. The AAO finds counsel's assertion and the submitted job postings unpersuasive. Although counsel asserts that job postings do not convey information about a company's nature, the regulation at 8 C.F.R.

§ 214.2(h)(4)(iii)(A)(2) requires that the specific degree requirement be common to the industry in parallel positions among *similar* organizations. A company's size, scope, and nature are therefore relevant factors in determining whether an employer is similar to the petitioner. Here, Hunter Douglas, Inc., a window fashion company, and Zinsser Co., Inc., a manufacturer of specialty coatings and decorating items, differ in nature from the petitioner, a fabricator and installer of marble and granite; and the AAO notes that the nature of the employer is not described in the job postings for Manpower, Management Recruiters International, and Title First Agency. For these reasons, the job postings fail to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence portrays the proffered position as so complex or unique that it can be performed only by an individual with a baccalaureate degree in industrial engineering, industrial management, or a related field. As discussed already, the *Handbook* reveals that the proposed position corresponds to a construction manager and that employers do not require a bachelor's degree in a specific specialty for this occupation. The AAO finds that no evidence in the record suggests that the proposed duties differ from those of a construction manager. As such, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must show that it normally requires a degree or its equivalent for the position. Counsel asserts that the petitioner previously employed the beneficiary in H-1B status as an industrial engineer, and refers to the petitioner's job advertisements seeking an industrial engineer. This evidence and counsel's assertion are not persuasive. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As discussed earlier, the *Handbook* discloses that the proposed position parallels a construction manager, and that employers do not require a bachelor's degree in a specific specialty for this occupation.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually

¹ The court in *Defensor v. Meissner* 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 be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the proposed position is comparable to a construction manager, which is an occupation that does not require a baccalaureate degree in a specific specialty. While the *Handbook* indicates that some employers hire persons with degrees in construction management or related fields, no evidence in the record reflects that the proposed duties require a degree in a specialty. The petitioner states that it has \$2 million in gross income and employs 121 persons in its marble and granite fabrication installation business, but there is no evidence in the record that corroborates this information or distinguishes the position from those of other construction managers. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As such, the petitioner fails to establish this last criterion at 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.

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.