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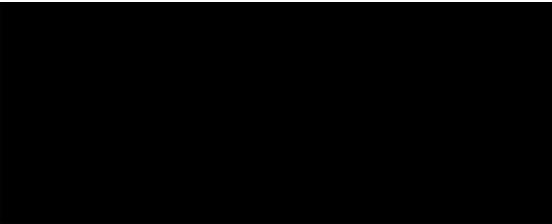


FILE: WAC 04 067 52319 Office: CALIFORNIA SERVICE CENTER Date: NOV 15 2005

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

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 provides civil engineering and land surveying. It seeks to employ the beneficiary as a surveyor. 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 states that the proffered position is 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.

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 a surveyor. 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 assisting in the planning and conducting of technical surveys. The beneficiary will perform boundary surveys to determine where property is located; map the topography of land for engineering design; establish elevations of home sites for flood insurance; perform title surveys for real estate transactions; certify that structures are built according to design; layout building subdivisions and other construction projects so the construction companies can relate the engineering plans to the real world; and provide data and analysis on the dimensions and features relevant to the goals and objectives outlined for each project. The beneficiary will compute the exact geodetic measurements of areas and boundaries using advanced engineering techniques and equipment; and will prepare sketches, maps, reports, and legal descriptions of surveys in order to describe and certify work performed and make presentations to the petitioner's owner and clients. The job description that was submitted in response to the request for evidence elaborated on the proposed duties. For the proposed position the petitioner requires a bachelor's degree in civil engineering or a related field.

The director found that the proposed position resembles a surveyor as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, and that the *Handbook* reveals that this occupation does not require a bachelor's degree in a specific specialty for entry into a surveyor position. The director discussed the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A), concluding that the petitioner satisfied none of them. The director stated that the submitted job postings failed to establish that the proposed position qualifies as a specialty occupation; that the submitted job description described the proposed duties in generic terms, failing to show the uniqueness or complexity of the proposed position or that the proposed position was more specialized or complex than any other land surveyor position. The director found the petitioner's assertion that its past and present job announcements specify a minimum of a baccalaureate degree in the field of civil engineering unpersuasive in that the petitioner's job announcement was provided subsequent to the filing of the petition and that the petitioner's self-imposed standards do not establish whether an occupation qualifies as a specialty occupation. The director discussed *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) and *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558 (Comm. 1988).

On appeal, counsel states that the state of California requires a land surveyor to possess a baccalaureate degree, and discusses sections 8742, 8730, and 8705 of the California Business and Professions Code. Counsel asserts that the beneficiary will serve as a subordinate to a licensed civil engineer, and indicates that the record contains a copy of the person's civil engineering license. Counsel emphasizes that the statutory code allows the beneficiary to be lawfully employed in the proposed position until the beneficiary obtains licensure, and that this exemption from licensure does not diminish the nature of the proposed position such that it is no longer a specialty occupation. Counsel describes this exemption from licensure as analogous to the exemption of licensure of architects, civil engineers, and physical therapists practicing under the direct supervision of a licensed superior.

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 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 finds that the proposed position resembles a surveyor as that occupation is described in the *Handbook*, and that *Handbook* indicates that this occupation does not require a baccalaureate degree in a specific specialty. The AAO does not agree with counsel's asserts that a land surveyor is required to possess a baccalaureate degree in California. The AAO recapitulates here the relevant codes, Sections 8741 and 8742 of the California Business and Professions Code:

8741. (a) The first division of the examination shall test the applicant's fundamental knowledge of surveying, mathematics, and basic science. The board shall prescribe by regulation reasonable educational or experience requirements including two years of postsecondary education in land surveying, two years of experience in land surveying, or a combination of one year of postsecondary education and one year of experience in land surveying for admission to the first division of the examination. Applicants who have passed the engineer-in-training examination, or who hold professional engineer registration, are exempt from this division of the examination. The second division of the examination shall test the applicant's ability to apply his or her knowledge and experience and to assume responsible charge in the professional practice of land surveying.

(b) The applicant for the second division examination shall have successfully passed the first division examination, or shall be exempt therefrom. The applicant shall be thoroughly familiar with (1) the procedure and rules governing the survey of public lands as set forth in "Manual of Surveying Instructions," published by the Bureau of Land Management, Department of the Interior, Washington, D.C. and (2) the principles of real property relating to boundaries and conveyancing.

(c) The board may by rule provide for a waiver of the first division of the examination for applicants whose education and experience qualifications substantially exceed the requirements of Section 8742.

(d) The board may by rule provide for a waiver of the second division of the examination and the assignment to a special examination for those applicants whose educational qualifications are equal to, and whose experience qualifications substantially exceed, those qualifications established under subdivision (c). The special examination may be either written or oral, or a combination of both.

8742. (a) The educational qualifications and experience in land surveying, which an applicant for the second division examination shall possess, shall not be less than one of the following prescribed criteria:

(1) Graduation from a four-year curriculum with an emphasis in land surveying approved by the board or accredited by a national or regional accrediting agency recognized by the United States Office of Education at a postsecondary educational institution and two years of actual broad based progressive experience in land surveying, including one year of responsible field training and one year of responsible office training, satisfactory to the board.

(2) Actual broad based progressive experience in land surveying for at least six years, including one year of responsible field training and one year of responsible office training, satisfactory to the board.

(3) Registration as a civil engineer with two years of actual broad based progressive experience in land surveying satisfactory to the board.

(b) With respect to an applicant for a license as a land surveyor, the board shall count one year of postsecondary education in land surveying as one year of experience in land surveying up to a maximum of four years, provided the applicant has graduated from the course in land surveying and the curriculum in land surveying is approved by the board or is accredited by a regional or national accrediting agency recognized for the purpose by the United States Office of Education. Each year of study in an approved or an accredited course in land surveying without graduation shall be counted the same as one-half year of experience. Each applicant claiming equivalent credit for education may be required to produce a complete transcript of all college level courses completed. Until January 1, 2000, the board may, at its discretion, confer credit as experience in land surveying, not in excess of two years, for successfully passing the first division of the examination prescribed in Section 8741.

As described in the above codes, neither the first nor the second division of the examination for licensure as a land surveyor requires a baccalaureate degree in land surveying or a relevant field such as civil engineering. According to section 8741 of the California Business and Professions Code, the board requires an application for the first division of the examination to possess two years of postsecondary education in land surveying, two years of experience in land surveying, or a combination of one year of postsecondary education and one year of experience in land surveying for admission to the first division of the examination. According to this section, applicants who have passed the engineer-in-training examination, or who hold professional engineer

registration, are exempt from this division of the examination. Thus, the first division of the land surveyor's examination does not require that an application possess a baccalaureate degree in a specific specialty.

Section 8742 of the California Business and Professions Code provides that an applicant for the second division examination possess one of three criteria: (1) graduation from a four-year curriculum with an emphasis in land surveying from an approved educational institution and two years of progressive experience in land surveying; (2) progressive experience in land surveying for at least six years; or (3) registration as a civil engineer with two years of progressive experience in land surveying. This indicates that an applicant is not required to possess a baccalaureate degree in a specific specialty in order to qualify to take the second division of the examination for licensure as a land surveyor if the applicant had progressive experience in land surveying for at least six years. Thus, section 8742 of the California Business and Professions Code does not substantiate counsel's contention that California law requires a land surveyor to possess a baccalaureate degree. Sections 8705 and 8742 of the California Business and Professions Code relate to licensure.

The AAO's conclusion, from the evidence in the record and the relevant sections of the California Business and Professions Code, is that 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 - the evidentiary record contains job postings. The postings fail to establish that a degree requirement is common to the industry in parallel positions among similar organizations as none of the companies in the posting indicate the requirement of a baccalaureate degree in engineering or a related field.

The petitioner has not established the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. The *Handbook* shows that the proposed position is similar to a surveyor, which is an occupation that does not require a baccalaureate degree in a specific specialty such as land surveying or civil engineering. Furthermore, the California Business and Professions Code conveys that a land surveyor does not require a baccalaureate degree in land surveying or civil engineering. For these reasons, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner must establish that it normally requires a degree or its equivalent for the position. No independent evidence in the record corroborates the petitioner's assertion that it normally requires a degree or its equivalent for the position as no evidence shows a prior pattern of this.

To establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In this decision the AAO has already relayed that the proposed position is akin to a surveyor, and that the *Handbook* and the California Business

and Professions Code reveal that this occupation does not require a baccalaureate degree in a specific specialty. No evidence in the record demonstrates that the proposed position has a specialization or complexity that would require knowledge associated with the attainment of a baccalaureate degree in land surveying, civil engineering, or a related degree. Accordingly, the petitioner fails to establish the 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 on this ground.

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.