U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

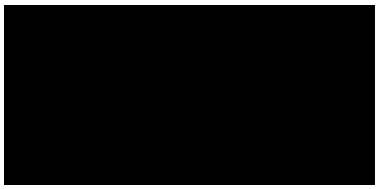
D 2

FILE: SRC 04 058 50973 Office: TEXAS SERVICE CENTER Date: OCT 0 3 2005

IN RE: Petitioner: [redacted]
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 is a professional construction company that seeks to employ the beneficiary as an agricultural 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 agricultural 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 applying knowledge in agriculture to address soil, water conservation, and the limited plant varieties that grow in El Paso's climate; preparing landscape plans; determining the amount of water for completed projects; testing soil at sites and implementing water-saving strategies; and selecting and positioning plants for water efficiency. The petitioner stated that the beneficiary qualifies for the proposed position based on his education, which SpanTran Services indicates is the equivalent to a U.S. bachelor's degree in agricultural engineering with an emphasis on plant science, and work experience.

The director stated that the petitioner provided no specific examples of the proposed duties and projects for which the beneficiary would provide agricultural engineering services. According to the director, the description of an agricultural engineer as described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) differs from the proposed position in that the *Handbook* portrays agricultural engineers as designing agricultural machinery, equipment, and structures. The design services described by the petitioner, the director stated, relate to irrigation systems for residential plots. The director concluded that the proposed position is more aligned with that of a landscaper, which is an occupation that the *Handbook* shows does not require a baccalaureate degree.

On appeal, counsel emphasizes that the proposed position's primary duty is to implement water-saving tactics which include designing and implementing drip irrigation systems; identifying, analyzing, and solving problems; supervising ground preparation; designing efficient irrigation systems; manipulating a computer to produce computer-generated designs; and selecting water efficient plants and positioning them to maximize water efficiency. Counsel states that the petitioner did not identify the specific projects that the beneficiary will work on as this depends on the beneficiary's start date and his designs. Counsel states that the director narrowly construes the description of an agricultural engineer as the *Handbook* also conveys that this occupation develops ways to conserve soil and water, works in research and development, and participates in management of areas in the field. Counsel asserts that the beneficiary will design agricultural equipment: he will design and implement drip irrigation systems. Counsel states that the *Handbook's* depiction of the typical employer of agricultural engineers is not exhaustive.

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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

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.

Counsel asserts that the proposed position is that of an agricultural engineer. The *Handbook* depicts this occupation as follows:

> Agricultural engineers apply knowledge of engineering technology and biological science to agriculture. . . . They design agricultural machinery and equipment and agricultural structures. Some specialties include power systems and machinery design; structures and environment; and food and bioprocess engineering. They develop ways to conserve soil and water and to improve the processing of agricultural products. Agricultural engineers work in research and development, production, sales, or management.

Counsel's March 12, 2004 letter states that the beneficiary will apply engineering knowledge and skills to introduce innovative "water saving tactics" in residential landscapes, and that the proposed position is "far more technical" than a landscape worker that installs a sprinkler system in that an agricultural engineer might design and implement a drip irrigation system which requires, counsel asserts, an aptitude for computing, calculation, and design, which most landscapers do not have. Counsel also states that plans for effective conservation of water might include duties such as "identifying[,] analyzing[,] and solving problems, supervision of ground preparation, designing water efficient irrigation systems, manipulating a computer to produce computer generated designs, [and] selection of water efficient plants." These assertions of counsel do not constitute evidence, however. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Furthermore, the AAO finds that the duties described in counsel's March 12, 2004 letter and the petitioner's job description are not encompassed within the depiction of an agricultural engineer. An agricultural engineer's duties involve conserving soil and water for agricultural products, which differs from the context of conserving water for an individual residential landscape project. Counsel alleges that the beneficiary will design "agricultural equipment" and "implement drip irrigation systems." But no evidence in the record, including the petitioner's job description, supports the allegation. Again, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*; *Matter of Ramirez-Sanchez*.

The director correctly found that the proposed position is similar to a landscape worker as that occupation is depicted in the *Handbook*. The *Handbook* conveys:

> The duties of landscaping workers and groundskeeping workers are similar and often overlap. *Landscaping workers* physically install and maintain landscaped areas. They grade property, install lighting or sprinkler systems, and build walkways, terraces, patios, decks, and fountains. In addition to initially transporting and planting new vegetation, they transplant, mulch, fertilize, and water flowering plants, trees, and shrubs and mow and water lawns. . . .

The beneficiary will prepare landscaping plans; determine the amount of water for projects; test soil and implement water-saving strategies; and select and position plants to produce water efficient landscaping. Landscape workers perform these duties: they too install sprinkler systems and plant new vegetation. The AAO observes that the petitioner does not describe the particulars of testing soil; thus, the AAO cannot conclude that this duty would require baccalaureate-level knowledge in agricultural engineering with an emphasis on plant science.

The *Handbook* reveals that a landscaper worker does not require a bachelor's degree in a specific specialty. Accordingly, 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.

No evidence in the record establishes 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.

No evidence establishes the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*): that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* discloses that the proposed position is similar to a landscaper worker, which is an occupation that does not requiring a bachelor's degree in a specific specialty.

No evidence reflects that the petitioner normally requires a degree or its equivalent for the position as required to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 associated with the attainment of a baccalaureate or higher degree. Since the *Handbook* reveals that the proposed position is analogous to a landscape worker, which is an occupation that does not require a bachelor's degree in a specific specialty, the petitioner fails to establish this last criterion.

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.