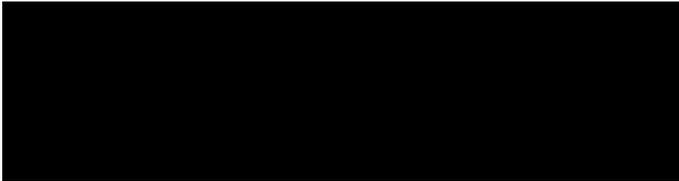


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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



D2

FILE: WAC 03 233 55415 Office: CALIFORNIA SERVICE CENTER Date: OCT 28 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, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion is granted, and the prior decision of the AAO is withdrawn. Upon consideration of the appeal, the appeal will be sustained, and the petition will be approved.

The petitioner is a general contractor engaged in project management, design, and building of multi-family buildings, low-income housing, commercial buildings, schools, and public projects such as fire stations and public libraries. In order to employ the beneficiary as a project engineer, 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 as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel subsequently filed a timely Form I-290B, but it did not identify specifically any erroneous conclusion of law or statement of fact by the director. The AAO summarily dismissed the appeal because it had not received the brief and/or evidence that the Form I-290B stated would follow in 30 days. On motion, counsel has overcome the basis of the summary dismissal, by demonstrating that, prior to the AAO decision, he had filed the material specifying the grounds of the appeal. Accordingly, the AAO's previous decision will be withdrawn, and the AAO will consider the appeal.

The director determined that the proffered position aligns with the construction manager occupational category as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, which Citizenship and Immigration Services (CIS) recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations. The director noted, in part, that the *Handbook* indicates that employers indicate a growing preference, but not a normal requirement, for a bachelor's degree in a specific specialty. On appeal, counsel contends that the petitioner has established that the duties of the proffered position exceed those of a construction manager and require a bachelor's degree in a specific specialty such as architecture.

The petitioner has overcome the grounds for the director's denial. The AAO bases this determination 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 materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief, dated December 23, 2003.

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.

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.

According to its July 24, 2003 letter of support that was filed with the Form I-129:

[The petitioner is] a general contractor involved in new construction, project management and design/related aspects concerning multi-family buildings, low income housings, commercial buildings, schools and public projects such as public libraries, fire stations, etc. We were established in 1983, currently employ 30 people, and, most recently, reported gross revenues of \$40 million.

This letter of support includes these statements about the proffered position:

[The beneficiary's] duties will be highly complex. Initially, he will meet with our clientele in order to discuss their project requirements and needs. He then will create a proposed design which will be coordinated with licensed company and engineering and architectural personnel. Under their direct supervision, he will partake in such functions as design development, space planning, interior presentation, and the rendering of various perspectives including aerial views of the proposed project.

In addition, we wish to convey that much of the work will be applied to both residential as well as commercial projects. Thus, as part of his responsibilities, he will partake in comprehensive architectural analysis incorporating AUTOCAD designs utilizing second and third generation software. He will also prepare bills of materials and will design a variety of engineering protection systems to be implemented into the various properties.

Furthermore, among [the beneficiary's] responsibilities will include [sic] the review of plans particularly oriented to projecting stress analysis factors. Therefore, such features as load requirements, size, shape and strength of the particular structure must properly be computed in order to insure that the edifice's stress levels are not only in compliance with code, but will further withstand all foreseeable stress fractures that may occur. At the same time, [the beneficiary] will also be required to inspect all completed projects, and will recommend remedial procedures where major stress fractures may come into play. It should be noted that much of the calculative work will access highly developed computer engineering software that has been particularly adapted for structural engineering purposes.

In the final series of work to be performed by [the beneficiary], he will be required to partake in review of product design work, which must be in compliance with established engineering principles, company standards, customer contract requirements, and related specifications. In this regard, he will coordinate all activities concerned with technical developments, scheduling, and resolving engineering and test problems.

The petitioner's October 13, 2003 letter of reply to the RFE includes this information about the proposed duties:

[W]e would like to clarify that as a Project Engineer at this company, [the beneficiary's] duties will primarily entail serving as a coordinator between the field crew, owner, architect and the design engineers in resolving technical issues and glitches that might emerge at any point within the construction process. To achieve this, he will review design and construction drawings in order to determine possible construction issues as well as responding to field emergencies. Moreover, [the beneficiary] will equally monitor various submittals in order to achieve timely delivery of the particular project in question.

Therefore, in summary, we would like to emphasize that the position will require that the Project Engineer coordinate project requirements and specifications through the project architect, engineering consultant and subcontractor, review design and construction drawings to determine possible construction-related issues, project information coordination between our company and the private owners, engage in the coordination of plan clarifications, technical information, site memos and submittals to the owner's consultant, architect and subcontractors, create proposed design subject to review, approval and signature of a licensed Engineer/Architect in the State of California, prepare CAD generated shop drawings for the Architect's ultimate approval to be used on the actual site construction, and to review all submittals in compliance with the specifications being sought before submitting to the Architect/Owner.

[W]e would like to equally emphasize that in light of the comprehensive work involving design development, space planning, interior presentation, architectural analysis, the preparation of highly detailed engineering-related paperwork and the implementation of remedial procedures involving the review of design and construction drawings where modifications will be rendered by the Project Engineer in order to insure that the project work will ultimately be in compliance with client contract requirements and specifications, company standards, and established engineering principles, it is apparent that a degreed professional will be necessary to engage in this type of position.

As a preliminary matter, the AAO does not concur with the director's judgment (at page 3 of his decision) that the petitioner's reply to the RFE materially alters the proposed duties as presented in the Form I-129 and the July 24, 2003 letter of support that was filed with it.

The AAO finds that the petitioner has satisfied the specialty occupation criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) by establishing that the nature of the specific duties is sufficiently specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate degree within a small range of specialty degrees that includes architecture. The AAO reaches this conclusion on the basis of the totality of the particular evidence of record in this proceeding, including the extent of the description of the proposed duties, the explanations of the subordinate but substantive interactions which the beneficiary would have with licensed architects and engineers, the content of the expert opinion rendered by the professor from the Construction Department at Southern Polytechnic State University who is also a construction consultant to management firms and general contractors, and the information presented about the petitioner's construction projects.

The *Handbook* indicates that employers increasingly prefer individuals who combine industry work experience with a bachelor's degree in construction science, construction management, or civil engineering. The *Handbook* also indicates that that an increasing number of graduates in related fields – engineering or architecture, for example – also enter construction management.

As the record's educational evaluation and associated documentation establish that the beneficiary holds a foreign degree that is equivalent to a United States bachelor's degree in architecture, the petitioner has established that the beneficiary is qualified to perform the services of the proffered position in accordance with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C).

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The AAO decision of July 1, 2004 is withdrawn. The appeal is sustained. The petition is approved.