



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY

Δ 2

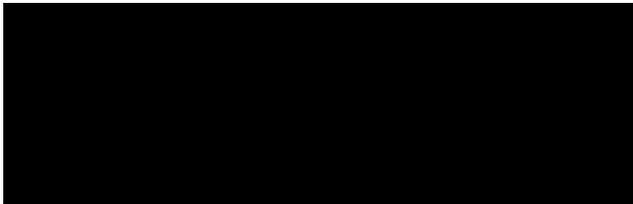


FILE: WAC 04 219 53685 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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 The director's decision will be withdrawn. The petition will be remanded for the entry of a new decision.

The petitioner is a construction company with five employees that seeks to employ the beneficiary as a project manager. 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 petitioner did not submit all evidence as requested by the director. The director found that the record as presently constituted, prohibits the director from making an affirmative determination as to the nature, complexity, and viability of the petitioner's business. The director found that the petitioner did not meet its burden of proof. On appeal, counsel submits a brief and additional evidence.

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

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 petitioner is seeking the beneficiary's services as a project manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and counsel's response to the director's request for evidence. According to the July 29, 2004 letter of support that the petitioner submitted with the petition, the beneficiary would perform these duties: "Review drawing specifications"; "Prepare project diary and documentation"; "Review for approval of project to meet specifications and regulations, change orders, pay applications and other project documentation"; and "Prepare cost reports and narrative reports on an outgoing basis for tracking purposes."

The director issued a request for evidence to establish that the proffered position meets the above listed criteria as a specialty occupation. The director requested a more detailed description of the work done, including specific job duties, the percentage of time to be spent on each duty, level of responsibility, and types of employees supervised. The director requested a foreign educational credentials evaluation. The director requested information to substantiate the information provided on the Form I-129. The director requested copies of the petitioner's Form DE-6 quarterly wage reports for all employees for the last six quarters. The director requested a line and block organizational chart showing the petitioner's hierarchy and staffing levels. The director requested a list of all employees by name and job title, and a brief description of the job duties and educational level of the employees employed under the direction of the proposed position. The director requested photographs of the petitioner's business premises, including company logos.

The petitioner provided a more detailed description of the work to be performed including the following duties: planning, organizing and directing activities concerned with construction, design and calculation of "construction project"; inspecting and reviewing project construction preparation, drawings and specifications to ensure work conforms to specifications; studying job specifications to plan and maintain control of job cost; communicating design requirements to vendors; directing and overseeing work of designers to ensure that the project meets specifications; reviewing approval of the project to meet specifications, regulations, change orders, pay applications and other project documentation; specifying order of supplies and purchase materials to complete the construction project; preparing reports concerning such areas as work progress, costs and scheduling and narrative reports on an outgoing basis for tracking purposes; estimating and preparing proposal documentation for the project and preparing project diary and documentation. The petitioner submitted a letter from an assistant professor of engineering in support of its contention that the position requires a bachelor's degree in a specific specialty. The petitioner submitted a foreign educational credentials evaluation indicating that the beneficiary has the equivalent of a bachelor's degree in architectural engineering. The petitioner did not submit the requested copies of the DE-6 quarterly wage reports as the employer maintained they contain confidential information about the employer which is protected by California privacy law. Counsel asserted that the quarterly wage reports for an H-1B petition are not required by federal regulations. The petitioner provided an organizational chart which included the positions of C.E.O., wood-frame construction manager, sub-construction manager and secretary/accountant.

The director noted that the petitioner did not submit all of the requested evidence. The director noted that the specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that CIS considers. The director noted that the petitioner is a construction company. The director found that the nature of the petitioner's business operation was not entirely clear. The director noted that the petitioner did not submit the requested DE-6 forms. The director found that failure to offer a complete response to a request for evidence is grounds for denial and summarized 8 C.F.R § 103.2(b)(14). The director

found that, as a consequence of the petitioner's non-production of the DE-6 forms, the record as presently constituted prohibits the director from making an affirmative determination as to the nature, complexity, and viability of the petitioner's business.

On appeal, counsel asserts that the director misinterpreted and misstated 8 C.F.R. § 103.2(b)(14). Counsel contends that the director misunderstood the nature of the petitioner's business. Counsel asserts that the director's sole basis for denying the petition was the petitioner's failure to provide copies of its DE-6 quarterly wage reports for the last six quarters. Counsel contends that copies of quarterly wage reports for the year and half prior to the submission of the petition would not evidence "the nature, operations, complexity, and structure" of the petitioner's business, and therefore would not be relevant.

Counsel asserts that the director misinterpreted the regulation at 8 C.F.R. 103.2 (b)(14) which provides:

Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. Failure to appear for required fingerprinting or for a required interview, or to give required testimony, shall result in the denial of the related application or petition.

Counsel asserts that failure to submit quarterly wage reports did not preclude a material line of inquiry. Upon review of the record, the AAO finds that counsel is correct.

The petition may not be granted, however, as the director has not made a determination on whether the position qualifies as a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A) and whether the beneficiary is qualified for the position under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C).

The director's decision will be withdrawn and the matter remanded for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issues of whether the position offered is a specialty occupation, and whether the beneficiary is qualified to perform the duties of the specialty occupation. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's October 14, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.