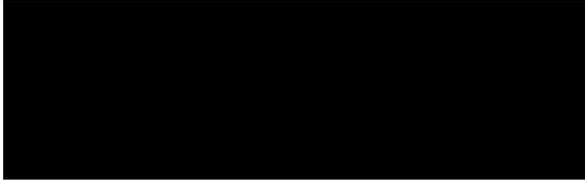




U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 132 51480 Office: NEBRASKA SERVICE CENTER Date: JUN 05 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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a general contractor of residential and commercial construction. It seeks to employ the beneficiary as a mechanical/construction engineer and to classify him 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 ground that the record did not establish 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.

As provided in 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 evidence (RFE); (3) the petitioner's response thereto; (4) the director's decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a general contractor of residential and commercial construction, founded in 2002, with two employees and gross annual income of \$91,500. The petitioner states that its growing business requires the services of a mechanical/construction engineer, and that it wishes to hire the beneficiary for the job at the pay rate of \$12.57/hour. The duties of the position, and the percentage of time required by each, are described as follows:

- 70% Perform engineering duties such as planning, designing and overseeing construction and maintenance of building structures, both commercial and residential. Design and/or review plans, sketches, charts, drawings or reports taking into account factors such as cost, structure and material availability.
- 30% Evaluate technical and economic factors, recommending engineering actions for attainment of design by applying knowledge of material science, mechanical engineering and/or related technologies.

According to the petitioner, the minimum educational requirement for the proffered position is a baccalaureate degree in mechanical or construction engineering, or a related field. The record indicates that the beneficiary earned a diploma in mechanical engineering technology at the Technical University of Cluj-Napoca, in Romania, on December 19, 1994.

In his decision the director found that the job duties lacked sufficient detail and the documentation of record was insufficient to classify the proffered position as a specialty occupation. Although some internet job postings for mechanical engineers had been submitted, the director noted that the advertising companies did not appear to be similar to the petitioner in their size, type of operations, and gross annual income. The record also included a letter from the president of an engineering company in Chicago, Illinois, stating that it was normal and customary to require a mechanical engineer to have a baccalaureate degree in that or a related engineering field, but the director determined that one such letter did not establish an industry standard. The petitioner did not have a history of hiring individuals with specialty degrees for the proffered position, the director declared, and did not demonstrate that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that the director erred in finding that the duties of the proffered position are not so specialized and complex as to require a baccalaureate degree. All engineering positions require specialized knowledge, counsel declares, and cannot be performed without an engineering degree. Counsel contends that it also was inappropriate to deny the petition due to the relatively small size of the petitioner's business operation. The director should have given deference, counsel concludes, to the petitioner's view of its business needs and the requirements of the proffered position.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. *See Shanti, Inc. v. Reno, id.*, at 1165-66.

As described in the *Handbook*, 2006-07 edition, engineering is a broad occupation with numerous specialty areas – including civil, construction, and mechanical engineering:

Engineers apply the principles of science and mathematics to develop economical solutions to technical problems

Engineers consider many factors when developing a new product

In addition to design and development, many engineers work in testing, production, or maintenance. These engineers supervise production in factories, determine the causes of component failure, and test manufactured products to maintain quality. They also estimate the time and cost to complete projects

Engineers use computers extensively to produce and analyze designs; to simulate and test how a machine, structure, or system operates; and to generate specifications for parts. Many engineers also use computers to monitor product quality and control process efficiency

Most engineers specialize

Civil engineers design and supervise the construction of roads, buildings, airports, tunnels, dams, bridges, and water supply and sewage systems. They must consider many factors in the design process, from the construction costs and expected lifetime of a project to government regulations and potential environmental hazards such as earthquakes The major specialties are structural, water resources, construction, environmental, transportation, and geotechnical engineering.

. . . .

Mechanical engineers research, develop, design, manufacture, and test tools, engines, machines, and other mechanical devices. They work on power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines, as well as power-using machines such as refrigeration and air-conditioning equipment, machine tools, material handling systems, elevators and escalators, industrial production equipment, and robots used in manufacturing. Mechanical engineers also design tools that other engineers need for their work Mechanical engineers may work in production operations in manufacturing or agriculture, maintenance, or technical sales; many are administrators or managers.

Based on the evidence of record, the AAO determines that the proffered position does not fit the *Handbook's* description of a mechanical engineer or a civil/construction engineer. The duties of the proffered position do not include any research, development, design, manufacture, or testing of tools, engines, machines, or other mechanical devices. Accordingly, the proffered position is not that of a mechanical engineer. While the duties of the proffered position include some general language relating to civil and construction engineering, they do not indicate a level of sophistication that would require the highly specialized knowledge of a civil/construction engineer. The petitioner has provided no information about the types of buildings the beneficiary would be working on, aside from the generic reference to commercial and residential structures. In the RFE the director advised the petitioner that the job description was not sufficiently detailed, and requested "a complete, detailed description of the duties to be performed by the beneficiary." Aside from estimating the percentage of time the beneficiary would spend on the previously described duties, the petitioner did not submit any additional details about the duties of the proffered position. Nor has any such information or evidence been submitted on appeal. The AAO concludes that the petitioner has failed to show that the beneficiary will be performing the duties of a construction engineer in the proffered position.

In determining the nature of a particular position and whether it qualifies as a specialty occupation, the duties actually performed are determinative, not the title of the position. While the petitioner claims that a baccalaureate degree in mechanical or construction engineering is required for the proffered position, the petitioner must establish that its degree requirement is required by the performance demands of the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). In this case the evidence fails to demonstrate that the performance demands of the proffered position require the beneficiary to have a degree in mechanical or construction engineering.

For the reasons discussed above, the record does not establish that a baccalaureate degree in a specific specialty is the normal minimum requirement for entry into the proffered position, as required for it to meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes three internet job postings for mechanical engineers, each of which requires a bachelor's degree in mechanical engineering. Since the record clearly shows that the duties of the proffered position are not those of a mechanical engineer, it is not a parallel position to those advertised in the internet job postings. Nor do the job postings show that any of the advertising companies is similar to the petitioner in their line of business or scale of operations. The record also includes a letter from the president of a construction company in Chicago, Illinois, who states that it is normal and customary for companies in the construction field to employ engineers with mechanical or construction engineering degrees, and that he employs two mechanical/construction engineers with bachelor's degrees in engineering. The letter contains no information about the company's scale of operations, relative to the petitioner, or the types of residential and commercial construction projects it works on. Nor is the letter supplemented by any evidence identifying the company's two engineers and documenting their engineering degrees. The AAO concludes that the internet job postings and the letter from the construction company fail to establish that a bachelor's degree requirement in mechanical or construction engineering is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify

as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in mechanical or construction engineering, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot show that it normally requires a bachelor's degree in mechanical or construction engineering or its equivalent for the proffered position, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the documentation of record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in engineering. As previously discussed, the petitioner has not provided a detailed description of the proffered position's duties, and has not demonstrated that the beneficiary would actually perform the services of a mechanical/construction engineer. The record fails to show that the duties of the position could not be performed by an experienced individual without a specialty degree in engineering.

Thus, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.