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U.S. Citizenship
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Services

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02

JUL 12 2007

FILE: WAC 06 024 50461 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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, Chief
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 construction company that seeks to employ the beneficiary as a civil engineer estimator. 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 determining that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, 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 the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary’s services as a civil engineer estimator. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s October 24, 2005 cover letter in support of the petition; and counsel’s January 27, 2006 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

1. Studies plans and detailed structural drawings to determine materials needed, time and labor requirements for completion of residential homes, office buildings and industrial facilities;
2. Provides structural steel detailing and for ready fabrication;
3. Estimates materials, equipment and incidentals needed for installation of concrete wood framing, roofing, interiors, and miscellaneous construction materials;
4. Compiles and maintains price lists and records from project to project, identifying competitive suppliers and subcontractors for potential bids;

5. Prepares budgets based on estimates, bid history and potential set-backs in production; and
6. Inspects sites to determine conformance with specifications and budget.

The director found that the proffered position most closely resembled the duties of a cost estimator, an occupation that does not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2006-07 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the director arbitrarily and capriciously asserted that a civil engineering estimator is not a specialty occupation. Counsel states further that the director failed to meaningfully address the list of proposed duties submitted by the petitioner. Counsel also states that, even if the proffered position is classified as that of a cost estimator, the position still qualifies as a specialty occupation, according to information in the *Handbook*.

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 turns first to 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO finds that the proffered position is similar to that of a cost estimator. Although a review of the *Handbook* finds that the occupation of a cost estimator, in some instances, may qualify as a specialty occupation, the petitioner in this matter has not established that the proffered position is a specialty occupation. The *Handbook* reports that the duties of a cost estimator in the construction industry include: reviewing various preliminary drawings and specifications; determining the quantity of materials and labor the firm will need to furnish; estimating the costs of all the items the contractor must provide; making decisions regarding equipment needs, the sequence of operations, the size of the crew required, and the physical constraints at the site; and preparing a cost summary for the project, including the costs of labor, equipment, materials, subcontracts, overhead, taxes, insurance, markup, and any other costs that may affect the project.

Regarding the education requirements of a cost estimator, the *Handbook* indicates:

Job entry requirements for cost estimators vary by industry. In the construction industry, employers increasingly prefer individuals with a degree in building construction, construction management, construction science, engineering, or architecture. However, most construction estimators also have considerable construction experience, gained through work in the industry, internships, or cooperative education programs.

* * *

Regardless of their background, estimators receive much training on the job, because every company has its own way of handling estimates.

The petitioner has provided a general description of the proposed duties of the position that generally tracks the information in the *Handbook* regarding the nature of the duties of a cost estimator. However, while such a generalized description is necessary when defining the range of duties that may be performed within an occupation, the petitioner cannot rely on such generalities when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed in this position in relation to specific projects, but rather has provided a generic description of the duties of the occupation of a cost estimator. The AAO cannot discern from the general description provided that the proffered position requires the theoretical and practical application of a body of highly specialized knowledge attained through the completion of a bachelor's or higher degree in a specific specialty. The petitioner has failed to establish the necessity of a bachelor's or higher degree for the proffered position.

The AAO acknowledges the *Handbook's* indication that employers in the construction industry increasingly prefer that cost estimators have a bachelor's degree in specific disciplines; however, employer preference is not synonymous with the "normally required" language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The *Handbook* does not report a degree requirement for the occupation of cost estimator.

Moreover, information on the petition reflects that the petitioner was established in 2004, and has seven employees and a gross annual income of \$1,342,990.00. Counsel also asserts on appeal that the petitioner "currently enjoys gross revenues in excess of \$1.3 million and employs seven full-time workers and six separate subcontracting entities project-to-project." The record, however, contains no evidence in support of these assertions, such as federal income tax returns and quarterly wage reports. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter*

of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner has not provided documentary evidence that it is currently engaged in any projects or has contracts to engage in any projects or is expanding. The record does not contain evidence that relates the broadly stated duties of the proffered position to the petitioner's construction business in a concrete way.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for positions related to construction estimators. The petitioner has not provided sufficient evidence that its business is similar to the advertising businesses in size, number of employees, or level of revenue. Moreover, as the record offers only a generalized description of the proffered position, the duties listed in the advertisements may not be established as parallel to those outlined by the petitioner. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. The AAO observes further that three of the advertisements, although listing a bachelor's degree in the education field do not indicate that the bachelor's degree must be in a specific specialty. When a degree of generalized title or a range of degrees, is sufficient to perform the duties of a position, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent only to the petitioner's business that would elevate the position to one requires the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In counsel's January 27, 2006 letter, counsel states that the proffered position is a new position. As such, the evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

The petitioner has not demonstrated that the duties are so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The AAO here incorporates its discussion about the lack of concrete evidence about the petitioning entity. Due to the deficiencies discussed herein, the petitioner has not demonstrated that the proposed duties

entail the specialization and complexity required by this criterion. Absent a meaningful description of the duties of the proffered position as the duties relate to the petitioner's business and substantiated by documentary evidence of the petitioner's business operations, the petitioner has not distinguished the proffered position based on the specialization and complexity of its duties from the routine duties of a cost estimator, an occupation that does not require knowledge usually associated with the attainment of a baccalaureate or higher degree. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.