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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

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[redacted]

FILE: WAC 06 231 50853 Office: CALIFORNIA SERVICE CENTER Date: OCT 29 2007

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:

[redacted]

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, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director to issue a new decision.

The petitioner is a construction firm, with 12 employees, and $5,000,000 in gross annual income. It seeks to employ the beneficiary as a civil engineer. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 petitioner had not shown that the beneficiary could legally practice engineering without a license or registration and had not provided evidence of an exemption or exception to the requirement that engineers whose work may affect life, health, or property, or who offer their services to the public must be licensed or registered.

The record of proceeding before the AAO contains: (1) the Form I-129 filed July 24, 2006 with supporting documentation; (2) the director's September 11, 2006 request for additional evidence (RFE); (3) the petitioner's October 12, 2006 response to the director's RFE and supporting documentation; (4) the director's December 8, 2006 denial letter; and (5) the Form I-290B, with counsel's statement and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

In a January 29, 2007 letter submitted on appeal, the petitioner stated: "[the beneficiary] is a Civil Engineer working as a Construction Manager in our company." The petitioner added: "[the beneficiary's] responsibility is to review the proposed plans and shop drawing, prepare budgets, estimating, putting bids together, project scheduling, meetings and walk-thurs [sic] with Architects, Engineers, and/or Clients." The petitioner indicated further that the beneficiary: "supervises the job by coordinating with all trades to complete the project within the given time frame as shown in the project schedule. He may report any discrepancies on the drawings as per field conditions to the project architect/engineer hired by the client." The petitioner acknowledged: "the [beneficiary's] job description does not fall in that category as define[d] by the Statutes for the Professional Engineer's duties, responsibilities and authorities. He is not involved in planning, design or any engineering calculations, but he may make suggestions to other parties involved as per field conditions."

The petitioner also provided a copy of its December 20, 2006 letter to the New Jersey State Board of Professional Engineers and Land Surveyors (State Board). In the letter, the petitioner again indicated that the beneficiary's responsibilities were "to review the proposed plans and shop drawing, prepare budgets, estimating, putting bids together, project scheduling, meetings and walk-thurs [sic] with architects, engineers, and/or clients," and requested an exemption for the beneficiary's licensure in New Jersey. The record also includes a January 25, 2007 response from the New Jersey State Board indicating that the beneficiary's job functions as described were not considered engineering work; thus an exemption would not be required as the beneficiary was not performing engineering work. The petitioner also provided an excerpt from the New Jersey State Statutes regarding the licensing requirements for engineering services.

As the petitioner has submitted evidence that the beneficiary does not need to be licensed as a civil engineer, it has overcome the director's decision. The petition may not be approved, however, as the petitioner has not established that the proffered position is a specialty occupation.

To meets 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.

CIS 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.

The petitioner seeks the beneficiary's services as a civil engineer. The petitioner initially indicated on the Form I-129 that the beneficiary would review plans and create job estimates as well as engineering plans. On the H Classification Supplement to the Form I-129, the petitioner indicated that the beneficiary would be responsible for reviewing plans and construction, costs analysis, and site supervision. The petitioner provided a Form 9035E,

Labor Condition Application, (LCA) indicating that the beneficiary would work in the Englewood Cliffs, New Jersey area.

On September 11, 2006, the director notified the petitioner that the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) reported that all 50 States and the District of Columbia require licensure for engineers who offer their services directly to the public. The director requested that the petitioner submit a copy of the beneficiary's New Jersey civil engineer license or if the beneficiary is exempt from the usual licensing requirements, a letter from the appropriate State Licensing agency affirming the beneficiary's exemption. The director also requested evidence of a senior or supervisor's license if the State where the beneficiary would work would allow the beneficiary to practice the occupation under the supervision of licensed senior or supervisory personnel.

In an October 12, 2006 letter in response to the director's RFE, the petitioner indicated: that it is a general contractor; that the beneficiary worked as a supervisor; and the company's "work falls under the general supervision of a licensed Architect/Engineer." The petitioner added that most of its projects are in the New York State area and that the beneficiary is working in those areas. The petitioner also provided: a copy of its license/registration to practice in New Jersey as a home improvement contractor; a New Jersey certificate of authority to collect New Jersey sales and use tax; and a copy of a construction plan for a project in Yonkers, New York that listed an individual in New Jersey as the architect.

To determine whether a particular job qualifies as a specialty occupation, CIS does not 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. In this matter, the AAO has reviewed the petitioner's description of duties of the proposed position, the petitioner's acknowledgement that the position is not an engineering position, and the New Jersey State Board's finding that the job functions are not the functions of an engineer. The AAO finds that although the beneficiary may have received a foreign degree equivalent to a bachelor's degree in engineering, the proffered position is not that of an engineer; thus it does not appear to be a specialty occupation. The AAO observes further that a beneficiary's educational background and experience do not make a non-specialty occupation, a specialty occupation.

The AAO will review the general description of the duties of the proffered position in an effort to ascertain if the duties of the position comport with those of any specialty occupation. The AAO determines that the duties of the position resemble a portion of the duties described in the *Handbook* as the duties of a construction manager.

The 2006-2007 edition of the *Handbook* reports the duties of a construction manager include the following:

> Construction managers plan, direct, and coordinate a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads,

> bridges, wastewater treatment plants, and schools and hospitals. Construction managers may oversee an entire project or just part of a project and, although they usually play no direct role in the actual construction of a structure, they typically schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors.
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> Construction managers coordinate and supervise the construction process from the conceptual development stage through final construction, making sure that the project gets done on time and within budget. They often work with owners, engineers, architects, and others who are involved in the construction process.
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> * * *
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> Construction managers determine the labor requirements and, in some cases, supervise or monitor the hiring and dismissal of workers. They oversee the performance of all trade contractors and are responsible for ensuring that all work is completed on schedule.

The petitioner's general description suggests that the beneficiary would perform many of the duties the *Handbook* ascribes to the position of construction manager, such as schedule and coordinate certain construction processes, oversee trade contractors, work with owners, engineers, architects, and ensure that all work is completed on schedule. The AAO observes, however, that the general description of the position does not provide sufficient information regarding the actual daily duties of the proffered position to establish that the duties are those of a specialty occupation. A petitioner cannot rely on general statements when discussing the duties attached to specific employment. When 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. Moreover, the AAO declines to accept a broad overview of an occupation as definitive of a particular position's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. 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)).

Further, the AAO routinely relies on the *Handbook* for the educational requirements of particular occupations. Upon review of the *Handbook's* discussion of the educational requirements for construction managers, the *Handbook* reports:

> For construction manager jobs, employers increasingly prefer to hire individuals with a bachelor's degree in construction science, construction management, or civil engineering, as well as industry

> work experience. Practical industry experience is very important, whether it is acquired through an internship, a cooperative education program or work experience in a trade or another job in the industry. Traditionally, persons advanced to construction management positions after having substantial experience as construction craftworkers - or after having worked as construction supervisors or as owners of independent specialty contracting firms, overseeing workers in one or more construction trades. However, as construction processes become increasingly complex, employers are placing a growing importance on post secondary education.

Thus, the *Handbook* does not find that a typical construction manager normally must have a bachelor's or higher degree in a specific discipline. The *Handbook* recognizes that experience is often sufficient. The AAO notes, further, that employer preference is not synonymous with the "normally required" language of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)*. The record in this matter is insufficient to establish that the proffered position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(1)* – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*, a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner did not submit evidence of an industry standard for construction managers in its industry. Thus, the evidence of record is insufficient to establish the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*.

In the alternative the petitioner may offer evidence to establish that the proffered position is so complex or unique that only an individual with a degree can perform the duties of the position. The AAO finds again that the general description provided corresponds to the outline of duties of a construction manager as described in the *Handbook*. The record does not contain any evidence that the duties of the proffered position are more complex or unique than that of a typical construction manager. Thus, the petitioner has not satisfied the second prong of the criterion by distinguishing the proffered position from similar, but non-degreed employment based on its unique nature or complexity. The petitioner has not submitted evidence sufficient to satisfy either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)*.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)*(3)* and *(4)*: whether the employer normally requires a degree or its equivalent for the position; or whether 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. The petitioner has not provided evidence of its past employment practices regarding the construction manager position; thus, the record does not contain evidence establishing that the petitioner's normal business practice is to hire individuals with a bachelor's degree in a specific discipline to carry out the duties of the proffered position. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)*.

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the general description of the beneficiary's duties provided by the record does not substantiate that they are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. Without a

meaningful list of duties related to its specific business operations and a description of duties that identifies the complexity and specialized nature of the position, the AAO is unable to find that the nature of the duties is specialized or complex. The petitioner has not identified any specific duties that are so specialized or complex that the duties would require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in a specific specialty as a minimum for entry into the occupation in the United States. Again, reciting the same general duties as outlined in the *Handbook* is insufficient to establish that the proffered position incorporates complex or specialized elements making the position a specialty occupation. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The record in this matter does not support that the proffered position is an engineering position. As the director did not address this issue, the petition will be remanded in order to render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the director should issue a request for evidence, the director must afford the petitioner a reasonable amount of time to provide the requested evidence. If the new decision is adverse to the petitioner, the director shall certify the matter to the AAO for review.

As always, 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 met that burden.

ORDER: The director's December 8, 2006 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.