



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: WAC-99-118-52972 Office: Western Service Center

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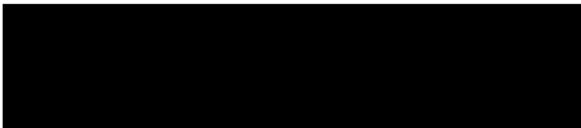
IN RE: Petitioner:
Beneficiary:



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)

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a construction company, with 13 employees and approximately \$1.5 million in gross annual income. It seeks to employ the beneficiary as a construction coordinator for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation. The director also found that the petitioner had not provided a certified labor condition application.

On appeal, counsel argues that the proffered position is a specialty occupation and submits a certified Labor Condition Application and additional documentation in support of the appeal.

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), provides in part for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is 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.

The duties of the proffered position are described in pertinent part as follows:

Using knowledge of construction engineering, read and interpret blueprints and structural plans. Apply engineering software's. Perform duties of lead estimator including quantities take-off, bid conditioning and negotiate with material suppliers and subcontractors. Final evaluation of bid estimates and contract negotiation with client and construction manager. Coordinate multi-task civil projects including schedule material delivery installation and subcontractors' activities. Prepare progress estimates, cost and progress reports.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding.

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to be that of a construction manager. The Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at pages 31-32 states in part that:

Construction managers plan and direct construction projects. They may have job titles such as *constructor, construction superintendent, general superintendent, project engineer, general construction manager, or executive construction manager.*

Managers and professionals who work in the construction industry, such as general managers, project engineers, cost estimators, and others, are increasingly called *constructors*. Through education and past work experience, this broad group of professionals manages, coordinates, and supervises the construction process from the conceptual development stage through final construction on a timely and economical basis. Given designs for buildings, roads, bridges, or other projects, constructors oversee the organization, scheduling, and implementation of the project to execute those designs. They are responsible for coordinating and managing people, materials, and equipment; budgets, schedules, and contracts; and the safety of employees and the general public.

A review of the Handbook finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a construction manager. Counsel points out that the Handbook states in pertinent part, "More and more employers - particularly large construction firms - hire individuals who combine industry work experience with a bachelor's degree in construction or building science or construction management." S & R Construction Company is a business with 13 employees and a gross annual income of approximately 1.5 million. Therefore, that company cannot be considered to be similar in size or job requirements to a larger firm. In view of the foregoing, it is concluded the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of regulations.

Shawki Rabat, President of S & R Construction Company, asserts in his letter dated June 8, 1999, that he has been in the building construction business for approximately 20 years and is therefore quite familiar with the kind of skills normally required by construction companies for coordination/management functions in the office as well as in the field. Mr. Rabat asserts that S & R Construction has in the past three years employed four employees with baccalaureate degrees in construction-related engineering fields, all at the same time, performing the stated construction coordination-management duties. However, he has not submitted any company records reflecting the nature of the positions or the credentials of those employees. Furthermore, Mr. Rabat has not submitted any evidence to corroborate his claim that other construction firms of a similar size require the services of such individuals in parallel positions.

Finally, the petitioner has not shown that 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.

It is noted that counsel submitted on appeal a Labor Condition Application which was certified on April 23, 1999, a date subsequent to March 16, 1999, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.