U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D11

[redacted]

FILE: LIN 03 184 51692 Office: NEBRASKA SERVICE CENTER Date: OCT 25 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2)

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The service center director 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 specializes in building golf course facilities. It seeks to employ the beneficiary, a citizen of Mexico, as an irrigation management consultant. The petitioner, therefore, endeavors to classify the beneficiary as a TN-2 alien to perform services as a professional business person pursuant to section 214(e)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(e)(2).

The director denied the petition because the proffered position does not qualify as a professional occupation according to Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (NAFTA). On appeal, counsel asserts that the proffered position qualifies as a professional occupation according to Appendix 1603.D.1 to Annex 1603 of the NAFTA.

Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2), states:

> An alien who is a citizen of Canada or Mexico . . . who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 1603 of the North American Free Trade Agreement (in this subsection referred to as "NAFTA") to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this Act, including the issuance of entry documents and the application of subsection (b), such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 101(a)(15) . . . .

Pursuant to 8 C.F.R. § 214.6(b):

> *Business activities at a professional level* means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

The beneficiary of this petition is a citizen of Mexico. Pursuant to 8 C.F.R. § 214.6(d)(3), a petition on behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by:

(i) Proof of citizenship by presenting a valid passport.

(ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the consular officer (in the case of a Mexican citizen) or the Department officer (in the case of a Canadian citizen) that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, and must be supported by diplomas, degrees or membership in

> a professional organization. Degrees received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:
> (A) The Appendix 1603.D.1 profession of the applicant;
> (B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, in which the applicant will engage in for the United States employer/entity;
> (C) The anticipated length of stay;
> (D) The educational qualifications or appropriate credentials which demonstrate that the Canadian or Mexican citizen has professional level status; and
> (E) The arrangements for remuneration for services to be rendered.

The petitioner is seeking the beneficiary's services as an irrigation management consultant. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: installing golf course irrigation, drainage, mechanical, and pumping systems; interfacing with irrigation consultants about field staking, layout, and construction; hiring and overseeing operators and labor crews; using, deploying, and maintaining specialized construction equipment; coordinating and consulting with contractors, sub-contractors, and golf course architects, and the project superintendent and foremen regarding activities of construction workers and determining the most efficient ways to implement a client's golf course and to solve problems; reviewing drawings and preliminary plans; providing guidance in materials, specifications, and applications; communicating regularly with clients; interfacing with the client and the superintendent to troubleshoot problems and make necessary repairs; and performing an inventory of irrigation materials. The petitioner's August 13, 2003 letter stated that the proffered position is listed in Appendix 1603.D.1 to Annex 1603 of the NAFTA under the occupational title of "management consultant."

Referring to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director stated that management consultants analyze and propose ways to improve an organization's structure, efficiency, or profits. According to the director, a management consultant position has historically been viewed as a temporary, short-term position. Based on the evidentiary record, the director determined that the beneficiary would not provide temporary, short-term services as a management consultant. Rather, he would occupy a permanent managerial position. Consequently, the director concluded that the proffered position was not a profession listed in Appendix 1603.D.1 to Annex 1603.

On appeal, counsel asserts that the petitioner, a consultant company that specializes in building golf courses, seeks to employ the beneficiary as a management consultant. Counsel describes the beneficiary's responsibilities, and claims that he will serve on the petitioner's consulting team. Counsel emphasizes that the beneficiary would ensure that irrigation, drainage, mechanical, and pumping systems are installed correctly by providing expertise when consulting with the irrigation superintendents. Counsel stresses that the beneficiary would not perform the duties on an on-going basis, and would not personally install the

irrigation, drainage, mechanical, and pumping systems. According to counsel, the occupational title "management consultant" is shown as a profession in the Appendix 1603D.1 to Annex 1603 of the NAFTA, and counsel narrates the responsibilities of a management consultant. Counsel states that the beneficiary is a management consultant because he is responsible for improving the petitioner's managerial, operating, and economic performance; and for improving its goals, objectives, policies, strategies, administration, organization, and operations by providing expertise about construction projects. Counsel further states that the petitioner employed the beneficiary at its Arizona facility, and now seeks to have him work temporarily as a management consultant. Counsel states that the director cited to the *Handbook* in describing a management analyst as someone who analyzes and proposes ways to improve an organization's structure, efficiency, or profits. According to counsel, some of the proffered position's duties are parallel to a management analyst's duties; however, the duties of the proffered position are more closely related to the positions described in the *Handbook* under the section entitled "management and public relations services," and counsel further claims that this section describes the petitioner's activities.

After careful consideration of the entire record, the petitioner has not shown that the proffered position satisfies the requirements for the classification sought as defined under section 214(e) of the Act.

The AAO routinely refers to the *Handbook* to provide a comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within an occupation. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position is a profession listed in Appendix 1603.D.1 of the NAFTA.

A review of the *Handbook* reveals that the duties of the proffered position are performed by construction managers, an occupation that is not listed in Appendix 1603.D.1 of the NAFTA. The *Handbook* states:

> Managers who work in the construction industry, such as general managers, project engineers, and others, increasingly are called *constructors*. Constructors manage, coordinate, and supervise 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 safety of employees and the general public.
>
> Construction managers evaluate and determine appropriate construction methods and the most cost-effective plan and schedule. They divide all required construction site activities into logical steps, budgeting the time required to meet established deadlines. This may require sophisticated estimating and scheduling techniques and use of computers with specialized software. They oversee the selection of trade contractors to complete specific pieces of the project—which could include everything from structural metalworking and plumbing to painting and carpet installation. 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.
>
> Construction managers direct and monitor the progress of construction activities, sometimes through construction supervisors or other construction managers. They oversee the delivery and use of materials, tools, and equipment; and the quality of construction, worker productivity, and safety. They are responsible for obtaining all necessary permits and licenses and, depending upon the contractual arrangements, direct or monitor compliance with building and safety codes and other regulations. They may have several subordinates, such as assistant managers or superintendents, field engineers, or crew supervisors, reporting to them.
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> Construction managers regularly review engineering and architectural drawings and specifications to monitor progress and ensure compliance with plans and schedules. They track and control construction costs against the project budget to avoid cost overruns. Based upon direct observation and reports by subordinate supervisors, managers may prepare daily reports of progress and requirements for labor, material, machinery, and equipment at the construction site. They meet regularly with owners, other constructors, trade contractors, vendors, architects, engineers, and others to monitor and coordinate all phases of the construction project.

The above-described duties encompass those of the proffered position. According to the petitioner's job description, the beneficiary will hire and oversee operators and labor crews; interface with irrigation consultants, the client, the superintendent, and architects; use, deploy, and maintain specialized construction equipment; determine the most efficient ways to implement a client's golf course; review drawings and preliminary plans; provide guidance in materials, specifications, and applications; communicate regularly with clients; interface with the client and the superintendent to troubleshoot problems and make necessary repairs; and perform an inventory of irrigation materials. Similarly, a construction manager is responsible for coordinating and managing people, materials, equipment, budgets, and schedules; evaluating and determining appropriate construction methods and the most cost-effective plan and schedule; determining the labor requirements and supervising the hiring and dismissal of workers; directing and monitoring the progress of construction activities; reviewing engineering and architectural drawings; tracking and controlling construction costs; and preparing reports of progress and requirements for labor, material, machinery, and equipment at the construction site.

The AAO finds that the beneficiary's duties do not parallel those of a management consultant. According to the *Handbook,* management analysts, often referred to as management consultants in the private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. The *Handbook* reports that analysts and consultants collect, review, and analyze information in order to make recommendations to managers. They define the nature and extent of problems; analyze relevant data, which may include annual revenues, employment, or expenditures; interview managers and employees while observing their operations; and develop solutions to problems. Once a course of action is decided, consultants report their findings and recommendations to the client, and for some projects, consultants are retained to help

implement their suggestions. According to the *Handbook*, firms providing management analysis vary in size from a single practitioner to a large international organization employing thousands of consultants.

The duties of the proffered position do not involve analyzing and proposing ways to improve the petitioner's structure, efficiency, or profits. Nor do they involve collecting, reviewing, and analyzing information in order to make recommendations to managers; defining a problem, analyzing data, interviewing managers and employees; developing solutions to problems; reporting findings and recommendations to clients; or helping to implement suggestions. Instead, the beneficiary's duties entail managing the installation of golf course irrigation, drainage, and mechanical and pumping systems. This includes hiring and overseeing operators and labor crews and using, deploying, and maintaining specialized construction equipment. The job description, therefore, indicated that the beneficiary will not be hired in a management consultant capacity, but will be a regular employee.

On appeal, counsel asserts that some of the proffered position's duties are parallel to a management analyst's duties, though the duties of the proffered position are more closely related to the positions described in the *Handbook* under the section entitled "management and public relations services."

Counsel's assertion is not persuasive. Pursuant to 8 C.F.R. § 214.6(3)(ii)(B), a petition on behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by a statement from the petitioner that indicates the Appendix 1603.D.1 profession in which the beneficiary will be engaging and a description of the nature of the duties which the beneficiary will be performing. The petitioner's August 13, 2003 letter stated that the proffered position is listed in the Appendix 1603.D.1 to Annex 1603 of the NAFTA under the occupational title of "management consultant." The petitioner never stated that the description of the proffered position corresponds to the *Handbook's* section entitled "management and public relations services." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Consequently, the AAO will disregard this assertion of counsel.

As already discussed, the duties of the proffered position are performed by construction managers, a position that is not listed in Appendix 1603.D.1 of the NAFTA. Accordingly, the petitioner has not shown that the proffered position meets the requirements for the classification sought as defined under section 214(e) of the Act.

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 appeal is dismissed. The petition is denied.