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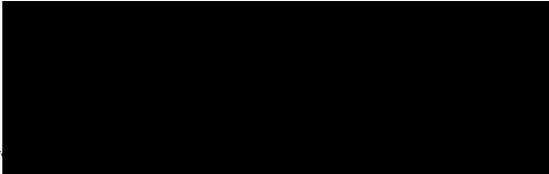
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FILE: WAC 03 100 50458 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2005

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 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

DISCUSSION: The director of the California 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 stoneworks company, with 16 employees. It seeks to employ the beneficiary as a project engineer 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 because he determined the petitioner had failed to establish its proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted documentation. 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) 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 project engineer. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s January 13, 2003 letter in support of the Form I-129; and petitioner’s December 10, 2003 response to the director’s request for evidence. As described by the petitioner, the proffered position would require the beneficiary to:

- Advise the petitioner on the cost and feasibility of new projects (15 percent of the beneficiary’s time);
- Design various types of structures, such as fountains, fireplaces, bathrooms, and kitchens and draft blueprints, using AutoCAD as appropriate (30 percent of the beneficiary’s time);
- Provide structural and stress analysis for the proposed project on an advisory basis, reviewing construction plans to ensure compliance with safety, strength and shape standards and needs (25 percent of the beneficiary’s time);
- Inspect existing structures, such as fountains, fireplaces, bathrooms and kitchens, and advise on and plan needed repairs/rebuilding to support intended modifications (15 percent of the beneficiary’s time); and
- Assign technical tasks to personnel, and supervise and review their work to ensure compliance with standards and plans; coordinate construction and engineering activities with licensed professionals such as contractors and architects; and provide on-site supervision to the extent that professional engineering expertise is required (15 percent of the beneficiary’s time).

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational*

Outlook Handbook (Handbook), on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has stated its proffered position is that of a project engineer and that its duties are traditionally performed by engineers. However, the AAO's review of these duties does not find them to reflect the work of engineers who, as described by the 2004-2005 DOL *Handbook* at pages 125-126:

[a]pply the theories and principles of science and mathematics to research and develop economical solutions to technical problems Engineers design products, machinery to build those products, plants in which those products are made, and the systems that ensure the quality of the products and the efficiency of the workforce and manufacturing process. Engineers design, plan, and supervise the construction of buildings, highways, and transit systems

While the petitioner has identified design, analytical and supervisory duties that require the beneficiary to possess some knowledge of engineering, the decisive question is not whether the petitioner's position requires knowledge of engineering principles, but whether the position is one that normally requires the level of engineering knowledge that is acquired through the completion of a bachelor's degree, or its equivalent, in engineering. The AAO's review of the duties of the proffered position finds they do not establish that the engineering knowledge required of the beneficiary would be on a par with that possessed by an engineer.

The duties to be performed by the beneficiary do not reflect the breadth and complexity of engineering employment. Instead, this position, with responsibility for overseeing the stonework to be performed by the petitioner under its construction contracts, appears to combine the employment of a construction manager with that of an engineering technician or drafter, jobs that require some knowledge of engineering but are not performed by engineers. As stated by the *Handbook* at page 28, construction managers:

[p]lan and coordinate construction projects. They may have job titles such as constructor, construction superintendent, general superintendent, project engineer, project manager, general construction manager, or executive construction manager They may plan and direct a whole project or just a part of a project

[C]onstruction managers usually represent the owner or developer along with other workers throughout the project. Although they usually play no direct role in the actual construction of a structure, they typically schedule and coordinate all design and construction processes

...

[C]onstruction managers oversee the completion of all construction in accordance with the engineer's and architect's drawings and specifications and prevailing building codes The construction manager participates during the design process and may be in charge of the construction project once the design is agreed upon.

[C]onstruction managers often work with engineers, architects, and others who are involved in the construction process.

Construction managers evaluate and determine appropriate construction methods

[T]hey 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

Construction managers regularly review engineering and architectural drawings and specifications to monitor progress and ensure compliance with plans and schedules

The position also appears to include certain aspects of the employment of drafters or engineering technicians. Drafters, whose work is described at page 141 of the *Handbook*:

[p]repare technical drawings and plans used by production and construction workers

[M]ost drafters now use computer-aided design and drafting (CADD) systems to prepare drawings

Similar work is performed by engineering technicians and is described at page 143 of the *Handbook*:

Engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection, and maintenance. Their work is more limited in scope and more practically oriented than that of scientists and engineers

[T]hey also assist in design work, often using computer-aided design (CAD) equipment.

A review of the *Handbook's* discussion of the educational requirements for employment as a construction manager, an engineering technician or drafter finds that none of these fields requires job applicants seeking entry-level employment to hold the minimum of a baccalaureate or higher degree, or its equivalent. Those seeking employment as engineering technicians or drafters may obtain such employment based on experience, although employers prefer to hire individuals with associate degrees in engineering technology and drafting, respectively. (*Handbook*, pages 142 and 144-145). Employers hiring construction managers increasingly prefer experienced individuals with a bachelor's degree in construction science, construction management or civil engineering. The AAO notes, however, that employer preference is not synonymous with the normally required language of the first criterion. Traditionally, persons have advanced to construction management positions after having experience in construction specialties or after having worked as construction supervisors or having been owners of specialty contracting firms. (*Handbook*, pages 29-30).

As the *Handbook* does not indicate that the proffered position of construction manager/engineering technician/drafter imposes a degree requirement on the beneficiary, the AAO finds that the proffered position cannot be established as a specialty occupation under the first criterion – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel contends that CIS may not rely on standardized government classification systems and must give deference to the petitioner's views, citing the findings of *Unico American Corp. v. Watson*, ___ F. Supp. ___. CV No. 896958 (C.D. Cal. March 19, 1991). He asserts that the proffered position is that of an engineer, as the petitioner "explicitly asserted" that it was an engineering position in its petition and indicated it required the services of an engineer in its January 13, 2003 letter of support. However, while the AAO acknowledges the petitioner's wish to hire an engineer to perform the duties of its proffered position, it is not the petitioner that dictates whether a proffered position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

Further, the AAO notes that counsel's claim regarding the unpublished findings of *Unico American Corp. v. Watson* is not supported by the record. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, in contrast to the broad precedential authority of the case law of a U.S. circuit court, the AAO is not bound to follow the published decision of a U.S. district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* At 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion, may qualify it under one of the three remaining alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish a proffered position as a specialty occupation under the second criterion, a petitioner is required to prove either that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. Although on appeal, counsel asserts that the proffered position can be established as a specialty occupation under any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), the record before the AAO offers no evidence that would satisfy either prong of the second criterion.

On appeal, counsel contends that the director misapplied the regulation and engaged in "impermissible rule-making," when he found that, as the petitioner had not submitted any job announcements, it could not establish the proffered position as a specialty occupation under the second criterion. Counsel asserts that there is no requirement that a petitioner submit job announcements and that CIS, therefore, is enforcing standards not required by law. Counsel has misunderstood the nature of the director's statements.

Petitioners seeking to establish their degree requirements as the norm within their industries routinely submit copies of Internet job advertisements for positions they believe to be similar to their proffered employment. Such advertisements, if they indicate a degree requirement and are found to be for parallel positions in similar organizations, may establish a proffered position as a specialty occupation under the first prong of the second criterion. While the submission of job announcements is not the only way to satisfy the requirements of the

first prong, it is a common means for doing so. The director's denial noted the absence of this commonly provided evidence from the record and the corresponding effect on the petitioner's ability to establish the proffered position as a specialty occupation under the first prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO notes the absence of other evidence in the record that would establish that a degree requirement is normal in the industry, such as surveys, studies or other publications.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the employment histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner submitted no evidence to establish its normal hiring practices with regard to the proffered position or other similarly-situated positions within its organization. Accordingly, the petitioner cannot establish its proffered position as a specialty occupation based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. However, the AAO's review of the proffered position's duties has not found them to require the beneficiary to possess a higher degree of knowledge and skill than would normally be required of a construction manager and engineering technician/drafter, or to represent an amalgam of jobs that would require the beneficiary to possess a unique set of skills and qualifications requiring a baccalaureate degree in a specialty. Accordingly, the AAO does not find the proffered position to satisfy the specialized and complex threshold set by the language at 8 C.F.R. § 214.2(h)(4)(A)(4).

On appeal, counsel contends that the director ignored the evidence of record and relied on unsubstantiated evidence or evidence not within the record, and that his decision demonstrates a misunderstanding of the legal standards and procedures involved in the adjudication of petitions. He asserts that the director violated 8 C.F.R. § 214.2(h)(9)(i) as he relied upon it for his use of evidence from outside the record. Counsel's reasoning in this regard is unpersuasive.

The AAO does not find the director's denial to have indicated a reliance on what counsel terms "derogatory information" or evidence not within the record. Further, the AAO does not find the director's reference to 8 C.F.R. § 214.2(h)(9)(i) to have been used to support a reliance on derogatory information. The director's denial, instead, set forth, in some detail, his evaluation of the evidence submitted by the petitioner to establish the proffered position as a specialty occupation. His conclusion that such evidence failed to satisfy any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) is clearly tied to the record before him. The director's reference to the lack of a *bona fide* position is withdrawn. Nevertheless, the AAO does not find that the proffered employment is in a specialty occupation.

For reasons related in the preceding discussion, the petitioner has failed to establish that its 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.

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