U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D2

FILE: EAC 04 130 51876 Office: VERMONT SERVICE CENTER Date: JUN 06 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a surveying company. It seeks to employ the beneficiary as a civil engineer technician and to continue her classification 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 on the grounds that the record did not establish that the proffered position qualifies as a specialty occupation or that the beneficiary was in valid nonimmigrant status at the time the instant petition was filed.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

As provided in 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response thereto; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as an environmental and land development engineering company engaged in such projects as waste water treatment design; upgrades and renovation, spray irrigation evaluation and design, water and sewer main design, road designs, storm water management design, shoreline engineering, and timber structure engineering. The petitioner stated that it was established in 1979, has six employees and gross annual income of $282,000 (in 2002), and proposed to employ the beneficiary as a civil engineer technician, at an annual salary of $21,486, to survey land on the eastern shore of Maryland for residential and commercial use. According to the petitioner, the civil engineer technician would work under the supervision of a licensed engineer and assist the civil engineer in the review and conduct of projects. The duties of the proffered position were listed as follows:

- Preparation of reports detailing tests conducted and results.
- Survey of project sites to obtain and analyze topographical details by using maps and surveying equipment.
- Drafting of detailed dimensional drawings such as those needed for highway plans, structural steel fabrication, and water control projects.
- Calculations of dimensions, profile specifications and quantities of materials such as steel, concrete, or asphalt.
- Inspection of construction site to determine conformance of site to design specifications.
- Assistance of water and wastewater treatment systems conformance to pollution and control requirements.

According to the petitioner, the proffered position requires a bachelor's degree in civil engineering. The beneficiary is qualified for the position, the petitioner states, by virtue of her master of civil engineering, specializing in building structures, which she earned at the Technical University of Opole, Poland, on November 21, 2001. The record includes a report from an education evaluation service located in Bothell, Washington, which declares that the beneficiary's degree is equivalent to a bachelor's degree in civil engineering from an accredited U.S. college or university. As pointed out by the petitioner, the beneficiary was previously granted H-1B status – valid from November 1, 2002 to November 1, 2005 – pursuant to a petition filed by another company, J.W. Salm Engineering, of Bishopville, Maryland.

In response to the RFE, the petitioner indicated that the proffered position is newly created. The petitioner listed four other current employees, including the owner/principal, a field survey crew chief, a field survey assistant, and an administrative assistant. The petitioner provided a short additional description of the proffered position:

> [The beneficiary] will be translating architectural and engineering drawings for construction stakeout, design/drafting, and record platting. Her job requires interaction with field conditions and layout surveying as well as integration of the design to existing conditions.

In his decision the director found that the duties of the proffered position are consistent with the duties of an engineering technician, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook* (*Handbook*). The director quoted information in the *Handbook* indicating that a baccalaureate level of education in a specific specialty is not a normal, industry-wide minimum requirement for entry

into the occupation. Nor was the director persuaded that the duties of the proffered position are so specialized and complex that their performance requires baccalaureate or higher level knowledge in a specific specialty. The director concluded that the proffered position does not meet any of the qualifying criteria of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also cited evidence in the record indicating that the beneficiary's employment with her original H-1B employer – J.W. Salm Engineering – terminated in September 2003, which would mean that the beneficiary was not in valid nonimmigrant status at the time the instant H-1B petition was filed in March 2004. As such, the beneficiary was not eligible for an extension of stay in H-1B status under the instant petition, even if the proffered position were a specialty occupation.

On appeal counsel asserts that the proffered position was erroneously classified as a "civil engineer technician," and suggests that it is actually that of a civil engineer, which is a specialty occupation. With respect to the beneficiary's status at the time of filing, counsel declares that the petitioner's prior attorney inexplicably failed to file the H-1B petition until March 2004 even though she signed it in October 2003 (which still postdated the termination of the beneficiary's prior H-1B employment in September 2003). The appeal is supplemented by a letter from the petitioner's president, dated February 11, 2005, who declares that surveying and engineering are closely related, that he needs the services of an individual with a civil engineering degree to perform the duties of the proffered position, and that the beneficiary had been working for his company for over a year. A letter has also been submitted from the beneficiary, who confirms that she stopped working for her initial H-1B employer on September 23, 2003. The beneficiary does not confirm on what date she began working for the petitioner.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*'s occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. *See Shanti v. Reno, Inc.*, *id.*, at 1165-66.

Civil engineers, a subcategory of the broad occupational field of engineering, are described in the *Handbook*, 2006-07 edition, as follows:

> Civil engineers design and supervise the construction of roads, buildings, airports, tunnels, dams, bridges, and water supply and sewage systems. They must consider many factors in the design process, from the construction costs and expected lifetime of a project to government regulations and potential environmental hazards such as earthquakes. Civil engineering . . . encompasses many specialties. The major specialties are structural, water resources, construction, environmental, transportation, and geotechnical engineering. Many civil engineers hold supervisory or administrative positions, from supervisor of a construction site to city engineer. Others may work in design, construction, research, and teaching.

The *Handbook*, *id.*, states that a bachelor's degree in engineering is required for almost all entry-level engineering jobs. *See id.* Accordingly, civil engineers qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Civil engineering technicians are a subcategory of the broad occupational field of engineering technicians. As described in the *Handbook*, 2006-07 edition:

> 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. Many engineering technicians assist engineers and scientists, especially in research and development. Others work in quality control – inspecting products and processes, conducting tests, or collecting data. In manufacturing they may assist in product design, development, or production . . . .
>
> Engineering technicians who work in research and development build or set up equipment, prepare and conduct experiments, collect data, calculate or record results, and help engineers or scientists in other ways, such as making prototype versions of newly designed equipment. They also assist in design work, often using computer-aided design (CAD) equipment.
>
> Most engineering technicians specialize in certain areas, learning skills and working in the same disciplines as engineers. Occupational titles, therefore, tend to reflect those of engineers . . . .
>
> *Civil engineering technicians* help civil engineers plan and build highways, buildings, bridges, dams, wastewater treatment systems, and other structures, as well as do related research. Some estimate constructions costs and specify materials to be used, and some may even prepare drawings or perform land-surveying duties. Others may set up and monitor instruments used to study traffic conditions.

The *Handbook* describes the educational requirements for engineering technicians as follows:

> Although it may be possible to qualify for certain engineering technician jobs without formal training, most employers prefer to hire someone with at least a two-year associate degree in engineering technology. Training is available at technical institutes, community colleges, extension divisions of colleges and in the Armed Forces.
> . . . .
>
> Technical institutes offer intensive technical training through application and practice, but less theory and general education than do community colleges. Many offer two-year associate degree programs, and are similar to or part of a community college or state university system . . . .

> Community colleges offer curriculums that are similar to those in technical institutes . . . . After completing the two-year program, some graduates get jobs as engineering technicians, while others continue their education at four-year colleges . . . . Colleges with [four-year engineering] programs usually do not offer engineering technician training, but college courses in science, engineering, and mathematics are useful for obtaining a job as an engineering technician . . . .

Id. at 144-45. The foregoing information indicates that a two-year associate degree from a technical institute or a community college is generally the minimum educational requirement for civil engineering technicians. Thus, a civil engineering technician does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), because a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into the occupation.

Based on the evidence of record, the AAO determines that the proffered position – consistent with the petitioner's original title for the position – is that of a civil engineering technician. The petitioner indicated in its original letter that the proffered position would assist and be supervised by a civil engineer, which accords with the *Handbook*'s description of the hierarchical position of many civil engineering technicians. Moreover, the duties of the position – such as surveying project sites, drafting detailed dimensional drawings of structures to be built, and calculating quantities of materials to be used – accord with the *Handbook*'s description of a civil engineering technician's duties. In addition, the duties of the proffered position reflect the *Handbook*'s statement that the work performed by engineering technicians is more limited in scope and practically oriented than the work performed by engineers. While engineers design projects and supervise engineering technicians and others in their construction, engineering technicians make drawings based on the engineer's designs and assist the engineer in other ways to bring turn the design into a finished project. The evidence of record does not demonstrate that the proffered position includes advanced engineering functions that are beyond the technical capability of an engineering technician. The AAO also notes that the annual salary of the proffered position – $21,486 – is far below the average starting salary of a civil engineer with a bachelor's degree (which was $43,679 in 2005, according to the *Handbook*), and more in line with the salary of an engineering technician (who the *Handbook* indicates had a median salary of $38,480 in 2005, with lowest 10% earning less than $24,180).

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive. The petitioner must show that the duties of the proffered position normally require a degree in a specialty field. The critical issue is not the employer's self-imposed standard, 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 a specific specialty as a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). Since a civil engineering technician does not normally require a baccalaureate or higher degree in civil engineering or a related specialty, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), there is no evidence in the record that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Though the petitioner previously worked in H-1B status for J.W. Salm Engineering, there is no documentary evidence of the duties she performed for that company, or that

the company is similar to the petitioner in its scale of operations and the kind of work it performs. Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in engineering. Accordingly, the position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

With regard to the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Accordingly, the petitioner cannot demonstrate that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in engineering or a related specialty. Based on the evidence of record, the AAO determines that the duties of the proffered position do not exceed the scope of a civil engineering technician and can be performed with less than baccalaureate level knowledge in engineering.

Thus, the proffered position does qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

The director also denied the petition on the ground that the beneficiary was not in valid nonimmigrant status at the time the H-1B extension petition was filed. The petitioner has appealed that ground of denial as well. As provided in 8 C.F.R. § 214.1(c)(5), however, "[t]here is no appeal from the denial of an application for extension of stay filed on Form I-129 or I-539." This issue will not be addressed, as the AAO does not have jurisdiction to consider that part of the petitioner's appeal.

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