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U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 048 52075 Office: VERMONT SERVICE CENTER Date: **SEP 18 2006**

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)

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, Chief
Administrative Appeals Office

DISCUSSION: The 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 firm that seeks to employ the beneficiary as an architect. The petitioner, therefore, endeavors to classify the beneficiary 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 basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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 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 proposed position.

Counsel’s February 18, 2005 response to the director’s request for additional evidence stated that the duties of the proposed position would consist of overseeing, inspecting, and managing projects; preparing shop drawings; preparing field reports and other documents; reviewing construction documents and contracts; estimating projects; and attending meetings.

Although the Form I-129 and certified labor condition application state that the proposed position is that of an architect, the petitioner’s December 6, 2004 letter of support states that it is an operation manager. Counsel’s letter of response to the director’s request for additional evidence referred to the position as an architect/project manager. While the petitioner’s March 24, 2004 appeal states that the beneficiary has worked for it as an operation manager and junior architect, it also states that his daily responsibilities are those of a senior operating manager, and that the petitioner requires his services as an operation manager/design professional. The AAO also notes that counsel’s February 18, 2005 response to the director’s request for additional evidence stated that the beneficiary would always work under the supervision of a licensed architect or engineer.

In its March 24, 2005 letter in support of its appeal, the petitioner stated, but submitted no documentation to establish, that in 2003 alone it “suffered a lost [sic] of approx. \$400,000 and the main reason was that our firm did not have an individual with architectural knowledge to address, give solutions and advice for several construction problems.” 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)).

In determining whether a proposed position qualifies as a specialty 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 actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO has reviewed the 2006-2007 edition of the *Handbook* and finds that the duties of the proposed position fall within those noted for construction managers.¹ As discussed in the *Handbook*:

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.

¹ The AAO agrees with the director’s statement in his March 3, 2005 denial letter that the duties of the proposed position “do not appear to be consistent with those generally associated with the position of architect. . .”

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.

Construction managers are salaried or self-employed managers who oversee construction supervisors and workers. They often go by the job titles program manager, constructor, construction superintendent, project engineer, project manager, construction supervisor, general contractor, or similar designations. Construction managers may be owners or salaried employees of a construction management or contracting firm, or may work under contract or as a salaried employee of the property owner, developer, contractor, or management firm overseeing the construction project.

Construction managers coordinate and supervise the construction process from the conceptual development stage through the 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. Given the designs for buildings, roads, bridges, or other projects, construction managers oversee the planning, scheduling, and implementation of the project to execute those designs.

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. And they continually track and control construction costs to avoid cost overruns. They may direct the work of several subordinates, such as assistant managers or superintendents, field engineers, or crew supervisors.

Having determined that the duties of the proposed position are similar to those of a construction manager, the AAO next turns to the *Handbook's* discussion of the position's training requirements in order to determine whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* sets forth the following educational requirements for those seeking employment as a construction manager:

Persons interested in becoming a construction manager need a solid background in building science, business and management, as well as related work experience within the construction industry. . . .

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—carpenters, masons, plumbers, or electricians, for example—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 postsecondary education.

Although counsel cites to this passage in support of his contention that a baccalaureate or higher degree is normally the minimum requirement for entry into the occupation, the *Handbook* specifically states that employers “increasingly prefer” a bachelor’s degree, and that they are placing “a growing importance on” postsecondary education. The statement that employers “increasingly prefer” a bachelor’s degree is not synonymous with the “normally required” standard imposed by the first criterion. Nor does the statement that employers are placing a growing importance on postsecondary education satisfy the first criterion, either, as postsecondary education does not necessarily equate to a bachelor’s degree; the *Handbook* notes that a number of 2-year colleges offer construction management programs.

As such, the proposed position does not qualify for classification as a specialty occupation under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

In determining whether the proposed position qualifies as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the AAO determines whether the requirement of a bachelor’s degree is actually the industry standard. Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that 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.” *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)).

The *Handbook* does not report that the industry normally requires a bachelor’s degree as a minimum qualification. Nor is there evidence that the industry’s professional associations have made a degree a minimum requirement for entry.²

² See Construction Management Association of America, <http://www.cmaanet.org>; *select* Career Headquarters; *select* CM as a Career (accessed August 10, 2006). “Some people become professional CMs [sic] after years of experience in one of the building trades. However, the job today increasingly requires specific academic preparation as well as construction knowledge.” The site notes that two-year, bachelor’s, and master’s-level academic preparation is offered by colleges and universities. It does not indicate that a four-year degree is the normal minimum requirement in the industry.

No evidence has been submitted by the petitioner to demonstrate that its degree requirement is common to the industry in parallel positions among similar organizations.

Accordingly, the petitioner has not established that its degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The *Handbook* reveals that the duties of the proposed position are similar to those of a construction manager as outlined in the *Handbook*, which does not require a degree as a minimum entry requirement. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner.

The record does not develop information about the proposed position and its duties with sufficient specificity and detail to demonstrate uniqueness, complexity, or specialization that would distinguish them from construction manager positions and attendant duties that neither require nor are associated with at least a baccalaureate degree in a specific specialty. Examples of the generic and generalized level of the position and its duties include, from the petitioner's letter on appeal, the petitioner's statements, without specific examples or explanation, that the beneficiary's work includes "project administration services for active projects," "management of person[nel]," and "construction management duties."

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. 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 histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence was submitted. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's 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 in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the minimum entry requirement.

As already discussed, no evidence has been submitted to demonstrate that the duties of the proposed position are more specialized and complex than those performed by members of the construction management occupational groups described in the *Handbook* who do not hold at least a baccalaureate degree, or the equivalent, in a specialty occupation. A baccalaureate degree in a specific specialty is not the minimum entry requirement for this position, and the petitioner has not demonstrated that its position is so specialized and complex that the knowledge required to perform its duties is usually associated with the attainment of a baccalaureate or higher degree.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria delineated at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

On appeal, the petitioner submits a letter stating why it needs the services of the beneficiary. For example, the petitioner states that the petitioner's services are vital to the company. However, the petitioner submits no information to establish the proposed position as a specialty occupation under any of the criteria set forth previously.

Finally, and beyond the decision of the director, the AAO notes that the beneficiary appears to have been working for the petitioner, without legal authorization, since 2003. According to the petitioner's March 24, 2004 appeal, the beneficiary "came to our team in September 2003 as part time at the beginning." The beneficiary's resume states that he has worked for the petitioner since October 2003. The record does not indicate that the beneficiary possessed an H-1B approval for employment with the petitioner during this time. However, the AAO will not address this matter, as issues related to maintenance of nonimmigrant status are beyond the scope of its jurisdiction.

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.

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