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U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 04 246 51080 Office: CALIFORNIA SERVICE CENTER Date: **SEP 25 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 of the 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 business engaged in providing termite inspections and repairs and seeks to extend its employment of the beneficiary as a cost estimator. 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 because the proffered position is not a specialty occupation. Counsel submits the petitioner's reasons for appeal on the Form I-290B, along with a brief.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) 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) Form I-290B and attachments. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a cost estimator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and

counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing reports and other documentation to prepare time, cost, materials, and labor estimates; assessing cost effectiveness of products, projects or services, tracking actual costs relative to bids as the project develops; consulting with clients, vendors, personnel in their departments or construction foremen to discuss and formulate estimates and resolve issues; conferring with engineers, architects, owners, contractors and subcontractors on changes and adjustments to cost estimates; preparing estimates used by management for purposes such as planning, organizing, and scheduling work; preparing estimates for use in selecting vendors or subcontractors; reviewing material and labor requirements to decide whether it is more cost-effective to produce or purchase components; preparing cost and expenditure statements and other necessary documentation at regular intervals for the duration of the project; preparing and maintaining a directory of suppliers, contractors and subcontractors; setting up cost monitoring and reporting systems and procedures. The petitioner stated that the proffered position requires a bachelor's degree or the equivalent in engineering or a related field.

The director requested evidence to substantiate the statements made on the Form I-129 such as Form DE-6 quarterly wage reports, the beneficiary's last pay receipt, the beneficiary's W-2 and an attestation of continued employment. The petitioner provided the requested information.

In his decision, the director noted that the proffered position must meet one of the above listed criteria. The director noted that CIS does not use just the title itself when determining whether a particular job qualifies as a specialty occupation. The director noted that the specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that CIS considers. The director found that the petitioner did not present specific credible evidence showing that its organization has unique and specific needs for such services for the period of time which it intends to employ the individual. The director reviewed the information provided by the petitioner and noted that the beneficiary's W-2 showed that he earned \$13,440 for the year 2004. The director noted that the beneficiary's Form 1099 shows that he received nonemployee compensation of \$36,667.

The director found that the record is insufficient to establish that the beneficiary was actually employed by the petitioner in the capacity stipulated in the previous petition. The director found that the record prohibits CIS from making an affirmative determination as to the bona fides of the proffered position. The director found it was not clear in what capacity the petitioner employed the beneficiary, e.g. whether the beneficiary was employed part-time as an on-call contract employee or full-time at a wage less than that claimed on the previous petition. Further, the director noted that if the beneficiary was performing his duties as a contractor employee as shown on the 1099 and there were no copies of contracts between the petitioner and the beneficiary, he was unable to determine if the petitioner complied with the terms of the LCA. The director found that it was not clear in this case that there is a bona fide position and concluded therefore that the proffered position was not a specialty occupation.

On appeal, counsel asserts the petitioner is the employer of the beneficiary and that the employer is allowed to allocate compensation between Forms 1099 and W-2. Counsel asserts that CIS did not identify or seek an explanation of the alleged discrepancy and asserts that the regulations require a Notice of Intent to Deny or a Request for Evidence indicating a need for an explanation. The AAO notes that the director issued a request for evidence, and in response the petitioner submitted the evidence that the director found to be inconclusive in establishing the bona fides of a full-time job offer. Additionally, the petitioner has the opportunity to supplement the record on appeal.

Counsel has not addressed the director's concern regarding the petitioner's failure to compensate the beneficiary as an employee. The director noted that the petitioner paid the beneficiary as an employee as reflected in the Form W-2 and as a contractor as reflected in the Form 1099. The petitioner has not established that it has met the criterion of the required wage obligation as defined in 20 C.F.R. § 655.731(c) governing the LCA requirements regarding wages. The petitioner has not established that it has paid the required wage to the employee, cash in hand, free and clear, when due, except for deductions in accordance with the paragraph 20 C.F.R. § 655.731(c)(9).

Upon review, the petitioner has not established that the proffered position is a specialty occupation.

Counsel notes that the petitioner is seeking to continue to employ the beneficiary as a cost estimator. Counsel explains that there are no changes in duties or conditions. The petitioner noted that CIS approved a petition that had been previously filed on behalf of the beneficiary. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel contends that the proffered position is professional and states that the position's closest corollary is a cost estimator as defined in the *Dictionary of Occupational Titles (DOT)*. Counsel refers to the SOC *O\*Net* as noting that a degree is required for the position. The SOC does not describe the amount of training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the AAO does not rely on SOC information.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers 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; 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 often considered by CIS when determining these criteria 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." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 812 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a 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 prefaces its analysis by noting that the record lacks evidence of specific projects and specific tasks and explanations of why they would require the theoretical and practical application of a bachelor's degree level of highly specialized engineering knowledge. The descriptions of the proposed duties are exclusively generic and do not persuade the AAO that the actual job performance rises to the level of a cost estimator requiring a baccalaureate degree in a specific specialty as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The petitioner provides termite inspections and repair. The petitioner has not related the duties of the cost estimator position to the business of termite inspections. Although the petitioner states that the beneficiary will review material and labor requirements to decide whether it is more effective to produce or purchase components, the petitioner has not described what components it produces in order to provide termite inspections. Further, the AAO notes that the petitioner submits a letter from its CPA which states that the beneficiary is a termite inspector and works for the petitioner. The author of this letter states that aside from salary, the beneficiary is paid on commission basis for which he receives a 1099-MISC at the end of the year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted in the *Handbook*, job entry requirements for cost estimators vary by industry. In the construction industry, employers increasingly prefer individuals with a degree in building construction, construction management, construction science, engineering, or architecture.

The petitioner fails to establish the first criterion because the *Handbook* states that employers of cost estimators prefer, but do not require, applicants with bachelor's degrees with a degree in building construction, construction management, construction science, engineering or architecture. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

The petitioner provided no evidence to establish the first alternative prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a specific degree as required by the second alternative prong of the second criterion.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

**The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)** requires that the petitioner establish that 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. The petitioner has provided a list of general duties of the proffered position. The petitioner provided a letter from its CPA indicating that the beneficiary was employed as a termite inspector, not as a cost estimator. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or

reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho.*

To the extent they are described in the record, the duties do not appear so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. While a cost estimator may be a specialty occupation, the petitioner has not established that the duties of the position in relation to its business require a four-year degree in engineering.

As related in the discussion above, the petitioner has failed to establish that the 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.

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