

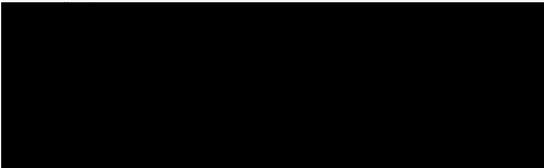


U.S. Citizenship
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Services

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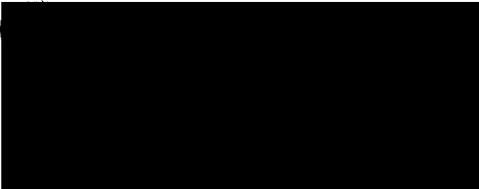


FILE: WAC 04 017 50224 Office: CALIFORNIA SERVICE CENTER Date: FEB 16 2005

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 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 provides surveying, civil engineering, and land planning. It seeks to employ the beneficiary as a survey technician. 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. On appeal, the petitioner states that the proffered position is a specialty occupation.

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 supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a survey technician. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail performing surveying duties under the direction of licensed land surveyors; obtaining and researching data used for construction, mapmaking, or boundary locations; preparing technical and statistical reports for management; and utilizing CADD. Counsel's November 24, 2003 letter elaborated on the beneficiary's duties. The petitioner indicated that a candidate for the proffered position must possess a bachelor's degree in engineering, forestry, geography, or a physical science.

The director determined that the proffered position was not a specialty occupation. The director stated that the *Dictionary of Occupational Titles (DOT)* and *Occupational Information Network (O*Net)* were not persuasive in establishing that the proffered position is a specialty occupation. According to the director, CIS routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* because it provides a comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. The director stated that the *Handbook* reveals that a survey technician does not require a bachelor's degree, and a surveyor does require a bachelor's degree. The director concluded that the proposed duties and stated level of responsibility did not indicate a complexity or authority beyond what is normally encountered in the occupational field, and further, that the evidence did not show that the job offered could not be performed by an experienced person whose educational training fell short of a baccalaureate degree.

On appeal, the petitioner states that the initial petition failed to indicate that the proffered position requires baccalaureate-level knowledge in civil engineering. The petitioner points out that the organizational chart showed the beneficiary as supervised by a licensed civil engineer, not a licensed surveyor. According to the petitioner, the majority of the beneficiary's work will be civil engineering in nature, and that the proposed position involves civil engineering and land surveying. The petitioner stresses that the proffered position requires advanced skills in computer-aided drafting, hydrology design, street plan and profile design, storm water retention design, sewer design, and tentative and final mapping. The petitioner indicated that CIS had previously approved an H-1B petition for another employee.

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 first 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 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.

In response to the request for evidence, which sought a more detailed job description, the petitioner elaborated on the beneficiary's proposed duties. However, the detailed job description does more than clarify and elaborate on the beneficiary's proposed duties; it materially altered the job description. The AAO will not consider this evidence on the ground that the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

Similarly, on appeal the petitioner seeks to modify the proffered position by indicating that it requires baccalaureate-level knowledge in civil engineering and that most of the beneficiary's work will be civil engineering in nature. The AAO will not consider this evidence on the ground that CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

As stated by the director, the *Handbook* is routinely consulted for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* discloses that the duties of the proffered position are performed by a surveying technician who assists "land surveyors by operating survey instruments and collecting information in the field and by performing computations and computer-aided drafting in offices." The *Handbook* indicates the following educational requirements for a surveying technician:

The National Society of Professional Surveyors, a member organization of the American Congress on Surveying and Mapping, has a voluntary certification program for surveying technicians. Technicians are certified at four levels requiring progressive amounts of experience, in addition to the passing of written examinations. Although not required for

State licensure, many employers require certification for promotion to positions with greater responsibilities.

According to the *Handbook*, most people prepare for a career as a licensed surveyor by:

combining postsecondary school courses in surveying with extensive on-the-job training. However, as technology advances, a 4-year college degree is increasingly becoming a prerequisite. About 50 universities now offer 4-year programs leading to a B.S. degree in surveying. Junior and community colleges, technical institutes, and vocational schools offer 1-, 2-, and 3-year programs in both surveying and surveying technology.

Thus, the *Handbook* indicates that the proffered position's duties are performed by a surveying technician, an occupation that does not require a bachelor's degree in a specific specialty. 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 particular position, survey technician.

The director properly stated that the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation, and that the DOL has replaced the *DOT* with the *O*Net*, and that both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. As already discussed, the *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, the director correctly indicated that CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the DOL has assigned it a specific SVP rating in the *DOT*.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the evidentiary record contains job postings. For various reasons, the postings are not persuasive in establishing 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2). The Los Angeles Unified School District and the City of Long Beach are public entities; therefore, they differ in nature from the petitioner, a company that provides surveying, civil engineering, and land planning. The City of Long Beach does not require a bachelor's degree for its job because it accepts experience in lieu of education. The duties in the postings from TKC differ from the proffered position in that the beneficiary will not prepare final civil engineer drawings, produce finished drawings from preliminary design sketches, and perform civil engineering design. Although the posting from XAP indicates that most surveying technician jobs require a four-year bachelor's degree, this is incongruous with the *Handbook's* information, which describes a surveying technician as not requiring a bachelor's degree. Based on the above reasons, the postings fail to establish that a 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 degree. Again, the *Handbook* shows that the duties of the proffered position are performed by a surveying technician, an occupation that does not require a bachelor's degree.

The petitioner stated that it employs another person who holds a master's degree in surveying and cartography as a surveying technician. Implicitly, the petitioner suggests that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the AAO cannot determine whether the original H-1B petition was approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other 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 petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already discussed, the *Handbook* reveals that the beneficiary's duties are performed by survey technicians, an occupation that does not require a baccalaureate degree.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

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. Again, the *Handbook* reveals that the proffered position's duties are performed by survey technicians, an occupation that does not require a baccalaureate degree. As such, the petitioner fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.