

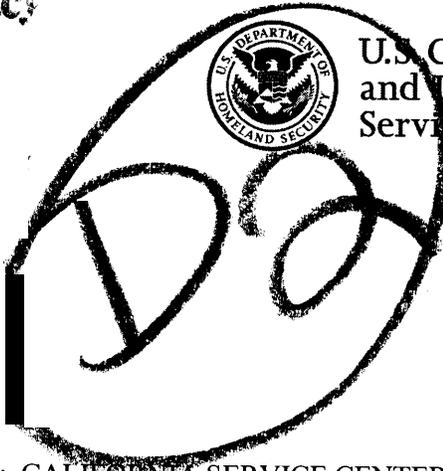
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U.S. Citizenship  
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Services

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MAY 20 2005

FILE: WAC 03 194 50220 Office: CALIFORNIA SERVICE CENTER Date:

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a landscape architectural design and consulting firm that seeks to employ the beneficiary as a Landscape Designer. 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 that the petitioner had not submitted proof that it was conducting business, as was requested. On appeal, counsel submits a letter from the petitioner and supporting evidence.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's first request for additional evidence (RFE), dated September 5, 2003; (3) the petitioner's response to that RFE; (4) the director's second request for additional evidence, dated October 21, 2003; (5) the petitioner's response to that RFE; (6) the director's third request for additional evidence, dated November 14, 2003; (7) both responses to that RFE; (8) the director's denial letter; and (9) the Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a Landscape Designer. Evidence of the beneficiary's duties includes: the Form I-129; the documents accompanying the Form I-129; the petitioner's letter of support; the RFE responses; the Form I-290B; and the documents accompanying the Form I-290B. The Form I-129 sets forth the following description of the duties of the proposed position:

[A]nalyze natural elements of the site re [sic] its climate, soil, slope of the land, drainage and vegetation; observe where sunlight falls on the site at various time[s] and assess the effect of existing buildings, roads, walkways, and utilities on the projects [sic]; prepare preliminary design using computer aided design tools/programs; present video simulation to clients to help clients evision [sic] the proposed ideas and plans; consult engineers and other professionals to perform complete assigned projects.

The petitioner's letter of support stated that the petition was an H-1B extension and amendment to reflect a change in corporate ownership, and that there were no material changes from the previous petition.

The director issued an RFE on September 5, 2003, requesting further evidence to include a more detailed job description, further evidence that a baccalaureate or higher degree is in fact required to perform the duties of the position, and a copy of the beneficiary's license, or evidence to establish that a license was not required. Counsel submitted a memorandum in response.

The director issued a second RFE on October 21, 2003, requesting a copy of the beneficiary's "permanent California Architect License." In response, counsel submitted a letter from the petitioner clarifying that

the position offered to the beneficiary is that of a Landscape Designer. The petitioner stated: "Landscape Designers are not required by the State of California to be licensed nor are Landscape Designers regulated by the State of California."

The director issued a third RFE on November 14, 2003, requesting additional evidence to establish that the position qualified as a specialty occupation, as well as evidence to prove that the petitioner is a valid business entity and employer. Two RFE responses were sent – one from the petitioner, and one from counsel.

Counsel's response to the third RFE, which was faxed to the director on February 6, 2004, did not address either issue. Counsel repeated previous assertions already in the record and noted that the beneficiary had been previously granted H-1B classification as a Landscape Designer. In response to the portion of the RFE requesting evidence to establish the petitioner's status as a valid business entity and employer, counsel stated that the petitioner was unable to release the company's documents at that time.

The director denied the petition, stating:

The Service requested for the petitioner to submit proof of business conducted. However, the petitioner did not submit the requested evidence, therefore, the Service is unable to determine if the petitioner is a United States employer as defined in 8 C.F.R. 214.2(h)(4)(ii). Consequently, the petitioner has avoided a material line of inquiry to determine if the petitioner engages in [the] business of a specialty occupation.

In making his decision the director relied in part on 8 C.F.R. § 103.2(b)(14), which states the following:

Effect of request for decision. Where an applicant or petitioner does not submit all requested additional evidence and requests a decision based on the evidence already submitted, a decision shall be issued based on the record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition.

It must be noted that the mere fact that an H-1B petition had been previously approved for this position is not determinative. 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). Moreover, the AAO is never bound by a decision of a service center or district director. *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). If the AAO determined that the director had erred in approving the previous petition it would not bind itself to treating the erroneous decision as binding precedent.

However, counsel's letter was not the only response to the third RFE. The petitioner also sent a letter and supporting evidence to the director, and that submission also arrived at the California Service Center on February 6, 2004.

Two RFE responses are not permitted. 8 C.F.R. § 103.2(b)(11) states the following:

Submission of evidence in response to a Service request. All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

Because counsel faxed his RFE response to the service center, the director received that letter before he received the petitioner's letter and supporting documents. Counsel's response did not address the issues raised by the RFE, and the director denied the petition pursuant to 8 C.F.R. § 103.2(b)(14), as the failure to submit evidence precluded the director from making a material line of inquiry. This was proper under the circumstances, as an RFE response containing only some (or none) of the requested evidence is considered a request for a decision based on the record.

However, a close inspection of the record demonstrates that the petitioner's letter and supporting documents in fact arrived at the California Service Center a few hours *prior* to counsel's letter.<sup>1</sup> The petitioner's letter and supporting documents will be considered on appeal.

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;

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<sup>1</sup> The record indicates that the petitioner's letter and supporting documentation were delivered to the California Service Center on February 6, 2004 at 7:31 a.m. Counsel's letter was faxed that same day at 2:04 p.m., and on the facsimile cover sheet the box stating "Yes, attached is the requested additional evidence" was checked (as opposed to checking the box stating "No, the requested evidence will be sent by regular mail or express mail"). Since counsel's letter was faxed directly to the Premium Processing Unit via facsimile, it did not go through the mailroom, so the director received counsel's letter first. As such, the director ruled on the petition using counsel's letter, which, as discussed *supra*, did not address a material line of inquiry and was therefore insufficient. The AAO will consider the petitioner's letter and supporting documents on appeal.

- (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.

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 routinely consults the *Occupational Outlook Handbook* (the “*Handbook*”) for its information about the duties and educational requirements of particular occupations.

A review of the duties of the proposed position finds them to be closely aligned to the responsibilities of Landscape Architects. As discussed in the 2004-2005 edition of the *Handbook*:

In planning a site, landscape architects first consider the nature and purpose of the project and the funds available. They analyze the natural elements of the site, such as the climate, soil, slope of the land, drainage, and vegetation; observe where sunlight falls on the site at different times of the day and examine the site from various angles; and assess the effect of existing buildings, roads, walkways, and utilities on the project.

After studying and analyzing the site, landscape architects prepare a preliminary design. To account for the needs of the client as well as the conditions at the site, they frequently make changes before a final design is approved. They also take into account any local, State, or Federal regulations, such as those protecting wetlands or historic resources. In preparing designs, computer-aided design (CAD) has become an essential tool for most landscape architects. Many landscape architects also use video simulation to help clients envision the proposed ideas and plans. For larger scale site planning, landscape architects also use geographic information systems technology, a computer mapping system.

Throughout all phases of the planning and design, landscape architects consult with other professionals involved in the project. Once the design is complete, they prepare a proposal for the client. They produce detailed plans of the site, including written reports, sketches, models, photographs, land-use studies, and cost estimates, and submit them for approval by the client and by regulatory agencies. When the plans are approved, landscape architects prepare working drawings showing all existing and proposed

features. They also outline in detail the methods of construction and draw up a list of necessary materials. Although many landscape architects monitor the installation of their design, the developer's project general contractor or a landscape contractor usually directs the actual construction and installation of plantings.

In that the proffered position appears closely aligned to that of a Landscape Architect, the AAO next turned to the *Handbook's* discussion of whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* reports the following educational requirements for those seeking employment as a Landscape Architect: "A bachelor's or master's degree in landscape architecture usually is necessary for entry into the profession."

As such, the AAO agrees with the petitioner's contention that the proposed position qualifies for classification as a specialty occupation.

The AAO next turns to the issue of whether the beneficiary is qualified to perform services in a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), in order to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record contains a copy of the beneficiary's Master of Landscape Architecture degree from California State Polytechnic University, Pomona, dated June 10, 2000. The transcript from that course of study is enclosed as well. Therefore, the beneficiary satisfies the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(C).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires.

Pursuant to 8 C.F.R. § 214.2(h)(4)(v), if the State requires licensure in order to work in the specialty occupation, the beneficiary must possess the license prior to approval of the H-1B petition:

(A) General. If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

(D) H-1C nurses. For purposes of licensure, H-1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.

(E) Limitation on approval of petition. Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

The beneficiary satisfies subsection (C) of 8 C.F.R. § 214.2(h)(4)(v). The AAO concurs with the petitioner that the beneficiary is able to fully perform the duties of the occupation under supervision.

According to the website of the California Employment Development Department (EDD):

Landscape Architects responsible for the approval of plans and drawings must be licensed by the Department of Consumer Affairs' LATC. A candidate must have six

years of combined education and work experience to take the licensing exam. The length of work experience depends upon the type of degree program completed.<sup>2</sup>

The record reflects that the beneficiary pursued her course of study in Landscape Architecture between 1997 and 2000, a period of three years. According to the enclosed "Employee Evaluation," she began working for the petitioner on January 29, 2001. The instant petition was received at the California Service Center on June 17, 2003. At that point in time (June 2003) the beneficiary had been working for the petitioner for two years and five months. Since a candidate must have six years of combined education and work experience to take the licensing examination, the beneficiary was not qualified to take that examination at the time the petition was filed. If three years of experience in the occupation are necessary in order to sit for licensure, then a novice is clearly allowed to perform the duties of the position without licensure (as otherwise, no one could ever gain the experience required to sit for the licensure examination).

As such, the AAO finds that the beneficiary is capable of performing the duties of the specialty occupation without licensure, thus satisfying the requirement set forth 8 C.F.R. § 214.2(h)(4)(v)(C).

The director also requested evidence that the company was operating in California. As discussed *supra*, counsel's letter stated that the petitioner was unable to provide evidence to establish the petitioner's business operations. However, the petitioner's own RFE response contained the following evidence regarding its existence as a valid business entity: (1) Copies of employee evaluations; (2) Copies of Form DE-6, California Quarterly Wage Report, for the quarters ending June 30, 2003 and September 30, 2003, as requested by the director; (3) Copies of Form 941, Quarterly Wage Report, for the quarters ending June 30, 2003 and September 30, 2003, as requested by the director; (4) Copies of the petitioner's quarterly payroll summaries, dated June 28, 2003 and October 4, 2003, as requested, and; (5) Copies of Forms W-2 for several of the petitioner's employees. This evidence satisfactorily demonstrates that the petitioner is a United States employer and will employ the beneficiary to perform services temporarily in a specialty occupation.

The petitioner has established both that the position qualifies for classification as a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation. As such, the petition will be approved.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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<sup>2</sup> California Employment Development Department, *Labor Market Information*, <http://www.calmis.cahwnet.gov/htmlfile/subject/guide.htm>; *select Landscape Architects, Guide #216 (2003) PDF* (accessed April 13, 2005).