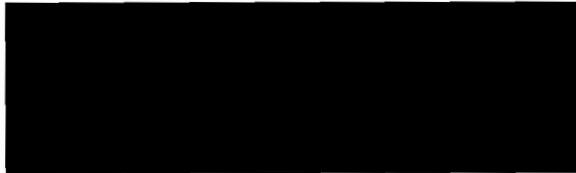




U.S. Citizenship
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Services

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FILE: EAC 04 260 53400 Office: VERMONT SERVICE CENTER Date: **MAY 24 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 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 dismissed. The petition will be denied.

The petitioner is a design and installation company providing custom hardwood floor design, installation and finishing. It seeks to employ the beneficiary as a production planner. The petitioner 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 position did not qualify as a specialty occupation. On appeal, counsel submits a brief and additional information asserting that the proffered position is a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

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 are 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) the Form I-129 and supporting documentation; (2) the director’s denial letter; and (3) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a production planner. Evidence of the beneficiary’s duties was set forth in the Form I-129 petition and supporting documentation. According to this evidence the beneficiary would:

- Supervise the planning and production of scheduled refinishing/finishing operations and liaison with upper management of construction companies and homeowners;
- Supervise the development and implementation of master schedules to establish a sequence and lead time for each operation to meet shipping dates according to sales forecasts or customer orders;
- Analyze production specifications and determine manufacturing processes tools and human resource requirements;
- Plan and schedule the workflow for each operation and provide guidance to production workers;
- Confer with management of construction companies and homeowners to determine the status of assigned operations and/or projects;
- Prepare production reports and expedite delayed operations and alter schedules to meet unforeseen conditions; and
- Supervise the preparation of required materials, tools and equipment for scheduled operations and/or projects.

The petitioner requires a minimum of a bachelor’s degree in construction management or a related field for entry into the offered position.

Upon review of the record, the petitioner has failed to establish that the offered position meets the requirements of the above cited regulatory criteria. Factors often considered by CIS when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook*, (*Handbook*), reports

that the industry requires a degree; whether an industry 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)).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for construction managers. The *Handbook* notes that construction managers plan and coordinate construction projects. Such managers are known by many titles, including: constructors; construction superintendents; general superintendents; project engineers; project managers; general construction managers; or executive construction managers. These individuals manage, coordinate, and supervise the construction process from the conceptual development stage through final construction on a timely and economical basis. Given designs for a particular project, they oversee the organization, scheduling, and implementation of the project to execute those designs. They are responsible for coordinating and managing people, materials, and equipment; budgets, schedules, and contracts; and safety of employees and the general public. Construction managers oversee the completion of all construction in accordance with the engineer’s and architect’s specifications and prevailing building codes. They evaluate and determine appropriate construction methods and cost effective plans and schedules. This may require sophisticated estimating and scheduling techniques and the use of computers with specialized software. They regularly prepare progress reports and meet with owners, other constructors, trade contractors, vendors, architects, engineers, and others to monitor and coordinate all phases of a construction project. On small projects such as remodeling a home, a self-employed construction manager or skilled trades worker who directs and oversees employees often is referred to as the construction contractor. In this instance, the beneficiary would work as a manager or supervisor on various construction projects overseeing the installation of flooring contracted by his company, and acting as a scheduling manager for jobs being performed by the petitioner. The duties to be performed by the beneficiary fall within the wide range of duties performed in the industry by construction managers. The *Handbook* notes that even though degrees are increasingly preferred in the industry, a baccalaureate or higher degree in a specific specialty is not normally the minimum requirement for entry into the offered position. The petitioner has not, therefore, satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations and in support of that assertion submits copies of five job advertisements. None of the advertisements, however, are from firms similar in nature and scope to that of the petitioner. Thus, the advertisements do not establish that a degree requirement, in a specific specialty, is common to the industry in positions parallel to that being offered to the beneficiary among organizations similar to that of the petitioner. The petitioner also refers to the Department of Labor’s *O*NET* classification of the position and its related SVP rating. This reference does not establish that a degree requirement is common for the position in the industry. Neither the *O*NET*’s SVP rating nor a Job Zone category indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies

the particular type of degree, if any, that a position would require. The petitioner has failed to establish the referenced regulatory criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does not assert that it normally requires a degree or its equivalent for the proffered position, and offers no evidence in this regard. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The duties of the proffered position are routine for production planners in the industry. While the petitioner indicates that it employs 68 persons, no corroborative evidence of record describing the number of projects, the size of the crews, the complexity of the projects, or the like establishes that the duties of the proposed position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Nor are they so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties of the position are routinely performed in the industry by individuals with less than a baccalaureate level education. The petitioner has not satisfied the referenced criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4).

Beyond the decision of the director, the petitioner indicates on appeal, that it has decided to increase the compensation to be paid to the beneficiary from \$25,000 per year to \$45,013 per year, and has submitted a new Labor Condition Application (LCA) certified by the Department of Labor on November 29, 2004. The Form I-129 petition was filed on September 21, 2004.

Section 101(a)(15)(H) of the Act defines an H-1B nonimmigrant as:

[A]n alien who is coming temporarily to the United States to perform services . . . in a specialty occupation . . . and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary of Labor an application under section 212(a)(n)(1)

Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with an H-1B petition “a certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” The regulations further provide:

Before filing a petition for H-1B classification in a specialty occupation the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 C.F.R. § 214.2(h)(4)(i)(B)(1).

As previously noted, the petitioner now states, and the record establishes, that the new LCA covering the intended employment was certified by the Department of Labor on November 29, 2004, subsequent to the filing of the Form I-129 petition. If the petitioner wishes to significantly change the terms and conditions of employment, it must file a new petition. The petitioner must establish that the position offered to the beneficiary qualified as a specialty occupation at the time the petition was filed. For this additional reason, the petition may not be approved.

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 and the appeal shall accordingly be dismissed.

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