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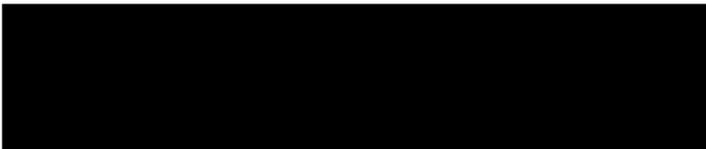
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FILE: WAC 05 222 52247 Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2007

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
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 dismissed.

The petitioner is a stone finish contractor and supplier that seeks to employ the beneficiary as a project coordinator. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

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:

An 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 qualification for classification as a specialty occupation, the proposed 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.

The petitioner is a stone finish contractor and supplier. It was established in 1990, has 60 employees, and has a gross annual income of \$3,000,000. According to the petitioner's June 13, 2005 letter of support, the duties of the proposed position would include issuing requests for information in instances where there is not enough information provided to the acting agent; utilizing state-of-the-art CAD to generate design intent and draw shop drawings, details, and cutting lists of different stone materials; preparing cover letters and issuing drawings to clients' designers for their approval; tracking and monitoring change orders; checking replies from clients' designers when there are changes or additional materials in their drawings or sketches; coordinating with estimators on change orders and allowing them to prepare change order proposals; issuing copies of shop drawings to the factory and construction site for fabrication and assembly; coordinating with the petitioner's personnel to solve problems involved in assembly; reviewing all materials (i.e., marble, tile, limestone, granite, and slate) and their respective suppliers and distributors; establishing relationships with suppliers and distributors; preparing bid packages with quote sheets, blueprints, sketches, specifications, and material information, and reporting to the president for review and to coordinate other details and timing issues; handling the petitioner's scheduling, purchase orders, invoicing, receivables, job costing, and other miscellaneous costs; acting as the petitioner's facilitator and coordinator of cross-functional projects, which may involve external partners and collaborators; organizing meetings, issuing minutes, tracking and reporting project progress, and following up on action items, using templates where appropriate; assisting the team leader by gathering information and preparing presentations; assisting with the development and implementation of standard project templates; and managing project repositories with guidance from the beneficiary's supervisor.

At the outset, the AAO notes that newly-retained counsel has renamed the proposed position on appeal. While the Form I-129, certified labor condition application, and letter of support title the position "project coordinator," counsel labels the position "project engineer." However, on appeal a petitioner cannot offer a new position to the beneficiary, or materially change a position's title. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The petitioner filed a certified LCA to employ the beneficiary as a project coordinator for \$2000 per month, or \$24,000 per year. No evidence of record indicates that project engineers earn comparable pay.¹ The AAO also notes that the Form I-129 and letter of support state that the petitioner's gross annual revenue is \$3 million. However, on appeal counsel states that the petitioner's revenue is "in excess of \$18 million." 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).

¹ By contrast, construction managers in Los Angeles County earn a mean annual wage of \$93,030. Architects and engineers earn a mean annual wage of \$77,300. See, May 2006, Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, Metropolitan Area Occupational Employment and Wage Estimates, Los Angeles-Long Beach-Glendale, California Metropolitan Division, <http://www.bls.gov/ocs/home.htm> (accessed May 24, 2007).

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 disagrees with the director's characterization of the proposed duties as analogous to those of a drafter. 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.² 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. 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.

² The AAO notes that, on appeal, counsel draws the same parallel.

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.

The AAO notes that the *Handbook* specifically states that employers “increasingly prefer” a bachelor's degree, and that they are placing “a growing importance on” postsecondary education. However, 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.³

The AAO has reviewed the job postings submitted by the petitioner, which counsel contends establish the petitioner’s degree requirement as the normal minimum entry into the position. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

Counsel has submitted no evidence to demonstrate that any of these job postings are from companies “similar” to the petitioner. For example, there is no evidence that the advertisers are similar to the petitioner in size and scope of operations, business efforts, and expenditures. Also, there is no evidence in the record as to how representative these advertisements are of the advertisers’ usual recruiting and hiring practices. Simply 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)).

The unnamed company advertising its vacancy through The Retail Search Group is a “renowned retailer.” HDR, Inc. is an architectural, engineering, planning, and consulting firm with 100 offices and over 4,000 employees. The Irvine Company Apartment Communities is a rental housing provider. According to its advertisement, Baker Hughes Incorporated provides products and services for the global petroleum market and has over \$5 billion in annual revenue. The unnamed company advertising its vacancy through Aerotek CE is a homebuilder. Moreover, the AAO notes that not all of these job postings require a bachelor’s degree, or its equivalent. For example, the posting from The Irvine Company Apartment Communities only states that a degree is preferred. As noted previously, employer preferences are not synonymous with employer requirements. Nor do the job postings establish that the advertised positions are “parallel” to the proposed position. As they are limited to sparse, generalized, and generic information about the nature of the duties of their positions, these advertisements do not provide a factual basis for a meaningful comparison with the duties proposed for the beneficiary. Finally, the AAO notes that these job postings are too few to establish an industry-wide standard, especially in light of the evidence from the *Handbook* and the Construction Management Association of America pointing to the opposite conclusion. Thus, while relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner’s degree requirement as an industry norm in parallel positions among similar organizations, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

³ See Construction Management Association of America, <http://www.cmaanet.org>; *select Career Headquarters; select CM as a Career* (accessed May 9, 2007). “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.

Nor do the letters from the petitioner's competitors submitted on appeal satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). First, the authors of these letters have submitted no evidence, such as copies of diplomas and payroll records, to support their assertions. The authors of the letters do not reference trade journals, surveys, or other publications to establish that their companies' practices are standard in the industry. Again, 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)). Also, the AAO notes that individual companies do not establish an industry standard—again, the AAO makes this notation in particular light of the evidence from the *Handbook* and the Construction Management Association of America pointing to the opposite conclusion.

Accordingly, the AAO finds that the proposed position does not qualify for classification as a specialty occupation under 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. Therefore, the petitioner 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 proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

On appeal, counsel states that the petitioner employs another individual in the same position as the one proposed in this petition, and provides a copy of that employee's diploma. However, one previous hire does not establish a pattern of normally requiring applicants for a position to possess a bachelor's degree in a specialty, or its equivalent, for a business established in 1990. The AAO also notes that another individual who, according to the organizational chart, will work in the same department as the aforementioned individual and the beneficiary, does not possess a bachelor's degree.

The fourth criterion requires the petitioner to establish that the nature of the specific duties of its proposed position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. To the extent that they are described, the proposed duties do not indicate the specialization and complexity required by this criterion. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the normal 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* which 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 petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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.