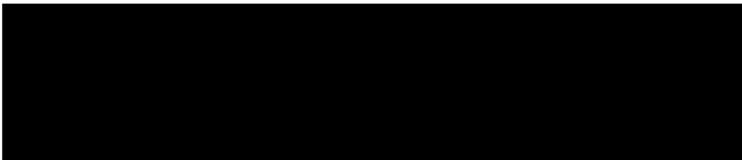


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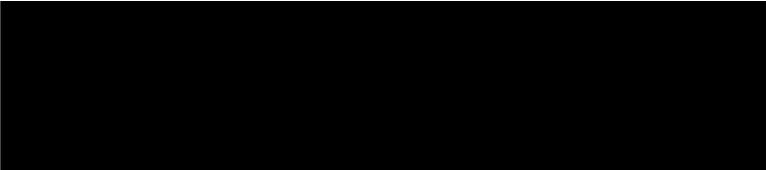
FILE: WAC 06 267 51406 Office: CALIFORNIA SERVICE CENTER Date:

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 construction company that seeks to employ the beneficiary as a construction manager. It endeavors to classify him 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 does not qualify as a specialty occupation, and because the petitioner did not qualify as a United States employer. On appeal, counsel submits a brief and additional information asserting that the offered position qualifies as a specialty occupation, and that the beneficiary would be the employee of the petitioner.

The first issue to be discussed in this proceeding is whether the petitioner qualifies as a United States employer.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The petitioner is a Florida corporation, and as such, is a separate legal entity qualified to conduct business and perform all other tasks permitted by law. As a separate legal entity, the petitioner is permitted by law to employ individuals to work and perform tasks on its behalf. The petitioner is involved in the construction industry and has employed the beneficiary to work as a construction manager. The petitioner is seeking to extend the beneficiary's employment and continue his H-1B employment. The petitioner will hire the beneficiary, will pay the beneficiary, has the right to fire the beneficiary and will otherwise have control over the beneficiary's work. The petitioner will engage the beneficiary to work in the United States, has an employer-employee relationship with the beneficiary, and has an Internal Revenue Service Tax identification number. The petitioner qualifies as a United States employer in this instance, and the director's decision to the contrary is withdrawn.

The final issue to be considered 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 notice of intent to deny (NOID); (3) the petitioner's response to the director's NOID; (4) the director's denial letter; and (5) 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 construction manager. Evidence of the beneficiary's duties includes the Form I-129 petition with attachment and the petitioner's response to the director's NOID. According to this evidence the beneficiary would:

- Negotiate contracts with the State of Florida, local municipalities and the Miami-Dade Expressway Authority (MDX) for the erection of signage and fences in roads and highways, for repairs of concrete bridges and guardrails, for building drainage systems and for the maintenance of roadside shoulders;
- Develop technical specifications to control erosions in slopes or embankments;
- Determine whether to use a RIP-RAP method (uses quick drying concrete) or a Geo-textile method (uses synthetic or metallic mesh) considering the specific ground where the project is taking place;
- Develop all cost estimates and submit proposals in response to official requests for proposals;
- Purchase materials (signs, guardrails and fencing) and rent equipment when equipment owned is not available;
- Hire and supervise all construction and administrative personnel;
- Develop work schedules and deploy equipment and personnel around the county and the state;
- Supervise field personnel and all work being done, and certify the quality of all work performed;
- Supervise a total of up to twelve construction workers that are deployed around the state using six trucks owned by the business and a variety of road construction equipment also owned by the petitioner (cranes, bobcats, bucket trucks, scaffoldings, drills and other accessories);
- Hire temporary personnel when the amount of work requires it;
- Rent equipment when needed, particularly for the implementation of emergency repairs and oftentimes require traffic re-routing and traffic control;
- Develop proposals that are submitted to the state or local municipalities in response to bidding requests;
- Control costs and prices;
- Secure financing when needed;
- Oversee all accounting functions particularly in the areas of accounts receivable and payable;
- Hire and supervise two employees that perform administrative functions;
- Prepare and submit reports to entities with which the petitioner enters into contracts;
- Prepare the annual budget and monitor the adherence to it during the year;

- Oversee the development of financial reports prepared for the petitioner; and
- Perform other administrative and management functions at may be necessary.

The petitioner finds the beneficiary qualified for the offered position by virtue of his past employment experience which has been determined by a credentials evaluation service to be equivalent to a bachelor's degree in business administration from an accredited college or university in the United States.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for general/operations managers and construction managers. The *Handbook* notes that the formal education and experience of operations managers varies as widely as the nature of their responsibilities. Many have a bachelor's or higher degree in business administration or liberal arts, while others obtain their positions by promotion from lower level management positions. Thus, it is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone. It is apparent from the *Handbook* that a baccalaureate or higher degree, in a specific specialty, is not the minimum requirement for entry into the offered position. Positions requiring a college degree are filled from a wide range of educational disciplines. A degree in a specific specialty, however, is not required.

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. 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) with regard to either the duties to be performed by the petitioner as a general/operations manager or a construction manager.

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 job advertisements for construction manager positions. The advertisements submitted, however, do not establish the petitioner's assertion. None of the advertisements submitted are from organizations similar in nature and scope to that of the petitioner. Further,

of the seven advertisements submitted, four require a bachelor's degree, but do not state that the degree need be in any specific educational discipline. Only two designate a degree in a specific educational discipline, and one indicates a preference for a degree but does not state that a degree is required. The advertisements do not establish that a degree in a specific specialty is common to the industry for the proffered position. The petitioner did not submit job advertisements for general/operations managers in the petitioners industry. The documentation submitted does not establish the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does not assert that it normally requires a degree for the proffered position as the petitioner is the only individual who has ever held the position, and offers no evidence in this regard. As such, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the petitioner has not established that the duties of the offered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that the duties are 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.

As described by the petitioner, the duties to be performed by the beneficiary do not establish that they are more unique, complex, or specialized than those normally performed by general/operations managers or construction managers in the industry who are not required to have a baccalaureate level education, or who are not required to have a bachelor's degree in a specific educational discipline. For example, the petitioner states that the beneficiary will: negotiate construction contracts; develop cost estimates and submit proposals; purchase materials; hire and supervise construction and administrative personnel; develop work schedules and deploy equipment and personnel; supervise field personnel; control costs and prices; secure financing; oversee accounting functions; hire and fire employees; prepare budgets and develop financial reports; and perform other administrative/management functions as needed. As described by the petitioner, all of these duties are routinely performed in the construction industry by management personnel and do not require the attainment of a baccalaureate level education in a specific educational discipline. The petitioner has failed to establish the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner submitted an evaluation of the beneficiary's education and work experience for the purpose of establishing that the beneficiary possesses the equivalent of a bachelor's degree in business administration from an accredited college or university in the United States. That evaluation was prepared by a credentials evaluation service. A credentials evaluation service may only evaluate an individual's foreign education for the purpose of establishing its equivalence to a United States degree, not prior work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). An individual's prior work experience may only be evaluated, for educational equivalence purposes, by an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation. For this additional reason, the petition may not be approved.

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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.