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U.S. Citizenship and Immigration Services
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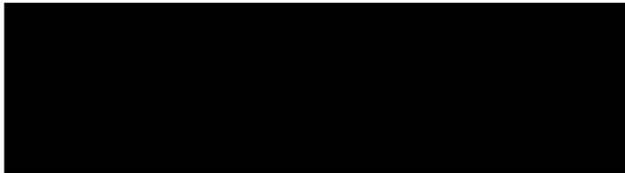
Date: SEP 08 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting 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 denied.

The petitioner is a general contractor and property management company that seeks to employ the beneficiary as a construction manager/cost estimator. 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 of his determination that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of the proposed position.

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 petitioner filed the instant petition on April 2, 2007. The beneficiary earned a bachelor of science degree in construction engineering and management from the University of Ulster, located in Northern Ireland, on July 2, 2007, three months after the petition was filed. The record contains an evaluation from the Foundation for International Services, dated October 4, 2007, which found the beneficiary's degree equivalent to a bachelor's degree in construction engineering, with specialization in management, from a regionally accredited college or university in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), 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.

Although not stated explicitly, the petitioner seeks classification for the beneficiary under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C): that the beneficiary's foreign degree has been "determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university."

The director denied the petition on December 10, 2007, on the basis of his determination that, because the beneficiary did not earn his degree until after the petition had been filed, he was not eligible to perform the duties of the proposed position at the time the petition was filed.

On appeal, counsel contends that the director erred in denying the petition. Counsel contends that "the regulations do not explicitly require that the alien must be in possession of a bachelor's degree certificate at the time of filing, so long as he has completed all academic requirements." Counsel contends further that the phrase "time of filing" should not refer to April 2, 2007, the date the petition was filed at the service center, but rather September 30, 2007, which was the start date of the requested period of employment. Counsel also cites to a 1988 decision by the Board of Alien Labor Certification Appeals (BALCA) as evidence that "there is no difference between receiving degree and completing all requirements."

Upon review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition. The BALCA case cited by counsel has no bearing on this case, as U.S. Citizenship and Immigration Services (USCIS) regulations 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). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm.). Moreover, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." There is no question that, in this case, the beneficiary did not possess a degree at the time the petition was filed.

Nor does the AAO find convincing counsel's contention that the "time of filing" should not refer to April 2, 2007, the date the petition was filed at the service center, but rather September 30, 2007, which was the start date of the requested period of employment. The regulation at 8 C.F.R. § 103.2(a)(7)(i) states the following: "[a]n application or petition received in a USCIS office shall be stamped to show the time and date of actual receipt and . . . shall be regarded as properly filed when so stamped." The Form I-129 was received at the service center on April 2, 2007, and was stamped to indicate as such. Accordingly, the petition was properly filed at the service center on April 2, 2007.

As he did not possess a degree on the date the petition was filed, the beneficiary did not qualify to perform the duties of the proposed position on that date. Accordingly, the director properly denied the petition on this ground. However, the record of proceeding also does not demonstrate

that the proposed position qualifies for classification as a specialty occupation. The AAO finds that, beyond the director's decision, the petition may not be approved for this additional reason.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner, a general contractor and property management company with four employees, was established in 2001. It proposes to hire the beneficiary as a “construction manager/cost estimator.” In its March 27, 2007 letter of support, the petitioner stated that the proposed position would include the following duties:

- Formulating, estimating, and resolving budget issues;
- Scheduling projects in logical steps and budgeting time to meet deadlines;
- Coordinating project closeouts, hand-overs, progress meetings, and site meetings;
- Scheduling day-to-day team activities on large-scale construction projects;
- Managing the activities and work product of subcontractors, vendors, tradesmen, etc.;
- Maintaining ongoing contact with subcontractors and their offices, in order to ensure that timing, schedule, manpower, and costs are closely regulated;

- Coordinating and organizing all permit inspections, certifications, insurance matters, etc.; and
- Engaging in ongoing cost control and administration throughout projects.

In determining whether a proposed position qualifies as a specialty occupation, USCIS 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 has reviewed the 2008-2009 edition of the *Handbook* and finds that the duties of the proposed position are largely encompassed within those noted for construction managers. 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 one. They schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors, but they usually do not do any actual construction of the structure.

Construction managers are salaried or self-employed managers who oversee construction supervisors and workers. They are often called project managers, constructors, construction superintendents, project engineers, program managers, construction supervisors, or general contractors. 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, or contracting firm overseeing the construction project.

These 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 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; worker productivity and safety; and the quality of construction. 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, other regulations, and requirements set by the project's insurers.

Having found the duties of the proposed position similar to those of a construction manager as set forth in the *Handbook*, the AAO turns next 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:

Employers increasingly prefer to hire construction managers with a bachelor's degree in construction science, construction management, building science, or civil engineering, although it is also possible for experienced construction workers to move up to become construction managers. . . .

* * *

For construction manager jobs, employers increasingly prefer to hire individuals who have a bachelor's degree in construction science, construction management, building science, or civil engineering, plus work experience. Practical industry experience is very important . . .

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. However, as construction processes become increasingly complex, employers are placing a growing importance on specialized education after high school.

The *Handbook* specifically states that employers “increasingly prefer” a bachelor's degree, and that they are placing “a growing importance on” postsecondary education. 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 two-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.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify for classification 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.¹

In order to determine whether the degree requirement is common to the industry in parallel positions among similar organizations, the AAO reviewed the job vacancy announcements in the record, and found them unpersuasive.

The petitioner has not submitted any evidence to demonstrate that any of these job postings are from companies "similar" to the petitioner. There is no evidence that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. None of the announcements indicate the size of the particular employer. As they are limited to sparse,

¹ See Construction Management Association of America, http://www.cmaanet.org/files/shared/cmaa_career_brochure.pdf (accessed August 15, 2009). "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." This website 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.

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. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, the petitioner has not established that its degree requirement is an industry standard, and therefore has not satisfied 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*; and the *Handbook* indicates that the construction manager occupation does not normally require a degree as a minimum entry requirement. 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. 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 petitioner, therefore, 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 AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. **However, no such evidence was submitted.** Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the 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* who 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 proposed position does not qualify for classification as a specialty occupation under any of the criteria delineated at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Beyond the decision of the director, the AAO finds that the petitioner has also failed to establish that the proposed position qualifies for classification as a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."). *See also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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