

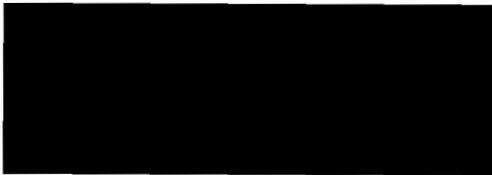
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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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Services



02

FILE: EAC 07 135 52742 Office: VERMONT SERVICE CENTER Date: **SEP 23 2009**

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)

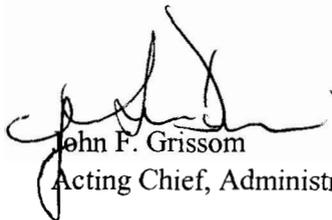
ON BEHALF OF PETITIONER:



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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom
Acting 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 civil and environmental engineering business that seeks to employ the beneficiary as a civil drafter. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 petitioner has not demonstrated that the proffered position is a specialty occupation.

In denying the petition, the director determined that the evidence submitted by the petitioner in response to a request for the petitioner's degree requirements and the degree requirements for the industry in general, does not show that the petitioner normally requires at least a bachelor's degree in a related field or that a bachelor's degree is commonly required in parallel positions among similar organizations.

On appeal, counsel contends that the proffered position, which entails performing engineering design, is "an intermediate position between a person who does full time civil engineering, and a draftsman" and thus requires a bachelor's degree in civil engineering or an equivalent thereof. Counsel contends further that "two other petitions for people with identical qualifications, were approved for the same company under virtually identical job descriptions," and that the examiner mistakenly concluded that the proffered position is a combination of a "drafter" and an "engineering technician," as described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, as opposed to a "civil drafter," which is defined in the DOL's *Dictionary of Occupational Titles (DOT)* and assigned a Specific Vocational Preparation (SVP) rating of 7, indicating the requirement of between two and four years of preparation.

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and its attachments, including counsel's brief in support of the appeal, a letter from the petitioner, copies of previously approved petitions, and the copies of documentation previously submitted.

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 proffered 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 AAO will now discuss and evaluate the evidence of record.

In the March 19, 2007 letter submitted with the Form I-129, the petitioner describes the proffered civil drafter position and educational requirements as follows:

Draft construction drawings, topographical maps used in the design and construction of Civil Engineering Projects such as highways, bridges and municipal engineering projects including utilities and drainage; reviews data collected from the records search on property ownership, existing utilities and other engineering and survey data; plots maps and charts including plans profiles, cross sections confirming to the designs; performs quantity take offs from the construction drawings for bidding purposes and prepares cost estimates for highway bridges and utility construction contracts; willing to accompany field survey crew for data gathering, performs data reduction and plotting; familiar with computer assisted drafting (CAD) utilizing AutoCAD.

Our educational requirement for this position is a Bachelor’s degree in Engineering or related field. Our special requirements for this position include having knowledge of Land Surveying principals, willing to work with Survey Crew, Engineers, Technicians, Construction Inspections and other Co-Workers and extend cooperation to maintain harmony at the work place and improve the quality and production needs.

In his letter of response to the RFE, the petitioner submitted two job advertisements for similar positions to show that the industry standard requires a bachelor’s degree for a civil drafter position. The petitioner also stated that he had employed two civil drafters since 2001. As supporting

documentation, the petitioner submitted job advertisements for a “Civil & Site Engineer/Designer” and a “Design Engineer.” Also submitted were the petitioner’s license as a Professional Engineering Corporation, and evidence of the educational backgrounds, as well as W-2 forms, for two of the petitioner’s employees.

In his May 31, 2007 letter submitted on appeal, the petitioner describes the proffered positions as follows:

The position is one wherein the person has an engineering degree so they can perform engineering calculations such as complex drainage calculations used to justify a zero net increase in storm water runoff and trigonometry used in the land surveying discipline and basic design such as storm sewer design and sanitary sewer design and they are experienced in drafting so they can draft their own design work. They also can draft the more complex designs of our professional engineers.

We need this in-between position due to our size. We have one draftsman who is not qualified to perform design work and only works for the professional engineers. . . .

The AAO does not concur with counsel that the proffered civil drafter position is a specialty occupation. The AAO notes that in his May 31, 2007 letter submitted on appeal, the petitioner adds engineering design duties to the proffered position. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. No evidence in the *Handbook*, 2008-09 edition, indicates that a baccalaureate or higher degree in a specific specialty is required for this position. The *Handbook*, under the category “Drafters and Engineering Technicians” defines a civil drafter position as follows: “*Civil drafters* prepare drawings and topographical and relief maps used in major construction or civil engineering projects, such as highways, bridges, pipelines, flood control projects, and water and sewage systems.” The 2008-09 edition of the *Handbook* does not indicate that civil drafter positions normally require at least a bachelor’s degree in a specific specialty. Under the “Training, Other Qualifications, and Advancement” section, the DOL states:

Employers prefer applicants who have completed postsecondary school training in drafting, which is offered by technical institutes, community colleges, and some 4-year colleges and universities. Employers are most interested in applicants with well-developed drafting and mechanical drawing skills; knowledge of drafting standards,

mathematics, science, and engineering technology; and a solid background in CADD techniques.

The AAO acknowledges counsel's finding that the *DOT* has assigned an SVP rating of 7 to the "civil drafter" position. The *DOT* is not, however, a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The SVP rating assigned by the *DOT* is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. Accordingly, the *DOT* does not establish the proffered position as a specialty occupation under the first criterion.

For the reasons discussed above, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, the record contains two job advertisements for a "Civil & Site Engineer/Designer" and a "Design Engineer." As discussed by the director, the advertised positions are for engineers, and thus are not similar to the proffered civil drafter position. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel submits copies of documentation to show that USCIS approved other petitions that had been previously filed on behalf of two of the petitioner's other civil drafters. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been

demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of two of the petitioner's other civil drafters, the AAO would not be bound to follow the contradictory decision of a service center. *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).

Therefore, the evidence of record does not establish this criterion. In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, the petitioner asserts that the proposed duties “come close to the duties of a design engineer.” To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. The petitioner has not established that the duties performed exceed in scope, specialization, or complexity those usually performed by civil drafters, an occupational category that does not normally require a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

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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.

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