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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

D2

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2011

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

For Michael T. Kelly
Perry Rhew
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.

On the Form I-129 visa petition the petitioner stated that it is a construction services firm. To employ the beneficiary in what it designates as a project engineer position, the petitioner 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceedings, 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 response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.

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. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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 also 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 a particular position 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its

equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the petition, counsel submitted a letter, dated February 3, 2009, from the petitioner's president. That letter states that, in the proffered position, the beneficiary would perform the following duties:

[The beneficiary would] assist with coordinating various engineering projects including material strength analysis, calculation of forming materials for slabs above grade and analysis of constructing concrete retaining walls. His work will be closely supervised and reviewed for accuracy.

[The beneficiary would] assist with calculating grade cuts and backfill for compaction and soils removal. He [would] use basic surveying skills for ground leveling and concrete slope design in accordance with engineering principles and company standards. He will make recommendations and his work will be reviewed for accuracy to ensure that it meets customer requirements.

[The beneficiary would] be responsible for assisting with analyzing engineering design problems and unit pricing.

The AAO notes that the petitioner's president stressed that the beneficiary would be closely supervised in the performance of each of those duties, or that, as to analyzing engineering design problems and unit pricing, he would be acting as an assistant. The petitioner's president also stated:

The position requires extensive computer skills and experience reading blueprints. A minimum of a United States or foreign equivalent Bachelor's Degree in Engineering is required.

Because the evidence was insufficient to demonstrate that the instant visa petition might be approved, the service center issued RFE in this matter. The service center noted that a specialty occupation position necessarily requires a minimum of a bachelor's degree or the equivalent in a specific specialty, and requested evidence to demonstrate that the proffered position requires such a degree. The service center specifically requested, *inter alia*, a more detailed description of the petitioner's business and evidence pertinent to that business, such as brochures, pamphlets, web content, or any printed matter that describes the services the petitioner provides. The service center also requested a more detailed description of the duties of the proffered position and an explanation of why that work requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The service center also noted that the requested period of employment, when added to previous periods in H-1B status, would place the beneficiary beyond the usual six-year limit on that H-1B status. The service center asked that the petitioner explain why H-1B status beyond the usual six-year limit may be extended in this case.

In response to the RFE, counsel provided an undated, unsigned, unattributed letter addressed "To whom it may concern" on the petitioner's letterhead. That letter states that the petitioner conducts building interior demolition. It states, "We also offer site clean-up, light grading equipment with operator, and roll-off dumpsters."

Counsel provided a copy of the petitioner's business license. The company name stated on that license is [REDACTED]. The license further states that the petitioner is a "Building Contractor General."

Counsel provided a vacancy announcement printed from popular job search web site. That announcement was placed by [REDACTED] Alabama, for a project engineer. As to requirements, that announcement states, "Four-year degree preferably in building science, construction management, or engineering."

That announcement is evidence that one employer, in one advertisement, specified a four-year degree as a hiring requirement and also stated the advertiser's preference that the degree be in "building science, construction management, or engineering." The AAO notes, first, that the advertisement does not indicate a requirement for a degree in a specific specialty. Even if the position required a degree in engineering, that would not, without additional specification, be a requirement of a degree in a specific specialty, as "engineering" encompasses a wide range of disciplines, some of which are only related through the basic principles of science and mathematics, e.g., petroleum engineering, nuclear engineering, and aerospace engineering. Further, even if that announcement required a degree in a specific engineering discipline, e.g. civil engineering, it would be of little probative value, as one vacancy announcement is insufficient to establish even the advertising employer's recruiting and hiring practice for the position advertised, let alone that the advertisement is representative of an industry-wide requirement.

As to the six-year limit, counsel provided approval notices showing that the beneficiary had been in H-1B status from October 1, 2004 to October 1, 2007, and from October 2, 2007 to October 1, 2010, but did not explain why H-1B status in this case may be extended beyond the usual six-year limit.

The director denied the visa petition on April 2, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. In that decision, the director stated that, although the petitioner characterized the proffered position as a project engineer position, the duties described more resemble those of a construction manager.

On appeal, counsel contested that finding. Counsel stated that the proffered position is a project engineer position rather than a construction manager position, because it involves coordinating various engineering projects, rather than coordinating various construction projects.

The AAO disagrees with the director's finding that the duties the petitioner's president asserts more closely describe a construction manager position than a project engineer position. However, as will be evident in the discussions below, regardless of the title that the petitioner has applied to the proffered position and the generalized duties that the petitioner asserts for it, the record of

proceeding fails to establish that the beneficiary would be employed in a position actually requiring at least a bachelor's degree, or the equivalent, in engineering or in any other specific specialty.

To the extent that the proposed duties are described in the record of proceeding, it is not evident that their actual performance would require the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in engineering, or for that matter, any specific specialty.

In this regard, the AAO finds that, regardless of the job title applied to them, the duties are described by a relatively small group of generic and generalized functions – “assist[ing] with coordinating various engineering projects including material strength analysis, calculation of forming materials for slabs above grade and analysis of constructing concrete retaining walls”; “assist[ing] with calculating grade cuts and backfill for compaction and soils removal”; “mak[ing] recommendations”; and “assist[ing] with analyzing engineering design problems and unit pricing” – all of which would be “reviewed for accuracy” and satisfaction of customer requirements. As such, and when considered in the context of the general information that the petitioner provides about its business, the proposed duties do not establish that the work that the beneficiary would actually perform would require a particular level of education, or educational equivalency, in a specific specialty. Consequently, regardless of the job title ascribed to the proffered position, the record of proceeding lacks an evidentiary foundation that would satisfy any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). This decisive determination will now be discussed in terms of the separate components of this regulation.

The AAO recognizes that the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that entry into the civil engineer occupation, and other types of professional engineer occupations, normally require at least a bachelor's degree in an engineering discipline. However, as discussed above, the petitioner has not established that the proffered position is that of a civil engineer or any other type of position that would normally require at least a bachelor's degree, or the equivalent, in a specific specialty. Because the evidence in the record of proceeding does not substantiate that the proffered position is one for which there is normally a minimum requirement for a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the record of proceeding does not provide an evidentiary basis for finding that the degree requirement asserted by the petitioner is common in its industry for positions that are parallel to the one proffered here and performed for organizations similar to the petitioner. This precludes a finding that the degree-requirement specified by the petitioner is a common industry practice for the proffered position, so as to satisfy the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next finds that neither the generalized and generic descriptions of the proffered position and its duties nor any other evidence in the record of proceeding develops the proffered position in terms of relative complexity or uniqueness. Accordingly, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the petitioner's

particular position is so complex or unique that it can be performed only by a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO also finds that the petitioner not satisfied the elements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). That is, it has not established a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, and that such history was generated by the position's actual performance requirements.¹

As already reflected in this decision's comments about the petitioner's dependence upon generalized and generic descriptions of the duties of the proffered position, the record of proceeding does not present the duties with sufficient specificity to establish whatever degree of specialization and complexity may reside in them. Therefore, the petitioner has also failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), as it has not developed the proposed duties to an extent establishing their nature as so specialized and complex that their performance would require knowledge usually associated with the attainment of at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO further notes that the evidence shows that the petitioner is a general building contractor specializing in demolition and site cleanup. The record does not support that conducting such a business requires the services of a person with at least a bachelor's degree in engineering. Even if the petitioner specialized in new construction, rather than partial demolition and cleanup, that would not, absent considerable evidence, justify employing a project engineer, rather than a construction supervisor or superintendent.

The lack of substantial evidence about the substantive work to be performed by the beneficiary, discussed earlier in this decision, precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the

¹ A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See *generally Cf. Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner's normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests an additional issue that was not addressed in the decision of denial.

In general, section 214(g)(4) of the Act, 8 U.S.C. §1184(g)(4) provides that: "[T]he period of authorized admission of [an H-1B nonimmigrant] shall not exceed 6 years." The record in the instant case indicates that the beneficiary was granted H-1B status from October 1, 2004 to October 1, 2007, and from October 2, 2007 to October 1, 2010. The instant visa petition requests approval of H-1B visa status from February 3, 2009 through February 3, 2012. On its face, this would place the beneficiary beyond the usual six-year limit.

Various exceptions to the usual six-year limit exist. The RFE issued in this matter accorded counsel an opportunity to show that the beneficiary is entitled to one of those exemptions. Counsel provided neither evidence nor argument pertinent to such exceptions. Even if the instant visa petition were otherwise approvable, the six-year limit on H-1B visa status imposed by section 214(g)(4) of the Act would appear to preclude approval for any period after September 30, 2010.

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. The appeal will be dismissed and the petition denied.

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