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FILE: WAC 02 220 54035 Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2006

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:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director initially approved the nonimmigrant visa petition. The director subsequently revoked the approval. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be revoked.

The petitioner is a construction and remodeling company. It seeks to employ the beneficiary as an industrial engineer and 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 gave notice to the petitioner of his intent to revoke, and subsequently revoked, the petition on the ground that the record failed to establish that the subject position is 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.

As provided in 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.

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 regulation at 8 C.F.R. § 214.2(h)(11)(iii) establishes the procedure for revocations on notice of the director. It reads as follows:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the approval notice (Form I-797A); (3) the notice of intent to revoke (NOIR); (4) the petitioner's response to the NOIR and supporting materials; (5) the notice of decision; and (6) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In a letter accompanying the Form I-129 the petitioner stated that its company is in the business of reconstructing and remodeling residential and commercial buildings such as apartments, condominiums, offices, restaurants, shopping centers, warehouses, and retail stores. The business was established in 1987, the petitioner indicated, had four employees and gross annual income of \$330,000, and proposed to employ the beneficiary as an industrial engineer to facilitate the company's expected growth. The duties of the proffered position were listed as follows:

- Determine the most effective ways to use machines, materials information and financial resources to make product[s] or provide service to our projects.
- Coordinate with management and design staff to create methods and procedures for business operation in order to increase productivity.
- Organize projects and their requirements and resolve organizational, production, and related business operational issues.
- Use engineering and mathematical tools to set up manufacturing and informational systems.

- Develop management control systems, design production planning and control systems to coordinate activities and control product quality and cost including designing or improving systems for the physical distribution of materials and services.
- Assist the executive staff to develop compensation and salary administrative systems and performance evaluation programs.

The minimum educational requirement for the position, the petitioner declared, was a bachelor's degree in industrial engineering. The record indicates that the beneficiary received a bachelor of science degree from the Kunming Institute of Technology in China on August 10, 1982. According to a report in the record from an educational credentials evaluation service, the beneficiary's degree is equivalent to a bachelor of science in industrial engineering from a U.S. college or university.

The petition was initially approved by the director in July 2002. In January 2004 the director sent the petitioner a notice of intent to deny (NOIR), advising that a reevaluation of the petition cast doubt on whether the beneficiary was actually performing the services of an industrial engineer. In response to the NOIR the petitioner maintained that the beneficiary was performing the services of an industrial engineer, and supplemented the previous record with additional documentary evidence including a cost estimate report for a residential project identifying the beneficiary as the project manager, an excerpt from the petitioner's 2001 federal income tax return, Form W-2 wage and tax statements from the years 2001-2003, and some materials pertaining to new business proposals.

In his decision, dated March 3, 2004, the director determined that the duties of the proffered position reflected those of a construction manager, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and quoted information in the *Handbook* indicating that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into such a position. There was no evidence in the record that the petitioner normally requires applicants for the proffered position to have a baccalaureate or higher degree in the field, the director stated, or that the duties and responsibilities of the position indicated complexity or authority beyond that normally encountered in the occupational field. The director concluded that the proffered position does not meet any of the criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner reiterates its contention that the proffered position is that of an industrial engineer, rather than a construction manager. Even if the position is deemed to be a construction manager, however, the petitioner asserts that the director misinterpreted the DOL *Handbook* which, according to the petitioner, "clearly indicates that the degree requirement is increasingly necessary" for construction managers. The petitioner quotes information in the *Handbook* indicating that more than 100 colleges and universities offer baccalaureate degree programs in construction management or construction science and around 20 such institutions offer master's degree programs in those fields. According to the petitioner, the beneficiary's baccalaureate degree coursework gave him the requisite knowledge of economics, material processing and advanced mathematics, computer science, structural mechanics and engineering mechanics, as well as enterprise management and material processing, to be able to perform the various duties of the position. Whether the position is called an industrial engineer or a construction manager, therefore, the petitioner asserts that a baccalaureate degree is required to perform the duties of the job, thereby making it a specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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." See *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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The occupation of industrial engineer is described in the *Handbook*, 2004-05 edition, at 135-36:

Industrial engineers determine the most effective ways to use the basic factors of production – people, machines, materials, information, and energy – to make a product or to provide a service. They are the bridge between management goals and operational performance. They are more concerned with increasing productivity through the management of people, methods of business organization, and technology than are engineers in other specialties, who generally work more with products or processes. Although most industrial engineers work in manufacturing industries, they may also work in consulting services, healthcare, and communications.

To solve organizational, production, and related problems most efficiently, industrial engineers carefully study the product and its requirements, use mathematical methods such as operations research to meet those requirements, and design manufacturing and information systems. They develop management control systems to aid in financial planning and cost analysis and design production planning and control systems to coordinate activities and ensure product quality. They also design or improve systems for the physical distribution of goods and services. Industrial engineers determine which plant location has the best combination of raw materials availability, transportation facilities, and costs. Industrial engineers use computers for simulations and to control various activities and devices, such as assembly lines and robots. They also develop wage and salary administration systems and job evaluation programs . . . .

Based on the evidence of record, the AAO determines that the proffered position does not fit the *Handbook's* description of an industrial engineer. The petitioner is not in the business of manufacturing or production; it is a construction and remodeling company. The duties of the position, as described by the petitioner, do not indicate a level of sophistication that requires the highly specialized knowledge of an industrial engineer. Though the petitioner recites some of the *Handbook's* language on industrial engineers in its list of the job duties, no specific information is provided about the tasks the beneficiary performs on a daily basis. The petitioner has provided no substantive examples of how the beneficiary uses mathematical methods to solve organizational or production problems, or designs manufacturing and information systems, or develops management control systems to aid in financial planning and cost analysis, or designs systems for the physical distribution of goods and services, or develops employee systems governing such issues as wages and job evaluations. These are the duties of an industrial

engineer, as indicated in the *Handbook*, but the petitioner has not shown that the beneficiary performs such tasks.

In determining the nature of a particular position and whether it qualifies as a specialty occupation, the duties actually performed are determinative, not the title of the position. The petitioner must establish that a specialty degree is required by the performance demands of the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000). In this case the evidence fails to demonstrate that the performance demands of the proffered position require the services of an individual with a degree in industrial engineering or a related specialty.

The AAO agrees with the director that the duties of the proffered position reflect those of a construction manager, as described in the *Handbook*, 2004-05 edition, at 28:

Construction managers plan and coordinate construction projects. They may have job titles such as constructor, construction superintendent, general superintendent, project engineer, project manager, general construction manager, or executive construction manager . . . .

Managers who work in the construction industry, such as general managers, project engineers, and others, increasingly are called *constructors*. Constructors manage, coordinate, and supervise the construction process from the conceptual development stage through final construction on a timely and economical basis. Given designs for buildings, roads, bridges, or other projects, constructors 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; safety of employees and the general public.

With respect to the education and training required for construction managers, the *Handbook* states as follows:

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. They need to understand contracts, plans, and specifications, and to be knowledgeable about construction methods, materials, and regulations. Familiarity with computers and software programs for job costing, online collaboration, scheduling, and estimating also is important.

Traditionally, persons advance to construction management positions after having substantial experience as construction craftworkers – carpenters, masons, plumbers, or electricians, for example – or having worked as construction supervisors or as owners of independent specialty contracting firms overseeing workers in one or more construction trades. However, employers – particularly large construction firms – increasingly prefer individuals who combine industry work experience with a bachelor's degree in

constructions science, construction management, or civil engineering. Practical industry experience also is very important, whether it is acquired through internships, cooperative education programs, or work experience in the industry.

*Handbook, id.*, at 29-30. As indicated in the foregoing language, a baccalaureate degree in a specific specialty is not the only avenue to a construction manager position. Work experience in the construction industry can substitute for a formal education. While a bachelor's degree in a construction-related specialty may be increasingly favored by large companies, it is not an industry standard for entry into the occupation.

Based on the foregoing information, the AAO determines that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a construction manager position, as required for the proffered position to meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, no evidence has been submitted that a bachelor's degree in industrial engineering, construction management, or a related specialty is common to the industry in parallel positions among similar organizations. Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty. Thus, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proffered position does not qualify as a specialty occupation under the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), because the evidence of record does not include a hiring history for the proffered position demonstrating that the petitioner normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position.

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that 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 in industrial engineering, construction management, or a related specialty. The AAO is not persuaded, based on the documentation of record, that the duties of the position could not be performed by an experienced individual with less than baccalaureate level knowledge in a specific specialty.

Thus, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel maintains on appeal that *Firstland International v. INS*, 377 F.3d 127 (2<sup>nd</sup> Cir. 2004) prevents CIS from revoking the current petition, as the court in that case ruled that CIS did not have the authority to revoke a prior approval of a visa petition when the beneficiary is already in the United States. The *Firstland* decision involved an interpretation of section 205 of the Act, 8 U.S.C. § 1155, which gives the Attorney General the discretionary authority to revoke immigrant petitions. The Form I-129 petition in this case is for a nonimmigrant worker, and the revocation provision of section 205 of the Act does not govern this proceeding. The instant revocation is guided by the regulation at 8 C.F.R. § 214.2(h)(11). Thus, *Firstland* is not applicable in this case.

The director also implicitly determined that the beneficiary was ineligible for H-1B classification because he could not speak English and did not know sufficient details of the job at a consular interview in China. The record does not reflect that the beneficiary was interviewed for a visa in China. Accordingly, the record does not establish that the beneficiary is not qualified for the position.

As previously discussed, however, the petition may not be approved because the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The petition was properly revoked under 8 C.F.R. § 214.2(h)(11)(iii)(5).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision revoking the petition.

**ORDER:** The appeal is dismissed. The petition is revoked.