PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

D2

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: LIN-00-011-50859 Office: Nebraska Service Center Date: JAN 0 3 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal was summarily dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on a Service motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a steel fabrication business with 82 employees and a gross annual income of $16,000,000. It seeks to employ the beneficiary as a structural steel estimator for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, the petitioner's previous counsel had provided additional information in support of the appeal.

The Associate Commissioner summarily dismissed the appeal reasoning that the petitioner's counsel addressed the issues relating to the director's denial of the requested change of status rather than the specialty occupation issues.

On motion, counsel states, in part, that the Department of Labor (DOL) has determined that the proffered position is a specialty occupation. Counsel further states that the petitioner employs three individuals in the position of estimator, each of whom holds a baccalaureate degree. Counsel further states that the beneficiary's duties are so complex as to require a baccalaureate degree.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Counsel's statement on motion is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service

considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

> Responsible for providing technical assistance and support to company's engineers. Analysis of blueprints, specifications, proposals and other documentation to prepare time, labor and material estimates for products, projects or services while working under the direction of the engineer. Design of sub-assemblies and a way to minimize the cost of purchasing, fabrication and erection in accordance with the overall specifications of the engineer.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in architecture, mechanical engineering, or a related field. A review of the Occupational Outlook Handbook, 2002-2003 edition, at page 41, finds that although employers of manufacturing industries prefer to hire individuals with a degree in engineering, physical science, operations research, mathematics, statistics, accounting, finance, business, economics, or a related field, in most industries, great emphasis is placed on experience involving quantitative techniques. Furthermore, it is noted that in its Request for Prevailing Wage form, the petitioner indicates that the minimum education and training required for the proffered position is an associate's degree in technology and ten months or less

experience in reviewing and analyzing structural steel specifications.

In a letter dated March 8, 2000, the petitioner's chairman and CEO states, in part, that:

> Most of the structural steel estimators that we have hired through the years have had some form of a degree, usually an Associates Degree. This is not necessarily a prerequisite. There have been certain successful estimators that we have had that relied simply upon their experience, usually well in excess of ten years in the field.

In view of the foregoing, the petitioner has not persuasively shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although counsel argues that three of the petitioner's estimators hold baccalaureate degrees in a specialized and related field, the comments of the chairman and CEO, noted above, demonstrate that the petitioner does not require the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. Third, although the record contains some job advertisements, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the record does not contain an evaluation of the beneficiary's educational background in combination with her employment experience from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.