



U.S. Citizenship
and Immigration
Services

D-2



FILE: WAC 03 085 51909 Office: CALIFORNIA SERVICE CENTER Date: AUG 11 2004

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.

Mari Johnson

for Robert P. Wiemann, Director
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 an electrical contracting and engineering services company, and seeks to employ the beneficiary as a hi-rise project engineer. The petitioner 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 because the proffered position is not a specialty occupation, and because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional information stating that the offered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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 are 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 record of proceedings before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s notice of intent to deny; (3) the petitioner’s response to the director’s notice of intent to deny; (4) the director’s denial letter; and (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a hi-rise project engineer. Evidence of the beneficiary’s duties includes the I-129 petition with attachment, and the petitioner’s response to the director’s notice of intent to deny. According to this evidence the beneficiary would: direct the design of build projects [sic] (10 percent of the time) – select, coordinate, and oversee electrical engineers contracted to develop and design the plan drawing process (blueprints) - coordinate and oversee architects, mechanical engineers, structural engineers, electrical engineers, local utility agencies, and the local inspection authority through completion of blueprints - and ensure that blueprints are submitted to the building department for a plan check and then oversee the installation of blueprints; project estimation (10 percent of the time) – oversee and direct the cost estimation of all projects through subordinate employees, which entails working closely with the petitioner’s senior estimator in bid development, presentation, and cost savings through re-design and engineering; project management (40 percent of the time) – plan, oversee, direct, coordinate, and ensure completion of all engineering projects – develop project budgets for estimates – prepare submittals, RFI’s and execute change orders – develop correspondence with owners, developers, and general contractors as well as building consultants – and ensure an adequate workforce for project completion with adherence to contractual obligations; superintendent (15 percent of the time) – jointly supervise and manage multiple site foremen and journeymen in conjunction with the site superintendent to insure projects are completed on time and on budget – provide technical direction for installations and support with on-site design problems – and provide engineering expertise in order to resolve engineering problems or obstacles; scheduling and project completion (25 percent of the time) – provide comprehensive reports detailing project progress, up to date cost analysis, and any project information deemed important – meet with company executives, customers, consultants, and any necessary personnel in order to insure project completion – and generate “Microsoft Project” schedules that identify critical paths, task duration, gant charts, and milestones. The petitioner requires a minimum of a bachelor’s degree in engineering for entry into the proffered position.

Upon review of the record, the petitioner has failed to establish that the offered position meets the requirements of the above cited regulatory criteria. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*), reports that the industry requires a degree; whether an industry 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. Min. 1999) (quoting *Hird/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for construction managers, not engineering managers as asserted by the petitioner. The *Handbook* notes that engineering managers supervise people who design and develop machinery, products, systems, and processes; or direct and coordinate production, operations, quality assurance, testing, or maintenance in industrial plants. Many are plant engineers, who direct and coordinate the design, installation, operation, and maintenance of equipment and machinery in industrial plants. Others manage research and development teams that produce new products and processes or improve existing ones. These are not the duties of the proffered position.

With regard to construction managers, the *Handbook* notes that they plan and coordinate construction projects. Such managers are known by many titles, including: constructors; construction superintendents; general superintendents; project engineers; project managers; general construction managers; or executive construction managers. These individuals manage, coordinate, and supervise the construction process from the conceptual development stage through final construction on a timely and economical basis. Given designs for a particular project, they 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; and safety of employees and the general public. Construction managers oversee the completion of all construction in accordance with the engineer's and architect's specifications and prevailing building codes. They evaluate and determine appropriate construction methods and cost effective plans and schedules. This may require sophisticated estimating and scheduling techniques and the use of computers with specialized software. They regularly prepare progress reports and meet with owners, other constructors, trade contractors, vendors, architects, engineers, and others to monitor and coordinate all phases of a construction project. These are essentially the duties of the proffered position. The *Handbook* notes that even though degrees are increasingly preferred in the industry, a baccalaureate or higher degree in a specific specialty is not normally the minimum requirement for entry into the offered position. The petitioner has not, therefore, satisfied the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations, and in support of that assertion submits: copies of job advertisements; a position evaluation from [REDACTED] Professor and Department Head, Industrial Engineering Department, University of Tennessee; [REDACTED] Director of the Industrial Management Program, State University of New York, [REDACTED] an opinion letter from [REDACTED] Executive Vice President, Associated General Contractors, San Diego Chapter; and an opinion letter from [REDACTED] Executive Manager of the National Electrical Contractors Association, San Diego Chapter. The submissions will be discussed in the order set forth above:

1. Job Advertisements

The petitioner submitted six job advertisements. Six advertisements are insufficient in scope to establish an industry wide educational requirement for the proffered position. Furthermore, the advertisements are not for positions parallel to that offered to the beneficiary. One is for a project engineer, but the duties of the position are vaguely described and it cannot be determined that it is in any manner similar to the position offered to the beneficiary. One is for a project engineer, design engineer, or project manager, and does not specifically detail the duties of the positions advertised. One is a civil engineering position (not the proffered position) and requires a degree in civil engineering. One is for a structural engineer/seismic project manager (not the proffered position) and requires a structural engineering degree with appropriate license. The final advertisement is for a project/construction manager. The duties listed with this advertisement are more similar in nature to those of the proffered position than the aforementioned advertisements. This position indicates that it “prefers”, not requires, an engineering degree but would consider equivalent experience in lieu of a degree. The advertisements submitted do not support the petitioner’s contention, that a degree requirement is common to the industry in parallel positions among similar organizations.

2. Position evaluation from ██████████ Professor and Department Head, Industrial Engineering Department, University of Tennessee

██████████ states that the proffered position is a specialty occupation and requires the services of someone with a minimum of a Bachelor’s degree in Engineering, or a related field. The opinion is based upon Dr. Badiru’s education and experience. ██████████ did not provide, however, evidence of any studies, industry surveys, or other information demonstrating specifically the basis of his opinion. It is also in conflict with the findings previously noted in the *Handbook*, and therefore given little weight.

3. Position evaluation of Herb Schiller, Director of the Industrial Management Program, State University of New York, Stony Brook

██████████ states that companies seeking to employ a “Hi-Rise Engineer in the fields of Engineering, require prospective candidates to possess at least a Bachelor’s degree in the area of Engineering, or a related field, from an accredited institution of higher learning.” ██████████ further notes that this degree requirement is standard in the industry. Again, ██████████ opinion appears to be based on his education and prior experience. He does not provide evidence of any studies, industry surveys, or other information demonstrating specifically the basis of his opinion. It is also in conflict with the findings noted in the *Handbook*, and accordingly given little weight.

4. Opinion letters of ██████████ Executive Vice President of Associated General Contractors, San Diego Chapter; and ██████████ Executive Manager of the National Electrical Contractors Association, San Diego Chapter.

Both individuals state simply that the proffered position requires an individual with a minimum of a bachelor’s degree, or its equivalent. Neither opinion provides the qualifications of the person rendering the opinion, states the basis of the opinion, or states that a degree in any particular discipline is required for the position. The opinions are, therefore, of little evidentiary value.

The petitioner has failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does not state that it normally requires a degree or its equivalent for the proffered position, and offers no evidence in this regard. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The duties of the proffered position are routine for project engineers/construction managers on engineering/construction projects in the industry. They are not so complex or unique that they can be performed only by an individual with a degree in a specific specialty. Nor are they so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not satisfied the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

The final issue to be considered is whether the beneficiary is qualified to perform the duties of the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In support of the beneficiary's qualifications, the petitioner submitted an experiential evaluation from [REDACTED] Badiru, Professor and Department Head, Industrial Engineering Department, University of Tennessee. [REDACTED] opined that the petitioner possessed the equivalent of a Bachelor of Science degree in Electrical Engineering from an accredited institution of higher learning in the United States based upon the beneficiary's prior work experience and professional training. The petitioner did not establish, however, that [REDACTED] 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. The petitioner did submit a letter from [REDACTED] Associate Dean for Academic Affairs, College of Engineering, University of Tennessee. [REDACTED] states that: (1) the University of Tennessee at Knoxville awards credit to foreign students based on an evaluation of the courses that they have taken in international institutions; (2) that professors, including [REDACTED] evaluate such credentials and determine whether the University of Tennessee at Knoxville should award credit to the student; and (3) that Professor Baidru is highly proficient and knowledgeable in this process. The letter is clear that [REDACTED] is permitted to evaluate educational courses taken by foreign students' and to then determine whether the students will be given academic credit for them at the University of Tennessee. [REDACTED] does not state that the University of Tennessee has a program for evaluating foreign students' work experience and awarding college credit based on that experience, or that [REDACTED] has authority to grant college credit based

upon a foreign student's work experience. [REDACTED] evaluation is, therefore, of little evidentiary value with regard to establishing the beneficiary's qualifications to perform the duties of a specialty occupation.

The most that can be said about the beneficiary's qualifications is that the petitioner deems him qualified to perform the duties of the proffered position. That is the petitioner's prerogative. As previously noted, however, the position offered is not a specialty occupation. There is no regulatory requirement that the beneficiary possess a baccalaureate level education or its equivalent to perform the duties of such positions as the position is not subject to H-1B classification.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, or that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 and the appeal shall accordingly be dismissed.

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