

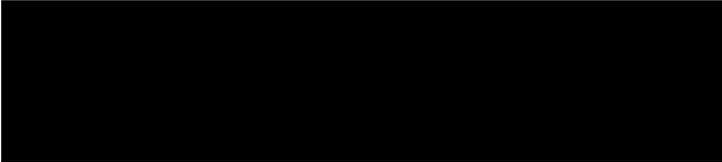
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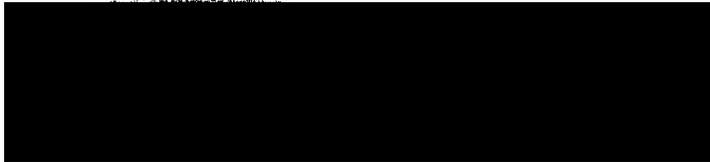
FILE: WAC 04 016 51677 Office: CALIFORNIA SERVICE CENTER Date: MAY 16 2005

IN RE: Petitioner:
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)

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and affirmed his decision upon consideration of a subsequent motion to reopen or reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be granted.

The petitioner is a corporation engaged in the business of preparing soil for construction work. In order to employ the beneficiary as a jet grout supervisor, 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 on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

On appeal, counsel contends that the director's findings on both the specialty occupation and the beneficiary qualifications issues were erroneous, and that the evidence of record requires that the petition be approved. Counsel also requests oral argument.

Upon consideration of the entire record of proceeding, the AAO has determined that the petition should be granted.

The specialty occupation will be discussed first.

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.

Consonant 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. (Italics added.)

In his brief (at pages 7-10), counsel provides the following collation of the duties of the proffered position as they were described in the record as it was constituted at the time of the director's latest decision:

- devise, plan, and enact the grouting and stabilization of soils 20 to 25 feet below the existing ground surface and 10 to 15 feet below the groundwater table. Working below the groundwater table is a difficult task, with grouting difficult and flooding a constant issue. Additionally[,] the project is expected to encounter a highly variable sequence of marine, coralline, alluvial and estuarine deposits consisting mainly of saturated silts, clays, sands, gravels and cobble-to-boulder sized coralline and basaltic clasts [sic], highly compressible soils, liquefiable soils, cemented hard coral ledges and basaltic lava flows. This variable soil condition requires constant attention to the project as each condition must be individually identified, evaluated and specially treated.
- Another challenge for the Jet Grout Supervisor is identifying and working around existing utilities. The first part of this is accurately locating the utilities. Should any existing utility be encountered[,] they would require special techniques to avoid damage. If any damage is caused, the company is required to immediately make repairs and is responsible for such costs. Furthermore[,] the Jet Grout Supervisor must ensure that the project is done in accordance with City, State, and Federal safety and environmental regulations.
- Additionally, the location of the supporting stabilized soil and columns must be precisely located. In addition to ensuring the support columns are in the correct place, their angles/inclination, depth and height must be strictly defined;
- Furthermore[,] the grout mix, injection rate, and pressure must follow guidelines;
- On top of this[,] the rotation/withdrawal rate and ground heave prevention techniques must be properly executed;
- In order to document meeting these project requirements, the Jet Grout Supervisor must follow the prescribed test program of the municipality. Testing of the grout mixture shall be performed in accordance with the American Petroleum Industry's Standard 13B Test Method. Grout and Soil-Cement Samples shall be taken every

100 linear feet and in accordance with American Society for Testing and Materials ASTM C 109;

- Finally[,] core samples of the stabilized soil must be taken as approved by the Officer-in-Charge to meet the previously described strengths in unconfined compressive tests;
- For the Kailua Sewer Project, the Jet Grout Supervisor must also prepare reports for the company and Municipalities Officer-in-Charge. These reports must include:
 - - Location of grouting work according to plans
 - - Jet grout column identification: column number, diameter, length, location, and inclination
 - - Time and date of beginning and completion of each column
 - - Grout mix data
 - - Grout flow rates and grout quantity for each column
 - - Water/Air jet pumping pressures and flow rates for each column
 - - Number and identification of each grout and soil-cement samples
 - - Other pertinent observations: existing utilities; obstructions; grout escape; other unusual behavior during drilling or grouting;
 - - As-built drawings indicating locations of each column
- Supervises the Jet Grouting Team.
- Project startup and commissioning of new drilling and grouting equipment.
- Evaluate and devise solutions for grouting situations.
- Reads and evaluates plans and geological reports for soil modification and foundation construction.
- Records and analyses [sic] engineering data on geology and soil data to ensure proper and efficient operation of Jet Grout Drill and High Pressure Pump.

- Assists in evaluating the performance of machinery and ancillary equipment to ensure efficiencies and quality of operations.
- Applies hydraulic and mechanical engineering principles to test equipment repairs and insure that it meets required specifications.
- Performs high-skilled, journey level mechanical work in the installation, modification, maintenance, and repair of Jet Grouting Drill and High Pressure Pumps.
- Maintains machinery and equipment performance reports.
- Supervises the work done by electricians, mechanics, and operators regarding the proper operation and maintenance of Jet Grouting Drill, High Pressure Pumps and Mixer.
- Trains electricians, mechanics, and operators to the proper operation and maintenance of the Jet Grouting Drill, High Pressure Pumps and Mixer.
- Ensures safety and security on work site.

Counsel adds that the petitioner's vice president states:

All of these aspects must be planned, monitored, executed, recorded and reported, and the Jet Grout Supervisor must coordinate and supervise all of this" (emphasis added).

Because they were not substantiated by any documentation in the record, the AAO discounted the petitioner's assertions about the degrees and degree equivalents of its previous jet grout supervisors. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Likewise, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

However, the petitioner presented several persuasive expert opinions regarding the speciality occupation issue.

The CEO of Huxted Tunneling stated:

The functions associated with the Jet Grout Supervisor position are extremely complex and specialized. Although I am not aware of any particular formal education program that directly (and effectively) prepares someone to perform these functions, I do know that the

work is of such a complex nature that the years it would take to learn and be fully qualified in the required job duties would be extensive – involving many more years than any formal degree in civil engineering. In other words, in my opinion, the work involved is clearly of a nature that requires at least a bachelor’s degree in civil engineering (or a closely related field) plus many years of actual construction experience or the equivalent to a degree in years of experience.

The Director of Underground Services for Shannon & Wilson stated:

In specifying and reviewing the qualifications of Jet Grout Supervisor, we generally require at least 10 years of continuous experience in the field and a thorough knowledge of the equipment and methodology required. This level of experience and knowledge might be equated to a bachelor’s degree in civil, mechanical, or material engineering along with relevant project experience. A person without this level of expertise and knowledge would not be able to perform the duties of planning, organizing, and successfully implementing a jet grouting operation.

The Principal of Lyman Henn, Inc. stated:

[I] am of the opinion that these duties and responsibilities [of the proffered position] are of such a nature that within this industry, a bachelor’s degree in the fields of geological science or engineering plus 10 years of relevant experience, or its functional equivalent in education, training, and experience in the industry, is a necessary prerequisite for the hiring of an individual to fill this position.

A great variety of soil conditions may be encountered on a project which can require different soil stabilization methods and process[es] that must be applied to meet the existing conditions. The nature of the work described for the position of Jet Grout Supervisor is of an exceptionally complex nature and typically requires the application of a considerable degree of highly specialized experience and knowledge in the field of soil stabilization, to include general geology and groundwater, the equipment, machinery, and substances used in performing these tasks.

Noting that a Jet Grout Supervisor “holds the responsibility of ensuring the soil treatment used is suitable to support a structure to provide the necessary foundation strength” and “will evaluate the soil conditions, devise a suitable ground treatment plan and ensure that the project is completed to specifications, supervising the work, personnel, equipment and costs associated with the same,” the president of Microtunneling, Inc. stated:

A person without 10 to 15 years experience with or with out [sic] a degree would be suspect in my opinion of possessing all the skills required of this highly skilled and technical profession.

The occupation in the Department of Labor's *Occupational Outlook Handbook (Handbook)* with which the proffered position most closely comports is an engineering technologist or applied engineer position with duties complex enough to require a related bachelor's degree in engineering technology.¹ The duties of the proffered position exceed those of an engineering technician position, for which the *Handbook* indicates that a 2-year engineering technology degree would be sufficient. The totality of the evidence, particularly the above related duty aspects and expert opinions, establishes that the specific duties are sufficiently specialized and complex as to require a level of construction engineering knowledge that is usually associated with the attainment of at least a baccalaureate degree in construction engineering technology. Therefore, the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO also finds that the petitioner has established that the beneficiary is qualified to serve in the specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

The AAO discounted the J.B. Ringer educational equivalency evaluation. It was based solely upon the beneficiary's experience. There is no evidence that the evaluator, or the Texas A&M professor upon whose assessment of work experience the evaluator relied, is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1); and, in compliance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), CIS recognizes only credential evaluation services' evaluations of education.

However, the petitioner also submitted documents from independent sources who are familiar with the beneficiary's particular work, including letters from: the area manager of SoilMec, who reviewed the beneficiary's work for that firm from October 1984 to August 2003; a construction inspector for the Wastewater Treatment Division of the Department of Natural Resources and Parks of Renton, Washington, who discussed the beneficiary's design and implementation of jet grout ground conditioning while working with inspection staff, engineers, and consultants; a letter from the Vice-President of Geo-Engineering for URS Corporation, who acknowledged the quality of the beneficiary's work with "licensed engineers and inspectors with engineering degrees."

In addition, experts in the field indicated the expertise required for the achievement of the jet grout supervisory positions that the beneficiary has achieved. The letter from the Director of Underground Services for Shannon & Wilson, Inc., stated in pertinent part:

In my experience there are only a few firms with the requisite experience and capabilities, and there are only a few acceptable Jet Grout Supervisors with the necessary 10 to 20 years of field experience and educational background to be able to perform this work professionally.

¹ The current, 2004-2005 *Handbook* notes (at page 145):

Many 4-year colleges offer bachelor's degrees in engineering technology, but graduates of these programs are often hired as technologists or applied engineers, not technicians.

The president of Microtunneling, Inc. noted that “U[.]S[.] Jet Grout engineers/supervisors [are] in short supply and difficult to find with the level of experience required for the more difficult civil projects.” The CEO of Huxted Tunneling stated, in part:

[The beneficiary] has worked on some of the largest, most complex projects in the world. . . . In order to be selected to work on such high profile projects like the Three Gorges Dam in China [the beneficiary] would have to be one of the best in the field, [as] selection for such projects is truly an exceptional and remarkable achievement.

Upon consideration of the entire record, the AAO has determined that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), by clearly demonstrating that (1) the beneficiary has sufficient work experience which included the theoretical and practical application of specialized knowledge required by the specialty occupation; (2) his work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and (3) he has attained industry recognition for his expertise as a jet grout supervisor. Thus, the beneficiary is qualified to perform the specialty occupation.

The request for oral argument is moot and shall not be granted.

The AAO notes that the record indicates that the beneficiary has previously worked for the petitioner in the United States, apparently as a jet grout supervisor. The record does not indicate whether the beneficiary was in a B-1 construction-supervisor status or some other status during those periods of employment, but the beneficiary’s prior status is not a matter within the purview of the AAO.

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 sustained that burden. Accordingly, the appeal will be sustained, and the petition will be approved.

ORDER: The appeal is sustained. The petition is approved.