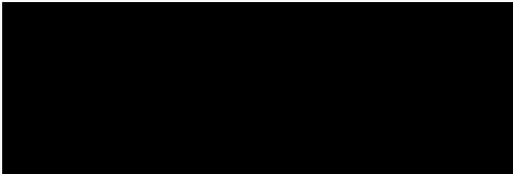




U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



FILE: WAC 03 131 54603 Office: CALIFORNIA SERVICE CENTER Date: MAR 31 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 a fabricator and erector of structural steel that seeks to employ the beneficiary as a project manager/estimator. The petitioner, therefore, 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. Counsel submits the petitioner's reasons for appeal on the Form I-290B, along with a brief and additional evidence.

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.

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.

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 proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and attachments. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a project manager/estimator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail analyzing the subcontract scope to ensure that the general conditions of the contract, specification and design drawings are fully complied with and the subcontract amount commensurate with the bid amounts; for submission and review by the general contractor; negotiating rates on materials, labors, equipment, subcontracts, and overhead and profits, and resolving subcontracts scope, which were excluded in the original bids, prior to subcontract signing; providing specification and drawings to detailer and supervising the completion of shop drawings to ensure the shop drawings comply with specification and design drawings; preparing, coordinating and obtaining responses to RFI from Architect/Engineer through the General Contractor; submitting shop drawings per Architect/Engineer comments and resubmit as necessary shop drawings; issuing shop drawings to General Manager for fabrication; preparing list of all materials and subcontracts from the specification and shop drawings required in the projects; preparing shop requisitions and submitting to General Manager for approval: planning work sequencing; preparing material list by piece mark and dividing buildings by sequence (each schedule equal to 40,000 pounds/truck load) for piling, shipping, carnage and erection sequence; coordinating and monitoring the steel fabrication with the general manager; ensuring that the procured materials are delivered on time to the shop; coordinating and resolving queries from shop fabricators on conflicting details from the detailer; ensuring that fabricated materials are delivered to jobsite on schedule; coordinating shipping/delivery with field superintendent and notifying the General Contractor regarding the material deliveries to jobsite; preparing copies of shop and erection drawings for field superintendent's use in erection; coordinating and resolving any conflicting erection details with the detailer and General Contractor; coordinating and preparing RFI to correct any problems occurring during erection and obtain approval for the suggested solutions for Architect/Engineer through General Contractor; coordinating with detailer and notify general contractor of any changes in the original subcontract scope and notify general contractor for the additional compensation; prepare quantity take-off, pricing of material, shop fabrication, field erection, equipment and overhead and profit; submitting to general contractor for review and approval; and incorporating approved change orders to subcontract sum; generally preparing correspondence to general contractor; coordinating, resolving and agreeing upon with general contractor on any matters related to the subcontracts including but not limited to welding procedure submission, material, product and sampling submittals, disputes, shop inspections and testing, change order requests, back charges, material shortages, field inspections and testing, and any matters required by General Contractor related to subcontract agreements; negotiating and agreeing on final subcontract amount with general contractor, including pending issues related to change orders, back charges, scope of work, etc; negotiating rates on materials, labors, equipment, subcontracts, and overhead and profits, and resolve subcontract scope, which were excluded in the original bids; prior to subcontract signing.

The petitioner stated that the minimum requirement and qualification for this type of work is a BS in engineering.

The director determined that the proffered position was not a specialty occupation. The director noted that the petitioner indicated on the Form I-129 and the labor condition application the proffered position was for a civil engineer. The director requested evidence that the beneficiary held the required state license or registration from California. Additionally, the director requested a detailed job description and an explanation

of why the work done requires the services of a person who has a college degree or its equivalent in the occupational field. The director requested additional information about the petitioner.

In response, the petitioner stated that the position offered was for a project manager/estimator and provided a detailed position description. The AAO notes that in the initial letter from the petitioner, the position is listed in one section as a civil engineer and in the second section as a project manager/estimator. In its response, the petitioner specifically noted that the beneficiary would not perform and not be involved in any of the company's work which requires the services of a professional engineer. The petitioner also provided the requested evidence regarding its business.

The director found that the duties of the proffered position described the duties of an engineering technician and construction manager, which are not considered specialty occupations. The director referred to the Department of Labor's *Occupational Outlook Handbook (Handbook)* and stated the information provided within indicates that although a baccalaureate level of training is increasingly preferred, it is not the normal, industry-wide minimum requirement for entry into the occupation. The director found that the submitted information did not indicate that the petitioner normally requires applicants for the position to possess baccalaureate or higher-level degrees in the field. The director determined that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field. Therefore the director concluded that the proffered position is not a specialty occupation. Finally, the director noted that the petitioner indicated on the Form ETA-9035 that the beneficiary's job title was "Civil Engineer." The director noted that since the petitioner amended the job title to a "Project Manager/Estimator" the labor condition application could not be considered to be in compliance.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. The AAO notes that counsel has submitted some documentation for a different petition in which the beneficiary was the same. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

On appeal, counsel contends that because the *Handbook* indicates that a baccalaureate degree is increasingly preferred for entry into the position that the degree requirement "has now evolved as a matter of business

necessity that more and more employers prefer to hire those with a baccalaureate degrees in construction science, construction management or civil engineering.” Counsel contends that that the attached internet job postings indicate that employers in the market for engineering technicians require a 4-year degree. In conclusion, counsel asserts that to be considered a specialty occupation, “it is enough to demonstrate that the position requires a baccalaureate degree.” Counsel concludes “the petitioner-appellant’s requirement that the candidate must have a baccalaureate degree is enough to elevate the position to the level of a specialty occupation and justifies the classification sought.”

Counsel notes that the petitioner could have obtained another LCA for the amended job title had the petitioner appellant been afforded reasonable opportunity.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; 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*, 812 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

In the denial, the director stated that the duties of the proffered position are similar to that of an engineering technician and construction manager. The director concluded that, at best, industry organizations and the petitioner prefer rather than require a bachelor’s degree in a related specialty for the position of engineering technician or a construction manager. For this reason, the director was not persuaded by the petitioner’s claim that the proffered position is a specialty occupation.

A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by engineering technicians and construction managers. As discussed in the *Handbook*, engineering technicians use the principles and theories of science, engineering, and mathematics to solve technical problems in research and development, manufacturing, sales, construction, inspection, and maintenance Many engineering technicians assist engineers and scientists, especially in research and development. Civil engineering technicians help civil engineers plan and build highways, buildings, bridges, dams, wastewater treatment systems, and other structures, and perform related surveys and studies. The *Handbook* mentions that some engineering technicians estimate construction costs and specify materials to be used, and some may prepare drawings or perform land surveying duties.

The *Handbook* reports:

Although it may be possible to qualify for a few engineering technician jobs without formal training, most employers prefer to hire someone with at least a 2-year associate degree in engineering technology.

The *Handbook* states that construction managers plan and coordinate construction projects. They may have job titles as such as constructor, construction superintendent, general superintendent, project engineer, project manager, general construction manager, or executive construction manager. They may plan and direct a whole project or part of a project. They are responsible for coordinating and managing people, materials, and equipment; budgets, schedules and contracts; and safety of employees and the general public.

The *Handbook* reports:

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, scheduling, and estimating also is important.

Traditionally, persons advance to construction management positions after having substantial experience as construction craft workers-carpenters, masons, plumbers, or electricians, for example-or after 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 construction 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.

The petitioner fails to establish the first criterion because the *Handbook* states employers of engineering technicians and construction managers prefer, but do not require, applicants with bachelor's degrees with a construction or engineering emphasis. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel submits internet job postings from a variety of companies for an engineer technician which include an architecture building company, a window manufacturer, and defense aerospace.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Some postings state that the positions require a bachelor's degree and

other postings indicate that an associate's degree is sufficient. Another deficiency in the postings is that the companies are either obviously dissimilar to the petitioner or their nature is undisclosed. For example, Raytheon Incorporated, a publicly traded company, provides aerospace and defense systems and products; and Anderson Corporation makes windows. Moreover, most of the advertised job descriptions are patently dissimilar to the proffered position. For instance, Symbol Technologies' posting for an engineering technician requires a full working knowledge of DMM, oscilloscopes and function generators; and Bennett & Smilas Engineering, Inc. requires experience in AutoCAD/Softdesk. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. On appeal counsel contends:

As earlier pointed out the requirement of a baccalaureate degree suffices to consider the occupation a specialty occupation. It is not required to demonstrate further that the duties to be performed are so complex that they could not be performed by one without a baccalaureate degree.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). To the extent they are described in the record, the duties do not appear so specialized or complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the proffered position is performed by an engineering technician or construction manager, occupations that do not require a bachelor's degree in a specific specialty.

The director found also that the LCA failed to conform to the occupation. The petitioner indicated that it should have been given an opportunity to amend the LCA. The regulation at 8 C.F.R. § 214.2 (h)(4)(i)(B)(1) requires that:

Before filing a petition from H-1B classification is a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus the director was correct to deny the petition without giving the petitioner the opportunity to amend the LCA. For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that the proffered position is 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.

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