

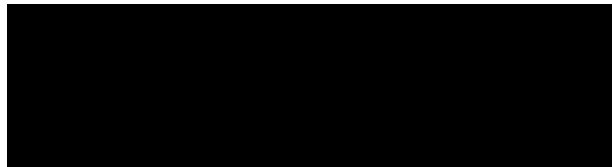
U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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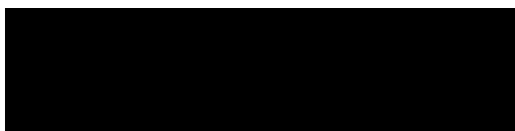
D *MAY 17 2005*

FILE: WAC 02 257 51267 Office: CALIFORNIA SERVICE CENTER Date:

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.

A handwritten signature in black ink that appears to read "Robert P. Wiemann".

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 firm seeking to employ the beneficiary as a Project Superintendent/Project Supervisor. 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 on the basis that the proposed position was not a specialty occupation. On appeal, counsel submits a brief.

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

The petitioner is seeking the beneficiary's services as a Project Superintendent/Project Supervisor. Evidence of the beneficiary's duties includes: the petitioner's letter of support; the RFE response; the Form I-290B; and the appellate brief accompanying the Form I-290B. The petitioner's letter of support set forth the following description of the duties of the proposed position:

Direct [the] activities of workers concerned with the plans and specs [sic] and the wiring of residential, industrial[,] and commercial buildings[,] and other wiring projects. Study project specification[s], plans, [and the] procedure for wiring to establish a project work schedule indicating the staff requirements for each phase of installation, [as well as the] tools and equipment needed to complete the project. Assemble and organize crewmembers and staff at the start of the project. Order [the] procurement of tools and materials to be delivered at [a] specified time [in order to] conform to the work schedule. Confer with and directs [sic] supervisory personnel and sub-contractors [who are] engaged in planning and executing work procedures, interpreting specifications and coordinating various phases of installation to prevent delays. Confer with supervisory personnel and labor representatives to resolve complaints and grievances with the work force. Confer with supervisory and engineering personnel, inspectors[,] and suppliers of tools and materials in order to perform the duties of the job offered...

The letter of support also stated that a bachelor's degree in electrical engineering or a related field, as well as two years of additional experience, were required.

The director issued an RFE, requesting further evidence to support the contention that the proposed position is in fact a specialty occupation. In the RFE response, counsel repeated these job duties and added the following:

Inspects work in progress to ensure that work conforms to specification and that installation schedules are adhered to [sic]. Prepares reports on material used and [its] cost. Adjust work schedule as needed. Beneficiary will also provide mentoring and training for staff regarding engineering design principles.

The director denied the petition on the basis that the petitioner had failed to establish that the proposed position qualified for classification as a specialty occupation. The director concluded that the duties of the position as described in the petition resemble those of an electrician.

On appeal, counsel contends that the position of Project Superintendent/Project Supervisor is in fact a specialty occupation. Counsel contends that the director erred in finding that the duties as set forth in the petition mirror those of an electrician, when in fact they actually mirror those of a construction manager.

In determining whether a position qualifies as a specialty occupation, Citizenship and Immigration Services ("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. The AAO routinely consults the *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO agrees with counsel that the duties of the proposed position are more closely aligned to those of a construction manager than to those of an electrician. As discussed in the 2004-2005 edition of the *Handbook*:

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. Construction managers may be owners or salaried employees of a construction management or contracting firm, or may work under contract or as a salaried employee of the owner, developer, contractor, or management firm overseeing the construction project. They may plan and direct a whole project or just a part of a project . . .

Although they usually play no direct role in the actual construction of a structure, they typically schedule and coordinate all design and construction processes, including the selection, hiring, and oversight of specialty trade contractors . . .

They are responsible for coordinating and managing people, materials, and equipment; budgets, schedules, and contracts; and safety of employees and the general public . . .

. . .

Large construction projects, such as an office building or industrial complex, are too complicated for one person to manage. These projects are divided into many segments: Site preparation, including land clearing and earth moving; sewage systems; landscaping and road construction; building construction, including excavation and laying of foundations, as well as erection of structural framework, floors, walls, and roofs; and building systems, including fire-protection, electrical, plumbing, air-conditioning, and heating. Construction managers may be in charge of one or more of these activities. Construction managers often work with engineers, architects, and others who are involved in the construction process.

Construction managers direct and monitor the progress of construction activities, sometimes through construction supervisors or other construction managers. They oversee the delivery and use of materials, tools, and equipment; and the quality of construction, worker productivity, and safety. They are responsible for obtaining all necessary permits and licenses and, depending upon the contractual arrangements, direct or monitor compliance with building and safety codes and other regulations. They may have several subordinates, such as assistant managers or superintendents, field engineers, or crew supervisors, reporting to them.

Having concurred with counsel that the duties of the proposed position are similar to those of a construction manager, the AAO turns to the question of whether the position qualifies as a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

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 AAO turns to the *Handbook's* discussion of the position's training requirements in order to determine whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* sets forth the following educational requirements for those seeking employment as a construction manager:

Traditionally, persons advance to construction management positions after having substantial experience as construction craftworkers—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.

Although counsel cites this paragraph to support the contention that a baccalaureate or higher degree is normally the minimum requirement for entry into the occupation, the *Handbook* specifically states that employers, particularly large construction firms, "increasingly prefer" a bachelor's degree. As a preliminary matter, it must be noted that the *Handbook's* statement regarding an increasing preference for bachelor's degrees pertains to large construction firms, and the petitioner is not a large construction firm. However, even if the petitioner were a large construction firm, the position would still not qualify as a specialty occupation under this criterion. The statement that many large construction firms "increasingly prefer" a bachelor's degree is not synonymous with the "normally required" standard imposed by 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). As such, the proposed position does not qualify as a specialty occupation under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires that the degree requirement is common to the industry in parallel positions among similar organizations, or that the position is so complex or unique that it can only be performed by a person with a degree.

In determining whether the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the AAO determines whether the requirement of a bachelor's degree is actually the industry standard. Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification. Nor have the industry's professional associations made a degree a minimum requirement for entry.¹

In order to determine whether the degree requirement is common to the industry in parallel positions among similar organizations, the AAO reviewed the six job vacancy announcements the petitioner submitted with the RFE response, and found none persuasive. None of the announcements indicate the size of the particular employer. While all six announcements do indicate that a bachelor's degree is required, only two specify the specific type of bachelor's degree that is required.

Moreover, many of the announcements do not appear to be from electrical contracting firms, nor do all the positions appear parallel to the position proposed in the petition. For example, CenterPoint Development "...is a developer of land, retail, industrial, and office properties with a geographic focus in Central Ohio." The duties of the position appear to be much broader than the duties of the proposed position. For example, it appears that a successful applicant for the position would be required to oversee all aspects of a construction site, and not a single component of it (the electrical aspects), as in the instant petition.

The announcement from Adecco Technical states that the primary responsibility of a successful applicant would be to manage the "plant" and supervise environmental technicians. The type of "plant" is not specified, but it appears that it would be a waste management plant. Regardless, neither the company nor the position parallels the position proposed in the petition. The second announcement from Adecco Technical appears identical to its other announcement. The same Yahoo! HotJobs "Job ID," [REDACTED] is listed in both announcements. The only difference appears to be that several certifications are required in the second announcement.

The announcement from Headway Corporate Staffing offers no information about the employer other than to state that it is a large manufacturing company. Therefore, this employer and an electrical contracting firm are not "similar organizations."

¹ See Construction Management Association of America, <http://www.cmaanet.org>; select Career Headquarters; select CM as a Career (accessed April 22, 2005). "Some people become professional CMs [sic] after years of experience in one of the building trades. However, the job today increasingly requires specific academic preparation as well as construction knowledge." "Increasingly requires" is not synonymous with a "minimum entry requirement" standard.

The announcement from Suite 16 Electrical Engineering is not persuasive, either, as the position offered is that of an Electrical Project Engineer. The duties of the proposed position as set forth in the petition do not mirror those of an actual electrical engineer.

The announcement from EMG does not reflect that the company is similar to an electrical contracting firm, as it makes no mention of electricity.

Although counsel contends that the requirement of a bachelor's degree for entry into the industry has evolved as a matter of "business necessity," the evidence submitted by the petitioner regarding the employment practices of other businesses is insufficient to establish its degree requirement as an industry norm. Counsel's assertions with regard to the hiring practices in the industry of the petitioner cannot establish the petitioner's degree requirement as an industry norm. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, these announcements do not satisfy the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish the proposed position as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding.

Accordingly, the petitioner cannot establish its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, there is no evidence in the record to suggest, nor does the petitioner contend, that the proposed position qualifies for classification as a specialty occupation under this criterion. As such, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a 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. A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than what would be normally expected of Project Superintendents/Project Supervisors in similar organizations. Therefore, the AAO finds that the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO will 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.