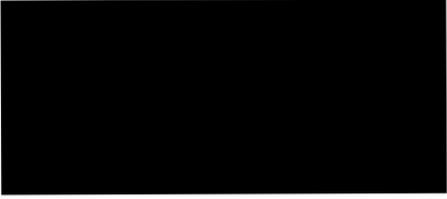


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FILE: SRC 05 152 50916 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



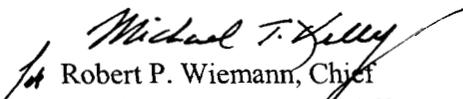
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Chief  
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 provides consulting services to the satellite and undersea fiber optic telecommunications industry. It seeks to employ the beneficiary as a part-time landscape contractor. 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 based on his determination that the record failed to establish the proffered position as a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

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.

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) consistently interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary’s services as a part-time landscape contractor. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 29, 2005 cover letter in support of the petition; and counsel’s June 24, 2005 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

- Studies **landscape designs** or drawings, and bills of materials to ascertain scope of landscaping work required, such as installation of lighting or sprinkler systems, erection of fences, concrete work, and types of trees, shrubs, or ornamental plants specified;
- Inspects grounds or area to determine equipment requirements for grading, tilling, or replacing top soil, and labor requirements to install sprinkler or lighting system, build fences, or perform concreting and planting work;
- Calculates labor, equipment, material, and overhead costs to determine minimum estimate or bid which will provide for margin or profit;

- Plans landscaping functions and sequences of work at various sites to obtain optimum utilization of work force and equipment;
- Directs and coordinates, through subordinate supervisory personnel, activities of workers engaged in performing landscaping functions;
- Purchases and ensures that materials are on-site as needed; [and]
- Inspects work at sites for compliance with terms and specifications of contract.

In her denial, the director found that the proposed landscape contractor position does not require a bachelor's degree. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the director denied the petition based on incorrect assumptions that the proffered position is that of an unskilled manual laborer. Counsel states further that the proffered landscape contractor position is needed to ensure the petitioner's compliance with environmental laws and, as such, is so specialized in nature as to require the equivalent of a bachelor's degree in landscape contracting. Counsel also states that the record contains industry letters, one of which is written by a coastal biologist, and a job advertisement for a commercial landscape contractor.

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 turns first to 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*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. No evidence in the *Handbook*, 2006-07 edition, under the category of Grounds Maintenance Workers, indicates that a baccalaureate or higher degree, or its equivalent, is required for a landscape contractor job. The Professional Grounds Management Society (PGMS) offers certification to grounds managers who have a combination of 8 years of experience and formal education beyond high school and who pass an examination covering subjects such as

equipment management, personnel management, environmental issues, turf care, ornamentals, and circulatory systems. The PGMS also offers certification to groundskeepers who have a high school diploma or equivalent, plus 2 years of experience in the grounds maintenance field. *See the Handbook*, 2006-07 ed. at 381. Further, although information on the petition reflects that the petitioner has three employees, the record contains no evidence in support of this claim such as quarterly wage reports. It is noted that the petitioner's 2003 federal income tax return reflects no compensation of officers or salaries and wages paid. 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)). Also noted is counsel's assertion on appeal that, in addition to the petitioner's current three employees, the petitioner is in the process of hiring several consultants. Again, the record contains no evidence in support of counsel's assertion. 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).

Regarding parallel positions in the petitioner's industry, the record contains letters from three businesses similar to the petitioner's. All of the writers assert that positions such as the proffered position require a bachelor's degree or comparable experience. The writers, however, do not provide any evidence in support of their assertion or rely on industry surveys, data or other documentation to reach the conclusion that the position requires a bachelor's degree. 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)). The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that there is no specific degree requirement for entry into the field. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Further, although one of the writers indicates that he holds a master's degree in "plant biology, physiology," the record contains no evidence that he is qualified as an expert on recruiting and hiring practices in landscape contracting. Additionally, the fact that the majority of the text of all three letters is identical makes questionable the level of consideration that the authors applied.

The record also contains an Internet job posting for a chief financial officer for a commercial landscape contractor. There is no evidence, however, to show that the advertised position for a chief financial officer is parallel to the proffered position of landscape contractor. Thus, the advertisement is not probative.

The record also does not include any evidence from individuals, firms, or professional associations regarding an industry standard. The record does not demonstrate that the proffered position is more complex than or unique from the range of grounds maintenance worker positions for which the *Handbook* indicates no requirement for at least a bachelor's degree in a specific specialty. The duties that comprise the proffered

position do not indicate the necessity for a body of highly specialized knowledge attained by at least a baccalaureate degree level of coursework in a specific specialty.

The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel indicates that the proffered position is a new position. Upon review of the record in its entirety, the evidence does not establish this criterion.

Further, the AAO notes that, regardless of any degree requirement imposed by the petitioner, the evidence of record does not substantiate a need for at least a bachelor's degree in a specific specialty. CIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

On appeal, counsel reiterates the proposed duties as described in the petitioner's March 29, 2005 cover letter, asserting that they are so complex as to qualify the position as a specialty occupation. The information in the record about the proposed duties, however, does not establish that they exceed in scope, specialization, or complexity those usually performed by "grounds maintenance workers," an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. In its *Handbook* at page 381, the DOL states as follows regarding grounds maintenance workers without a degree: "Laborers who demonstrate a willingness to work hard and quickly, have good communication skills, and take an interest in the business may advance to crew leader or other supervisory positions." Also, in regard to the proposed duties that relate specifically to environmental laws, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. As indicated earlier in this decision, a review of the DOL's *Handbook* finds that the PGMS offers certification to grounds managers who have a combination of 8 years of experience and formal education beyond high school and who pass an examination covering subjects such as equipment management, personnel management, *environmental issues*, turf care, ornamentals, and circulatory systems. (Emphasis added.)

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the U.S. equivalent of a bachelor's degree in landscape contracting. The evaluation, however, is based upon the beneficiary's education and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluator's conclusions about the equivalency of work experience carry no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In view of the foregoing, the petitioner has not demonstrated that the beneficiary is qualified to perform a specialty occupation. For this additional reason, the petition may not be approved. 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.