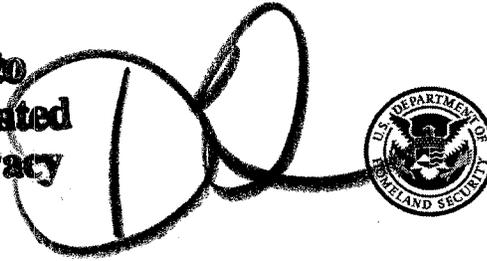


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**U.S. Citizenship  
and Immigration  
Services**



FILE: EAC 02 109 53390 Office: VERMONT SERVICE CENTER Date: **MAR 11 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

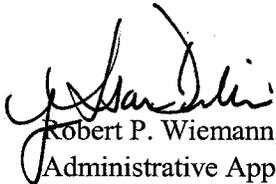
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

  
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 a construction company specializing in post-and-beam construction and restoration of historic barns. 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), so that it may employ him as a budget analyst.

The director denied the petition because the petitioner had failed to establish that the proffered position is a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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.

It is important to note that 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.

In reaching its determination on the appeal, the AAO considered the entire record of proceeding, which contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, annotated with reasons for the appeal, and the documents accompanying it.

The director found that the proffered position did not meet any of the qualifying criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel asserts that, on the contrary, the evidence of record qualifies the proffered position as a specialty occupation under each of those criteria. Upon review of the record, the AAO has determined that director's decision to deny the petition was correct, as the proffered position is not a specialty occupation.

The evidentiary value of some of the submissions merits special mention because of the petitioner's reliance upon them. These are: the Internet reply from an on-line consulting service; the job vacancy advertisements from other firms, which the petitioner presents to establish an industry-wide degree requirement; and the opinion of Professor [REDACTED] of the Marriott School of Management, Brigham Young University.

After receiving the RFE, counsel had queried, apparently on the Internet, whether an expert would "validate my claim that a small, rapidly growing construction company (Gross Income: approximately \$1,000,000) would be wise to hire a full time financial analyst for budget forecasting and contract costing, along with general accounting/bookkeeping duties?" In an approximately four-line E-mail reply to counsel's question, an online business consulting service opined that the situation called for a controller. The AAO discounted this evidence for several reasons. Counsel did not provide sufficient specific details about the petitioner and its business to evoke a response based upon a detailed understanding of the petitioner's specific situation. Also, the online company provided inadequate information about the analysis upon which it based its opinion. Furthermore, because there is no significant information about the company that replied, it is impossible to assign any weight to its opinion.

The job vacancy announcements have no evidentiary significance, either. This is because the advertised positions are too remotely related to the one proffered here to have any bearing on its educational requirements.

The management professor's letter did not provide a definitive opinion on the educational or educational equivalency requirements of the proffered position. Rather, it concluded in the non-specific recommendation "that the company retain a financial analyst with the skill set outlined in the job description, for it is a business necessity." Furthermore, the documents from the petitioner upon which the professor based his opinion presented limited information about the petitioner and its industry.

The duties of the proffered position were a critical factor in the AAO's determination. According to counsel's reply to the RFE, the beneficiary's 40-hour workweek would generally incorporate these blocks of duties: (1) cost accounting (budgeting and costing of contracts, materials, and labor) (*8 hours*); (2) auditing (preparation of annual audit and audit of workmen's compensation and disability) (*4 hours*); (3) taxation (payroll and corporate taxes) (*2 hours*); (4) new contracts' feasibility (analysis and preparation of feasibility reports regarding new contracts; bidding strategies for cost-effective new contracts) (*10 hours*); (5) marketing (establishment of target markets; assistance in the development of literature and advertising; and estimation of new contracts based on historical data) (*8 hours*); and financial accounting (preparation of ledgers; billing; bank reconciliation; cashbook recording; and monthly preparation of a trial balance and financial statements) (*8 hours*). Counsel's letter contended, "All proposed duties with the exception of the general accounting [apparently the "financial accounting" category] require the expertise of someone who holds a bachelor's degree."

In analyzing the evidence, the AAO first applied the specialty occupation criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) for qualifying a particular position if it is one for which a baccalaureate or higher degree or equivalent is normally a minimum requirement for entry. The evidence of record does not convey that the position is actually a budget analyst position or any other position that normally requires a bachelor's degree or higher or equivalent in any specific specialty. Rather, as depicted in the record, it is a composite of broadly described accounting, construction cost estimating, and marketing duties for which the evidence does not establish a need for a bachelor's or higher degree or the equivalent. Therefore, this first criterion was not satisfied.

Next, the AAO determined that the evidence of record did not qualify the proffered position as a specialty occupation under either of the two prongs of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

With regard to the first prong, the evidence of record did not establish that the proffered position has a degree requirement that is common to the industry in parallel positions among organizations similar to the petitioner.

Factors often considered by CIS when determining this criterion include: whether the Department of Labor's *Occupational Outlook Handbook (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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The evidence does not substantiate a budget analyst position: the record indicates a scope of budget analysis duties that is qualitatively less than that associated with the budget analyst occupation as described in the *Handbook*. The broad, generalized terms in which the duties are presented convey an amalgam of accounting, marketing, and construction cost estimator duties. However, the generalized nature of the duty descriptions does not convey that the accounting, marketing, and contract cost estimating areas of the position require a level of highly specialized knowledge attained by a bachelor's degree or higher in any associated specialty.

In terms of *Handbook* analysis, the evidence does not show that any of the various duties will be exercised at the level of an accountant, marketing research analyst, construction manager, or any other occupation which requires a degree in a specific specialty.

The record does not contain evidence from individuals or other firms to establish that there is an industry-wide educational requirement for the type of position proffered here.

As earlier indicated in this decision, the AAO discounted the job-vacancy announcements. These advertisements are clearly not for positions that are parallel to one proffered here, and they clearly are not among organizations similar to the petitioner. They include positions such as: staff accountant for an electric company; senior cost accountant for a manufacturing plant; senior accountant for an entertainment company; assistant controller for a college; and budget analyst for a museum. In any event, the advertisements are too few to establish an industry-wide hiring practice.

In summary, the evidence of record does not qualify the proffered position under the first prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), that is, as a position for which a bachelor's or higher degree is a common industry requirement.

The AAO also found that the evidence of record does not qualify the proffered position by the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2). The petitioner has not shown that the proffered position possesses a complexity or uniqueness that requires a degree in a specific specialty.

The AAO did consider the professor's opinion for its bearing on this criterion, as well as on the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4) for specialized and complex duties. However, the professor's opinion carried little weight. It did not elaborate or shed significant light on any complexity, uniqueness, or specialization that may reside in the duties.

After finding that the petitioner had not met the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) or (2), the AAO turned next 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. This criterion is not a factor. The record necessarily lacks any meaningful evidence about the petitioner's past hiring history, as this is the first time the position has been offered. The AAO notes that counsel correctly maintains that the fact that a petitioner has never before hired for a particular position is not a bar to a non-immigrant petition based on a *bona fide* need for such position.

Finally, the AAO turned to the criterion at 8 C.F.R. § 214.2(h)(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. To the extent that they are depicted in the record, the duties do not appear so specialized and complex. Rather, the duties are depicted in broad terms that do not convey any particular complexity or specialization. The record does not relate specific details about the actual tasks that would engage the beneficiary in the particular exercise of his general duties. Therefore, there is insufficient information about any complexity and specialization of the matters that would engage the beneficiary, and 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. 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.