

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

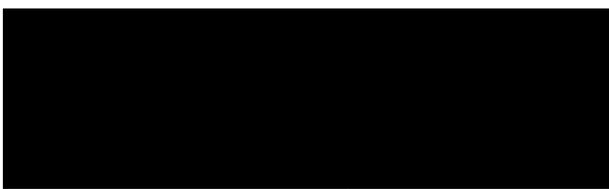
U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D,



FILE: SRC 05 190 51352 Office: TEXAS SERVICE CENTER Date: DEC 27 2006

IN RE: Petitioner:
Beneficiary:



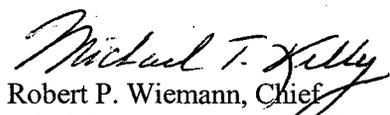
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 general contractor that seeks to employ the beneficiary as a project manager. 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 two grounds, namely (1) that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation and (2) that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. On appeal, counsel contends that the proposed position qualifies as a specialty occupation because the petitioner's degree requirement is common to its industry in parallel positions among similar organizations.

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 response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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) 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 proposed position.

In its May 25, 2005 letter of support, the petitioner stated that the duties of the proposed position would consist of developing and creating computer applications and specialized utility programs to assist in the architectural and construction sides of the petitioner's business; utilizing computer-aided design software to create architectural drafts to assist in the design and construction process; and creating three-dimensional computer models to assist clients in envisioning the final structures. In response to the director's RFE, the petitioner stated that the project manager would manage the company's projects. The field manager and assistant manager will report the progress of contract work to the project manager daily. The project manager will update files and report to the president on the progress of pending jobs, costs incurred, and other information. The petitioner gave the following percentages of time to be spent on each duty: design, develop, and maintain project database (10%); plan and schedule projects (40%); update project status (5%); report project status to president (15%); report project profit and loss statement to the president (10%); implement quality control (10%); and evaluate projects (10%). The petitioner stated that it needed someone with at least a bachelor's degree in computer science or a related field.

In determining whether a proposed 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. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO has reviewed the 2006 edition of the *Handbook* and finds that the duties of the proposed position fall within those both noted for construction managers and systems analysts. As discussed in the *Handbook*:

Construction managers plan, direct, and coordinate a wide variety of construction projects, including the building of all types of residential, commercial, and industrial structures, roads, bridges, wastewater treatment plants, and schools and hospitals. Construction managers may oversee an entire project or just part of a project. . . .

Construction managers are salaried or self-employed managers who oversee construction supervisors and workers. They often go by the job titles program manager, constructor, construction superintendent, project engineer, project manager, construction supervisor, general contractor, or similar designations. 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 property owner, developer, contractor, or management firm overseeing the construction project.

Construction managers coordinate and supervise the construction process from the conceptual development stage through the final construction, making sure that the project gets done on time and within budget. They often work with owners, engineers, architects, and others who are involved in the construction process. Given the designs for buildings, roads, bridges, or other projects, construction managers oversee the planning, scheduling, and implementation of the project to execute those designs.

The *Handbook* states the following with regard to the duties of systems analysts:

Computer systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power. Most systems analysts work with specific types of systems—for example, business, accounting, or financial systems, or scientific and engineering systems—that vary with the kind of organization. Some systems analysts also are known as *systems developers* or *systems architects*.

Having determined that the duties of the proposed position are similar to those of construction managers and systems analysts, the AAO next turns to the *Handbook's* discussion of the positions' 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:

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. . . .

For construction manager jobs, employers increasingly prefer to hire individuals with a bachelor's degree in construction science, construction management, or civil engineering, as well as industry work experience. Practical industry experience is very important, whether it is acquired through an internship, a cooperative education program, or work experience in a trade or another job in the industry.

Traditionally, persons advanced 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, as construction processes become increasingly complex, employers are placing a growing importance on postsecondary education.

The *Handbook* specifically states that employers “increasingly prefer” a bachelor’s degree, and that they are placing “a growing importance on” postsecondary education. The statement that employers “increasingly prefer” a bachelor’s degree is not synonymous with the “normally required” standard imposed by the first criterion. Nor does the statement that employers are placing a growing importance on postsecondary education satisfy the first criterion, either, as postsecondary education does not necessarily equate to a bachelor’s degree; the *Handbook* notes that a number of two-year colleges offer construction management programs.

The *Handbook* notes that there is no universally accepted way to prepare for a position as a systems analyst, but that most employers place a premium on some formal college education. While a bachelor’s degree is a prerequisite for many positions, others may require only a two-year degree. For more technically complex positions, persons with graduate degrees are preferred. Many employers seek applicants who have a bachelor’s degree in computer science, information science or management information systems (MIS). MIS programs are usually part of a business school or college and differ considerably from computer science programs, emphasizing business and management-oriented course work and business computing courses. Employers are increasingly seeking individuals with a master’s degree in business administration with a concentration in information systems as more firms move their business to the Internet. The educational requirements for these positions vary greatly, depending on the needs of a particular position. A bachelor’s degree in a specific specialty, however, is not a minimum requirement for entry into the occupation.

As such, the proposed position does not qualify for classification 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 either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

In determining whether the proposed position qualifies as a specialty occupation under the first prong of 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The *Handbook* does not report that the construction industry normally requires a bachelor’s degree as a minimum qualification. Nor is there evidence that the construction industry’s professional associations have made a degree a minimum requirement for entry.¹ Nor has any evidence been submitted to establish

¹ See Construction Management Association of America, <http://www.cmaanet.org>; select Career Headquarters; select CM as a Career (accessed November 29, 2006). “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.” The site notes that two-year, bachelor’s, and master’s-level academic preparation is offered by colleges and universities. It does not

that the construction industry normally requires its systems analysts to possess a bachelor's degree as a minimum qualification

The AAO has reviewed the seven job postings submitted by counsel (three in her response to the director's request for evidence and four on appeal). Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. For job postings to be of any probative value, the petitioner must demonstrate that the advertised position is "parallel" to the proposed position, and that the entity placing the advertisement is "similar" to the petitioner.

As noted previously, the petitioner is a general contractor with five employees. There is no information in the record to demonstrate that the companies advertising are similar in size, scale, or scope of operations to the petitioner. Simply 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

Counsel submitted three job postings in her September 28, 2005 response to the director's request for evidence. According to its posting, the unnamed company advertising its vacancy through Management Recruiters International is in the "biotechnology and pharmaceutical" industry. The Blackstone Technology Group is a financial services firm. Jones Lang LaSalle is a real estate services and money management firm. Thus, none of the three job postings were from general contractors.

In his denial, the director stated the following:

The business focus, size[,] and scope of the other companies are not similar in nature to those of the petitioner. The petitioner employs five people and provides services in commercial building construction, building inspections, interior design, and residential design and reconstruction. The job advertisements submitted for comparison were for large companies requiring project managers in the fields of biotechnology and pharmaceuticals; financial services; and real estate services and money management.

On appeal, counsel states the following:

It appears unnecessarily discriminatory to conclude that [the petitioner] is somehow not eligible to hire Project Managers with the same degree requirements as those required by larger companies. Like other businesses, [the petitioner] has a right to seek applicants sufficiently qualified to ensure competitiveness amongst larger firms.

However, counsel has misunderstood the basis of the director's denial of the petition on this ground. The director did not deny the petition on the basis of his determination that the petitioner may not have the same hiring qualifications as larger companies. Rather, the director determined that the petitioner had not met its burden of proof under the first prong of the second criterion in establishing that it is "similar" to the three companies that placed the advertisements submitted in response to the director's request for evidence. The AAO concurs with the director's findings in this regard.

indicate that a four-year degree is the normal minimum requirement in the industry.

On appeal, counsel submits four additional job postings. Two are from an unnamed company advertising its vacancy through MRINetwork. The other two are from NVR, Inc. and Artimus Construction, Inc. Again, counsel has submitted no evidence to demonstrate that these companies are similar in size, scale, or scope of operations to the petitioner. No information was submitted regarding the business operations of the unnamed company except the statement that it is innovative, progressive, and has more than 30 years of experience in construction. Thus, the AAO cannot make a determination as to whether it is truly similar to the petitioner.

NVR, Inc. (NVR) is a construction firm. However, it does not appear from its advertisement that it is similar to the petitioner. According to its posting, NVR has a gross annual revenue of \$4 billion, while the petitioner states that it has a gross annual income of approximately \$5 million. NVR's posting also notes that its business operations include mortgage banking, while the record does not establish that the petitioner engages in such activities. While Artimus Construction, Inc. appears to be a construction firm, the petitioner has submitted no evidence to demonstrate that its business activities are similar to the petitioner's or that the two companies are similar in size, scope, or scale of operations. Accordingly, the petitioner has not demonstrated that any of the four job postings submitted on appeal are from companies that are "similar" to the petitioner.

Moreover, the AAO notes that four of the seven job postings contained in the record of proceeding do not establish that a bachelor's degree, or its equivalent, in a specific field is required for the performance of the proposed duties. As noted previously, 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 proposed position.

Artimus Construction, Inc., the unnamed company advertising its vacancy through Management Recruiters International, and the Blackstone Technology Group do not require that the degree they require be in any particular field of study, and NVR only states that the applicant's degree must come from a related field. Only [REDACTED] mentions that the requisite degree should come from a specific field of study (architecture, interior design, or construction management). The two unnamed companies advertising through MRINetwork indicate that qualified candidates should have a bachelor's degree in construction management and 5-10 years of experience in construction. The salary offered in both of these advertisements range from \$19,000 to \$54,000 more than the salary offered in the proposed position.

Finally, the AAO notes that seven job postings do not establish an industry-wide standard, in light of the evidence from the *Handbook* and the Construction Management Association of America pointing to the opposite conclusion.

Accordingly, the AAO finds that the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The *Handbook* reveals that the duties of the proposed position are similar to those of a construction manager and systems analyst as outlined in the *Handbook*, which do not require a degree as a minimum entry requirement. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner.

The record does not develop information about the proposed position and its duties with sufficient specificity and detail to demonstrate uniqueness, complexity, or specialization that would distinguish them from construction manager and systems analyst positions and attendant duties that neither require nor are associated with at least a baccalaureate degree in a specific specialty. Therefore, counsel has not established that the proposed position qualifies for classification 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 criterion 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, no such evidence was submitted. Accordingly, the proposed 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. As previously discussed, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the minimum entry requirement.

As already discussed, no evidence has been submitted to demonstrate that the duties of the proposed position are more specialized and complex than those performed by members of the construction management and systems analyst occupational groups described in the *Handbook* who do not hold at least a baccalaureate degree, or the equivalent, in a specialty occupation. A baccalaureate degree in a specific specialty is not the minimum entry requirement for this position, and the petitioner has not demonstrated that its position is so specialized and complex that the knowledge required to perform its duties is usually associated with the attainment of a baccalaureate or higher degree. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria delineated at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. 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.