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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 124 51785 Office: CALIFORNIA SERVICE CENTER Date: JUN 25 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 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 wholesale distributor of telephone cards that seeks to employ the beneficiary as a full-time accountant. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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. On appeal, counsel submits a brief and additional information, including a previous AAO decision, a letter from the petitioner, a copy of the petitioner's complaint to the California State Bar and confirmation of receipt related to the petitioner's former attorney, and an industry opinion letter. Counsel also requests for an approval of the beneficiary's request for a change of status.

Pursuant to 8 C.F.R. § 248.3(g), there is no provision for an appeal from the denial of a change of status. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for a change of status, this issue will not be reviewed.

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 supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a full-time accountant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's undated letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: examining, analyzing, and interpreting accounting records for the purpose of giving advice or preparing statements; installing or advising on systems or recording costs or other financial and budgetary data; controlling the petitioner's expenses with an established budget; preparing daily, weekly, and monthly financial reports; forecasting expenses and cash flow; ensuring the availability of cash flow with minimum interest rates; and developing the petitioner's annual budget. The petitioner indicated that the beneficiary must have proficiency in the software program, Quick Book. Although not explicitly stated, it appears that the petitioner also requires a baccalaureate degree or its equivalent in an accounting-related field for the proffered position.

The director found that the proffered position was not a specialty occupation because the job is not an accountant; it is a financial record keeper position. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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 proffered position is that of an accountant, and is not an accounting clerk position. Counsel states further that, as indicated previously in the petitioner's response to the director's request for additional evidence, the petitioner's gross annual income rose from \$13 million in 2002 to over \$100 million in 2003, thereby necessitating the services of an on-site accountant to maintain the petitioner's financial integrity and prevent monetary waste or abuse. Counsel also states that the AAO approved a similar position for an accountant. Counsel states further that all the petitioner's employees enter the company's financial data into "Quickbooks," which allows the petitioner's bookkeeper to carry out the petitioner's simple bookkeeping and basic financial reports.

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 *Handbook* for its information about the duties and educational requirements of particular occupations. 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 does not concur with counsel that the proffered position is that of an accountant. The *Handbook*, 2004-2005 edition, indicates that management accountants are usually part of executive teams involved in strategic planning or new-product development. Public accountants are generally self-employed or work for accounting firms. In this case, information on the petition, which was signed by the petitioner's chief executive officer on December 20, 2002, indicates that the petitioner is a wholesale distributor of telephone cards with six employees and a gross annual income of \$19 million. On appeal, counsel states, in part, that the petitioner's gross annual income in 2002 was \$13 million and over \$100 million in 2003. The record contains no explanation for the discrepancy between the chief executive officer's claim on December 20, 2002 of a gross annual income of \$19 million and counsel's statement on appeal of a 2002 gross annual of \$13 million. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, although counsel states that the petitioner's increase in gross annual income to its 2003 level of over \$100 million demonstrates the petitioner's need of an on-site accountant "in order to maintain financial integrity and prevent monetary waste or abuse," 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). It is also noted that the record contains no evidence of this increase. 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). As described, it appears that the proposed duties are not so complex as to require the services of an accountant. A review of the Financial Clerks job description in the *Handbook* confirms the accuracy of the director's assessment to the effect that, the job duties parallel those responsibilities of a financial clerk. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a financial clerk job.

On appeal, counsel submits an opinion from a CPA of an accountant-and-consulting business who asserts that positions such as the proffered position require a baccalaureate degree in accounting. The writer, however, provides no evidence in support of his assertion. 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)). Furthermore, the opinion is based on the petitioner's conflicting and unsubstantiated gross annual income statistics discussed above. In view of the foregoing, the opinion is accorded no weight.

Regarding parallel positions in the petitioner's industry, the petitioner submitted an AAO decision for an accountant. There is no evidence, however, to show that the employer in the decision is similar or that the

proposed duties of the proffered position are as complex as the duties in the AAO decision. The petitioner in the decision was engaged in the research, manufacture, and distribution of computer workstations and e-mail services, as opposed to the petitioner's sole business activity of wholesale distribution of telephone cards. The petitioner has not demonstrated that the nature of its business is as complex as the business described in the AAO decision, which includes research and manufacturing activities. Thus, the decision has no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. 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. As the record indicates that the proffered position is a new position, the petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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.

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. 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.