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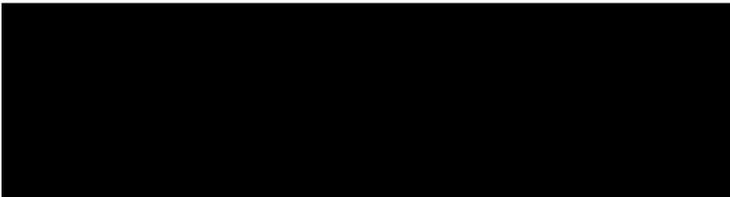
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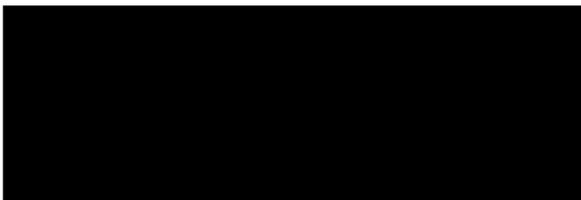
FILE: SRC 03 245 50374 Office: TEXAS SERVICE CENTER Date: SEP 17 2007

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, Texas Service Center, approved the nonimmigrant visa petition on February 10, 2004. On January 28, 2006, the director issued a Notice of Intent to Revoke (NOIR) setting forth the grounds for revocation of the approval of the petitioner's Form I-129 petition. The director informed the petitioner that it had 30 days in which to respond to the NOIR. Counsel for the petitioner responded to the NOIR in a letter dated March 2, 2006. On June 20, 2006, the director revoked approval of the Form I-129 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's revocation of the approved petition will be sustained. The petition will be revoked.

The petitioner is a Florida auto repair services provider established in 1998, with three employees, and \$481,628.00 stated gross income. The petitioner seeks to employ the beneficiary as an accountant. 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 record includes: (1) the Form I-129 and supporting documents; (2) the director's request for further evidence (RFE); (3) counsel's response to the director's RFE and supporting documents; (4) the director's NOIR; (5) counsel's response to the NOIR; (6) the director's decision revoking approval of the petition; and (7) the Form I-290B and brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

On January 28, 2006, the director issued an NOIR based on a finding by the American Embassy in Manila, Philippines. The NOIR stated:

The quarterly wage report shows that the Beneficiary is only working 25 hours per week and earning \$15.00 per hour. This would bring his yearly wage to approximately 20K. In conclusion, it appears that the Beneficiary has not taken up the position for which he was petitioned according to the terms of the approved petition.

On June 20, 2006, the director revoked the I-129 petition determining that the documents provided by the petitioner had failed to overcome the deficiencies noted in the NOIR. On appeal, counsel for the petitioner submits a letter, recent pay stubs and resubmits documents already in the record.

The issue before the AAO is whether the petitioner has overcome the grounds for revocation specified by the director.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

- (A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The AAO determines that the documents submitted in response to the NOIR and on appeal do not effectively rebut the grounds for revocation. On appeal, counsel asserts:

When the Beneficiary initially began working for the employer, the Petitioner's payroll department made an administrative error when totaling the Beneficiary's hours of employment per week. The payroll department in error issued him a weekly total of 25 hours instead of 40 hours (full-time). However, this error was corrected when noticed by the Beneficiary and Petitioner. And as a result, the Beneficiary received an adjusted lump sum payment for previous hours of employment that was [sic] accidentally not included in his initial salary. The Beneficiary has since been receiving that correct rate of [sic] as per the Petition.

Counsel has resubmitted the beneficiary's weekly pay stubs dated 4/30/2004 – 1/27/2006, quarterly reports for the beneficiary's pay, and a copy of the beneficiary's 2005 Internal Revenue Service Form W-2 (Form W-2) in addition to weekly pay stubs dated 2/30/2006 – 6/30/2006, the beneficiary's employee information sheet, and the beneficiary's financial information. The documents submitted by the petitioner show that the beneficiary has been paid \$553.50 per week and that the payroll error was corrected on July 13, 2004. However, although the petitioner has shown that the beneficiary was paid the proffered wage, the record does not establish the petitioner as the beneficiary's employer or that "the Beneficiary has [] taken up the position for which he was petitioned according to the terms of the approved petition."

The record does not reflect that the beneficiary was employed by the petitioner as an accountant. The term "employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii):

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The documents provided by the petitioner call into question whether an employer/employee relationship exists according to the terms of the petition. The beneficiary's Form W-2 lists South East Employee Leasing as the employer and includes an Employer Identification Number (EIN) different from the petitioner's EIN as stated in the petitioner's 2002 Internal Revenue Service Form 1120S and on the Form I-129. Based on the documents provided, it appears that the beneficiary is employed and paid by South East Employee Leasing as stated in the Form W-2 submitted. The beneficiary's employee information sheet also seems to corroborate this by listing the petitioner as a "client" and including two different hiring dates and listing one as a "Sub. Hire Date." In addition, the AAO notes that the beneficiary's occupation is listed as "manager" in the employee information sheet. The discrepancies in the petitioner's submissions have not been explained. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As the record does not establish the petitioner as the beneficiary's employer, the AAO finds that the petitioner violated terms and conditions of the approved petition, as noted and found by the director. See 8 C.F.R. § 214.2(11)(iii)(A)(3). Thus, the director's decision will not be disturbed.

Beyond the decision of the director, the record does not establish that the position is 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) 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 (5th 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 an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's August 28, 2003 letter; and the petitioner's January 19, 2004 letter in response to the RFE. The Form I-129 and the petitioner's August 28, 2003 letter in support of the position state the following duties:

Apply principles of accounting to analyze financial information and prepare financial reports. Compile and analyze financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyze financial information detailing assets, liabilities, and capital, and prepare balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audit contracts, orders, and vouchers, and prepare reports to substantiate individual transactions prior to settlement. Establish, modify, document, and coordinate implementation of accounting and accounting control procedures. Devise and implement combination of manual and computer-based system for general accounting.

In response to the director's RFE requesting a detailed job description, the petitioner's January 19, 2004 letter included the following:

As previously stated, [REDACTED] will be responsible for applying knowledge of accounting to analyze my company's financial information and prepare needed financial reports. He will analyze and gather financial information to prepare entries to accounts to document business transactions. He will analyze financial information to summarize assets, liabilities, capital and prepare the balance sheet, profit and loss statement, and other financial reports to show the current and projected company financial position. Since I am expanding to obtain corporate accounts from company's [sic] that have multiple vehicles needing regular maintenance, [REDACTED] will also be needed to audit the contracts and prepare reports to substantiate individual transactions. In addition, he will also be responsible for devising and implementing a computer based and also a manual system for general accounting, as none now exists.

Finally, he will also share with me where expenses exceed the recommended amounts, make and carry out investment planning recommendations for retirement plans.

To make its determination as to whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2006-2007 edition of the *Handbook* for its discussion of management accountants, the category of accounting

most closely aligned to the duties described by the petitioner. As stated by the *Handbook*, management accountants:

[r]ecord and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management They analyze and interpret the financial information that corporate executives need in order to make sound business decisions. They also prepare financial reports for other groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, management accountants may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would require the beneficiary to have an understanding of accounting principles. However, degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties requiring accounting knowledge does not establish the proffered position as that of an accountant. The question is not whether the petitioner's position requires knowledge of accounting principles, which it does, but rather whether it is one that normally requires the level of accounting knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting.

The *Handbook's* discussion of the occupation of accountants clearly indicates that accounting positions may be filled by individuals holding associate degrees or certificates, or who have acquired their accounting expertise through experience:

Capable accountants and auditors may advance rapidly; those having inadequate academic preparation may be assigned routine jobs and find promotion difficult. Many graduates of junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.

The *Handbook* also notes in its description of the work performed by bookkeeping, accounting and auditing clerks that:

Demand for full-charge bookkeepers is expected to increase, because they are called upon to do much of the work of accountants, as well as perform a wider variety of financial transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects.

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the Accreditation Council for Accountancy and Taxation (ACAT), an independent accrediting and monitoring organization affiliated with the National Society of Accountants. The ACAT does not require a degree in accounting or a related specialty to issue a credential as an Accredited Business Accountant® /Accredited Business Advisor® (ABA). Eligibility for the

eight-hour comprehensive examination for the ABA credential requires only three years of "verifiable experience in accounting, taxation, financial services, or other fields requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination." Up to two of the required years of work experience may be satisfied through college credit.¹

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in accounting, the AAO turns to the record for information regarding the nature of the petitioner's business operations. While the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker as an accountant. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent.

At the time of filing, the petitioner indicated that it was established in 1998, employed three individuals, provided auto repair services, had a gross annual income of \$481,628.00, and a net annual income of \$7,977.00. The petitioner submitted a copy of its 2002 Internal Revenue Service Form 1120S. The AAO acknowledges the petitioner's assertion that it may expand by obtaining corporate accounts from companies that have multiple vehicles needing regular maintenance. However, upon review of the current record, the AAO does not find documentary evidence sufficient to determine that the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. The record does not contain sufficient documentation related to its financial operations or organization that would shed light on the complexity of the accounting work to be performed by the beneficiary, e.g., financial documents or reports that evidence the complexity of the petitioner's financial operations. The record does not contain documented evidence of the petitioner's intentions for expansion such as contracts from companies for the regular maintenance of multiple vehicles or a business plan substantiated by documentary evidence. The AAO notes that the petitioner claims that the beneficiary will audit contracts and prepare reports to substantiate individual transactions in addition to carrying out investment planning recommendations for retirement plans; however, the record offers no meaningful evidence to establish that the accounting duties to be performed by the beneficiary in relation to the petitioner's business are sufficiently complex to require the services of a degreed accountant. 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 petitioner has not provided documentary evidence establishing that it has a complicated financial situation and thus that its business, despite its relatively limited income and small size, has the complexity of financial operations to require that the proffered position requires a degree in accounting. Further, as noted above, the record suggests that the beneficiary is being leased to the petitioner as a manager, not as an accountant. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency

¹ Information provided by the ACAT website [REDACTED] *The Handbook* identifies the ACAT website as one of several "Sources of Additional Information" at the end of its discussion of the occupation of accountants.

of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The duties of the proffered position are not established as the duties of a degreed accountant. Instead, they appear at most to be more closely aligned to accounting responsibilities that may be performed by junior accountants, employment that does not impose a baccalaureate degree requirement on those seeking entry-level employment. The evidence submitted by the petitioner is insufficient to establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining this criterion include 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)). In the instant matter, the petitioner has not submitted evidence that responds to either prong of the criterion.

To meet the burden of proof imposed by the regulatory language, the petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. The petitioner has not submitted documentation to support such an industry standard. Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner's failure to submit information related to its financial operations or its business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from accounting employment that is performed with less than a four-year degree. Simply going on the 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 190 (Reg. Comm. 1972)). The petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position,

and copies of those employees' diplomas. In response to the director's request for evidence, the petitioner stated that it has not previously hired a full-time accountant and instead used [REDACTED] to perform its accounting tasks. However, the record does not include information regarding the accounting duties performed by [REDACTED], or that the performance of the accounting duties required or would require a degreed accountant.² As a result, the record only shows that the petitioner has previously used an accounting firm, not that it has a practice of hiring a degreed accountant. Again, going on record without supporting documentation is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, 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. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a bookkeeper or a junior accountant. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a bookkeeper or at most a junior accountant.

The totality of the record does not establish the proffered position is a specialty occupation based on its complex and unique nature as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). For this additional reason, the petition may not be approved.

As discussed above, the director properly noted and found that the petitioner violated terms and conditions of the approved petition. Further, the record does not establish the position as a specialty occupation. Thus, the director's decision to revoke the petition will not be disturbed.

² The AAO notes that the petitioner's tax returns for 2002 and 2003 were prepared by [REDACTED] Inc. While accounting services are not separately itemized, the 2002 return reflects a total of \$2,305 paid for professional services; that amount is \$6,207 for 2003. Assuming the accountant's fee is included within the itemization of professional services, it is not readily apparent that the work to be performed by the beneficiary for \$28,787/year is primarily the same as that performed by the accountants in 2002 for \$2,305 and in 2003 for \$6,207.

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The burden of proving eligibility for the benefit sought remains entirely 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 revoked.