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U.S. Citizenship
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[REDACTED]

FILE: WAC 03 241 50559 Office: CALIFORNIA SERVICE CENTER Date: AUG 24 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:

[REDACTED]

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 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 certified public accounting firm that 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 director denied the petition on the basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s RFE response and supporting documentation; (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.

The petitioner, a certified public accounting firm with two employees, was established in 1986 and has a gross annual income of \$145,000. The petitioner initially proposed to hire the beneficiary as an "accountant/bookkeeper." On the Form I-129, the duties of the proposed position were listed as: "Calculate persons, and businesses Taxes, expenses, reconcile year end [sic]." In the petitioner's letter of support, the duties of the proposed accountant/bookkeeper position were set forth as follows:

[The beneficiary] will be responsible for compiling and analyzing financial information to prepare entries to accounts, such as general ledger accounts to document business transactions in accordance with generally accepted accounting principles, (GAAP). [The beneficiary] will prepare financial statements, balance sheets, profit and loss statements, and business projections.

[The beneficiary] will also be expected to prepare cash flow projections, schedules of payments, taxes due, accounts receivable balances and projections, and accounts payable balances and projections for each client of the firm. [The beneficiary] may provide business strategies, and advice [sic] on budgetary policies designed to benefit our client. This includes preparing detailed analyses [sic] of budgetary projections; evaluations of budgetary limitations using 1) pay backs, 2) return on average investments, and 3) future cash flows.

[The beneficiary] will be involved in the implementation of internal control measures linked to central computer programs for a particular client; and also [the beneficiary] will be involved with corporate [a]udits, vouchers, sales invoicing, and cash flow balancing.

[The beneficiary] will also be involved with the implementation and instruction to clients as to the latest and best computer software which may be best suited for our particular client's needs.

The director issued an RFE, requesting additional evidence to support the contention that the proposed position qualifies as a specialty occupation. In response, new counsel submitted an expanded list of job duties from the petitioner. The petitioner stated that the duties of the beneficiary would consist of three broad categories - accounting services, tax services, and attestation services. The petitioner stated that "[A]s I hope is apparent from this letter, the complexities of this position require the services of a true professional, and not merely those of a bookkeeper."

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at § 214.2(h)(4)(iii)(A), and therefore had not established the proposed position as a specialty occupation. Also, the director noted that the description of the duties of the proposed position as set forth in the RFE response differed substantially from those as set forth in the initial filing:

The duties listed in response to the USCIS's request for a more detailed description of the duties of the position appear to be quite different from the duties that were identified with the documentation provided as initial evidence. The duties described in the response appear to be general duties that would involve auditing/budgeting preparations. There was no mention at all of bookkeeping or financial record keeping, which were the majority of the duties described as initial evidence.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation. Counsel contends that the director acted in an arbitrary and capricious manner in denying the petition.

The AAO agrees with the petitioner that, as a general matter, accountant positions normally qualify for classification as specialty occupations. However, the AAO disagrees with the petitioner's assertion that the proposed position is actually that of an accountant.

The AAO concurs with the director that the duties of the proposed position as set forth in the initial filing differ considerably from those as set forth in the RFE response. While counsel and the petitioner assert in the RFE response and on appeal that the proposed position is not one of a bookkeeper, the AAO notes that the proposed position, which is now described as an "accountant," was entitled "accountant/bookkeeper" in the initial filing.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The AAO will consider the duties as set forth in the initial filing.

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 *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

According to the *Handbook* there are four major fields of accounting – public, management, government, and internal auditors. On appeal, counsel quotes from the *Handbook's* discussion of both management accountants and internal auditors, contending that the duties of the proposed position are analogous to those positions.

The *Handbook* sets forth the following description of the duties of a management accountant:

Management accountants – also called cost, managerial, industrial, corporate, or private accountants – record and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, cost management, and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

The *Handbook* sets forth the following description of the duties of an internal auditor:

Internal auditors verify the accuracy of their organization's internal records and check for mismanagement, waste, or fraud. Internal auditing is an increasingly important area of accounting and auditing. Internal auditors examine and evaluate their firms' financial and information systems, management procedures, and internal controls to ensure that records are accurate and controls are adequate to protect against fraud and waste. They also review company operations—evaluating their efficiency, effectiveness, and compliance with corporate policies and procedures, laws, and government regulations. There are many types of highly specialized auditors, such as electronic data-processing, environmental, engineering, legal, insurance premium, bank, and healthcare auditors. As computer systems make information timelier, internal auditors help managers to base their decisions on actual data, rather than personal observation. Internal auditors also may recommend controls for their organization's computer system to ensure the reliability of the system and the integrity of the data.

The *Handbook* also states that, increasingly, accountants “not only provide clients with accounting and tax help, but also help them develop personal budgets, manage assets and investments, plan for retirement, and recognize and reduce exposure to risks.”

By comparison, the *Handbook* describes the occupation of bookkeeping, accounting, and auditing clerks as follows:

Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those which tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. They have a wide range of skills and knowledge from full-charge bookkeepers who can maintain an entire company's books to accounting clerks who handle specific accounts. All of these clerks make numerous computations each day and increasingly must be comfortable using computers to calculate and record data.

In small establishments, *bookkeeping clerks* handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers. Bookkeepers also prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

In large offices and accounting departments, *accounting clerks* have more specialized tasks . . . such as accounts payable . . . or accounts receivable . . . Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts, to ensure that payments are up to date.

More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on accounts; and code documents, according to company procedures. These workers post transactions in journals and on computer files and update the files when needed

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are correct, mathematically accurate, and properly coded

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks are using specialized accounting software on personal computers. With manual posting to general ledgers becoming obsolete, these clerks increasingly are posting charges to accounts on computer spreadsheets and databases The widespread use of computers . . . has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing.

According to the *Handbook*, a two-year associate's degree in business or accounting is often required for bookkeeping and accounting clerk positions. A four-year bachelor's degree is not required for entry-level positions. The *Handbook* does indicate that many individuals with four-year degrees accept bookkeeping and accounting clerk positions in order to enter the field or a particular company with the goal of being promoted to professional or managerial positions.

The *Handbook* describes the occupation of a tax preparer as follows:

Prepare tax returns for individuals or small businesses but do not have the background or responsibilities of an accredited or certified public accountant.

The *Handbook* indicates that the normal educational requirement for a tax preparer is "moderate-term on-the-job training."

A petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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.¹ 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.

The record in this case does not support the assertion that the duties of the proposed position require a bachelor's degree in accounting or a related specialty. While this position may include some duties that involve accounting functions, the AAO is not persuaded that they are at a level of specialization or complexity that they require the theoretical and practical application of a body of highly specialized knowledge and a baccalaureate degree or its equivalent. The proposed position lacks crucial characteristics

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

of a management accounting position, as described in the *Handbook*. For example, the *Handbook* indicates that management accountants are involved in strategic planning or new-product development, usually as part of an executive team, and prepare financial reports for nonmanagement groups like stockholders, creditors, regulatory agencies, and tax authorities. Such functions are not reflected in the petitioner's description of the proposed position's duties. Moreover, no information is submitted regarding the petitioner's clientele. For example, it is unclear whether the petitioner caters primarily to corporate clients or to individual clients. Regardless, the scope of the proposed position, based upon the evidence of record, lacks both the breadth and the depth of a management accounting position.

Similarly, the proposed position also lacks crucial characteristics of an internal auditor position. For example, the statement that the beneficiary will be "involved in" the implementation of internal control measures linked to central computer programs for clients is not synonymous with "implementing" those control measures.

Counsel correctly notes that a petitioner's size alone does not determine whether or not a proposed position qualifies as a specialty occupation. While the size of the company does not, in and of itself, determine a company's need for an accountant, its income level and scale of operations, however, do have a direct and substantial bearing on the scope of the duties the beneficiary would perform in the proposed position. The responsibilities associated with an annual income of \$145,000 differ considerably from the responsibilities associated with an annual income in the millions, or tens of millions, of dollars. The AAO notes further that no financial documentation of record corroborates the petitioner's statement on the Form I-129 that it earns an annual income of \$145,000. Nor is there any evidence in the records to indicate the scale or scope of operations of the clientele with whom the beneficiary would work. 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)). The record does not support a finding that the petitioner will employ the beneficiary in an accounting position.

Rather, the AAO concludes that the proposed position will actually be that of an experienced bookkeeping, accounting, or auditing clerk. Many of the duties – including preparing balance sheets, profit and loss statements, accounts receivable, and financial statements, compiling general ledger accounts, and sales invoicing – accord with the *Handbook's* description of bookkeeping, accounting, and auditing clerks. As discussed in the *Handbook*, a baccalaureate or higher degree is not the normal minimum requirement for entry into bookkeeping, accounting, or auditing clerk positions, though employers often require a two-year associate's degree in business or accounting. The AAO concludes that the position is actually that of a bookkeeping, accounting, or auditing clerk. Since these positions do not require a baccalaureate degree in accounting or a related specialty, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The proposed position does not 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. The AAO has reviewed the two statements submitted by counsel. The first letter, submitted by the principal of another accounting firm, does not satisfy the first prong. The author of this letter explains in great detail why employers require individuals with degrees to fill accounting positions. However, as noted above, the issue before the AAO is not whether accounting positions qualify as specialty occupations. The issue here is whether the proposed position is actually that of an accountant. As such, most of the information contained in this letter does not address the issue at hand in this proceeding and therefore has little relevance. The author

discusses the duties of the proposed position, stating that he is convinced that the proposed position is actually that of an accountant due to the petitioner's "clarification" of the duties of the position.² As stated above, the duties of the "accountant" position as set forth in the RFE response are substantially different than those of the "accountant/bookkeeper" position as set forth in the initial filing and cannot be considered. Thus, the duties of the position upon which the opinion is based are dissimilar from the proposed position.

A professor of accounting at California State University, Fullerton, writes the second letter. The professor states "[i]t has been brought to my attention that government sources are of the opinion that in-house Accountants working at C.P.A. firms generally will not perform accounting related aspects if the firm is considered to be 'small'" Again, the issue before the AAO is not whether accounting positions qualify as specialty occupations. The issue is whether the position proposed in the instant petition is actually that of an accountant. The author of this letter also spends one paragraph discussing, in a general manner, the duties of the proposed position. However, once again, the duties of the "accountant" position as set forth in the RFE response are substantially different than those of the "accountant/bookkeeper" position as set forth in the initial filing, and cannot be considered.

Thus, 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).

The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as the duties of the proposed position are very similar to those of bookkeepers, auditing clerks, accounting clerks, or tax preparers, which do not require a four-year degree.

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

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally 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.

While counsel asserts that the proposed position qualifies for classification as a specialty occupation under this criterion, no evidence has been submitted to verify this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As noted previously, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the petitioner's burden of proof in these proceedings. *Soffici*, 22 I&N Dec. at 165. While counsel submits copies of two H-1B approval notices, no evidence was submitted that would allow the AAO to verify whether these individuals were filling the same position as the one to be filled by the beneficiary, such as copies of those individuals' diplomas, or employment records or other documentation to verify whether or not these individuals were employed as accountants.

² By "clarification," the author seems to be referring to the duties of the proposed position as set forth in the RFE response, which, as noted previously, marked a substantial departure from the duties set forth in the initial filing.

Further, counsel's submission of the H-1B approval notices, with no supporting documentation, is insufficient. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proposed position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior H-1B petition were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of that petition would constitute material and gross error on the part of the director. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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 AAO is not persuaded by the evidence of record, including the nature and scale of the petitioner's business operations, that the duties of the position exceed the occupational scope of an experienced bookkeeper, auditing clerk, or accounting clerk, positions which do not require specialized knowledge at a baccalaureate level.

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). 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.