identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC-01-221-56014 Office: Vermont Service Center Date: OCT 10 2002

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a certified public accounting firm with four employees and a stated gross annual income of $400,000. It seeks to employ the beneficiary as an accounts assistant for a period of three years. The director determined that the petitioner had not established that the proffered position is a specialty occupation. The director further determined that the petitioner had not submitted a certification from the Department of Labor that a Labor Condition Application (Form ETA 9035) had been properly filed.

On appeal, counsel submits a brief and supporting documentation.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

> 1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
>
> 2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
>
> 3. Evidence that the alien qualifies to perform services in the specialty occupation . . .

The director determined that the petitioner had not submitted a certification from the Department of Labor that a Labor Condition Application (Form ETA 9035) had been properly filed.

On appeal, counsel submits a certified Form ETA 9035 Labor Condition Application (LCA). However, the LCA submitted on appeal was certified on June 26, 2001, a date subsequent to June 21, 2001, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that <u>before filing a petition for H-1B classification in a specialty occupation</u>, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this has not occurred, the petition may not be approved.

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.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director further determined that the offered position of accounts assistant does not qualify as a specialty occupation.

On appeal, counsel asserts that the Department of Labor (DOL) has determined in its Dictionary of Occupational Titles (DOT) and Occupational Outlook Handbook (Handbook) that the proffered position of accounts assistant is a specialty occupation.

The Service does not agree with counsel's assertion that the offered position requires a bachelor's degree in a specific field of study. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The Service considers the specific duties of the offered position combined with the nature of the petitioning entity's business operations. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

* Examines and Analyzes accounting records, prepare financial reports.

* Verifies Journal and Ledger entries of cash and check payments, purchases, advances trial balances of the parties.

* May make recommendations regarding improving operations and financial position of the company.

* Applies Principles of accounting to analyze financial information and prepare financial reports.

* Compiles and analyzes financial information to prepare entries to accounts.

* Prepare balance sheet, audit contracts, vouchers and prepares reports etc.

* May devise and implement manual or computer based system for general accounting.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The proffered position combines the duties of a bookkeeping clerk, an accounting clerk, and an auditing clerk in a small business establishment. In its Handbook, 2002-2003 edition at page 390, the DOL describes the job of accounting 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 that tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. . . .
>
> *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. . .

> 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.
>
> *Auditing clerks* verify records of transactions posted by other workers. They check figures, postings, and documents for correct entry, mathematical accuracy, and proper codes.

A review of the Handbook at page 387 finds no requirement of a baccalaureate degree in a specialized area for employment as a bookkeeping clerk, accounting clerk, or auditing clerk. However, having some college is becoming increasingly important, particularly for those occupations requiring knowledge of accounting. For occupations such as bookkeepers, accounting clerks, and procurement clerks, an associate's degree in business or accounting often is required.

Counsel asserts that the DOL has determined in its DOT that the position of accounts assistant requires a bachelor's degree in a specific field of study. However, a reference in the Department of Labor's DOT, Fourth Edition, 1977, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook. The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

The petitioner's president, Mark Szuran, stated in a letter dated April 4, 2001, that the firm has a large number of clients from India, Pakistan, and Bangladesh and needs an accounts assistant who has experience in accountancy and can communicate with the firm's clients in Hindi, Urdu, Punjabi and Bengali, as well as in English. However, the petitioner has not shown that this aspect of the job is of such complexity that a baccalaureate degree in those languages is necessary for the successful completion of the duties of the job. While the beneficiary may very well be fluent in several Asian languages, he does not possess a formal degree in

a formal degree in those languages and his familiarity with those languages derives from the fact that he is a native born speaker.

The petitioner has not provided any evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

In response to a Service request for additional evidence, counsel stated that the petitioner requires a bachelor's degree in a specific field of study for the position being offered to the beneficiary. In support of this statement, counsel submitted the college diplomas of the other employees of the firm. Marci Jill Szuran has a bachelor of science degree, but the major field of study is not specified. Alan Jay Szuran has a bachelor of business administration degree, and Mark David Szuran has a bachelor of science diploma from the College of Business and Public Administration, New York University. The petitioner has not provided any information regarding the job titles or duties of the individuals listed above. Without this information, it cannot be concluded that those individuals hold positions similar to the position of accounts assistant or that the petitioner requires a bachelor's degree in a specific field of study for the proffered position. Additionally, the petitioner has not submitted any evidence to show that it requires a bachelor's degree in a specific field of study as part of the hiring process such as job advertisements or vacancy announcements.

Finally, the petitioner has failed to establish that 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job combines the duties of a bookkeeper, accounting clerk, and an auditing clerk. According to the DOL at page 391 of Handbook, the usual requirement for a bookkeeping, accounting clerk, or auditing clerk is a high school diploma or its equivalent. A higher level of training is favored but not required, and such training is available in community colleges or schools of business. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.