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U.S. Citizenship
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Services

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[redacted]

DEC 1 4 2004

FILE: WAC 02 123 52419 Office: CALIFORNIA SERVICE CENTER Date:

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)

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 of the service center 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 corporation engaged in coffee-service innovation, design, and manufacture, and it provides coffee service equipment and beverages to offices, manufacturing facilities, supermarkets, hotels, and retailers. In order to employ the petitioner as a staff accountant, the petitioner 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 proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director determined, in part, that the duties "as stated by the petitioner are those of a [sic] bookkeeper, accounting, and auditing clerks," an occupation for which the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates no requirement for the type educational credentials that characterize a specialty occupation.

Counsel contends, in part, that the director misapplied the *Handbook,* because the evidence of record on the proposed duties comport with the accountant occupation.

The director's decision to deny the petition was correct. The AAO based its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the letter and accompanying documents that the petitioner submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents submitted with that letter.

The issue on appeal is whether, as counsel contends, the petitioner has established that the proffered position is that of an accountant, which Citizenship and Immigration Services (CIS) has long recognized as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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." (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner's letter of reply to the RFE stated that, as staff accountant, the beneficiary would:

- Analyze financial information detailing assets, liabilities, and capital. [The beneficiary] will prepare balance sheets, profit and loss statements, and other reports to summarize current and projected [petitioner] financial position. This will account for approximately 20% of his time.

- Prepare [the petitioner's] year-end financial statement and trial balances for submission to an outside tax and accounting firm. This function will make up about 20% of his time.

- Prepare and submit sales tax reports for government authorities, and prepare property tax reports for the seven counties in which [the petitioner] does business. He will spend approximately 10% of his time on these reports.

- Prepare monthly reports specifically on [the petitioner's] sales progress for the Franchise's head office. In [the petitioner's] estimate, this should take up approximately 10% of his time.

- Audit contracts, orders, and vouchers, and prepare reports to substantiate individual transactions prior to settlement. These functions should take up about 10% of [the beneficiary's] time.

- Compile and analyze financial information, such as orders, accounts payables [sic], and prepare entries to accounts, and document business transactions. [The beneficiary] will spend approximately 5% of his time doing this.

- Establish, modify, document, and coordinate implementing of accounting and account control procedures. These duties are expected to take up about 5% of the Accountant's time.

- Devise and implement manual or computer-based systems for general accounting, and direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks in working with these systems. He will spend approximately 5% of his time on these duties.

- Prepare payroll reports and data for an outside payroll service that prepares the checks and calculates the payroll. [The beneficiary] will spend approximately 5% of his time doing this.

- Utilize an accounting system to reconcile bank statements for all cash accounts and track marketing expenses and submit them to [the petitioner's] main office for reimbursement. These duties are expected to take up about 5% of the Accountant's time.

- Track the locations of [the petitioner's] equipment and prepare reports on costs of service and maintenance of equipment using databases. [The beneficiary] will spend approximately 5% of his time doing this.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Here the decisive question is not whether the petitioner's staff accountant position requires accounting knowledge - which it clearly does - but rather whether this position 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO considered the excerpts that counsel has provided from the 2003 Internet version of the *Handbook,* namely, the sections entitled "Financial Clerks," "Bookkeeping Accounting, and Auditing Clerks," and "Accountants and Auditors." These sections recognize that employers require at least a bachelor's degree in accounting for genuine accountant positions. However, the sections on the financial clerk occupation and its subset of bookkeeping, accounting, and auditing clerks indicate that there are *non-accountant* accounting positions which require some knowledge of accounting principles and practices, but less than the highly specialized knowledge associated with a baccalaureate degree or its equivalent in accounting.

The record's information about the proposed duties indicates that the position involves accounting principles, but this evidence is too generalized and abstract to convey that the position is a genuine accountant position, or any other position which normally requires at least a bachelor's degree, or its equivalent, in a specific specialty.

The proposed duties are described in general terms that are generic to accounting-type positions in general. They convey no meaningful details about the actual, employer-specific matters that would be the subject of the beneficiary's work. Different employers could use such abstract terms to generally describe a variety of jobs that are substantially different in their actual performance requirements and in the level of accounting knowledge that they would actually require.

The AAO finds that, while the evidence of record indicates that the proffered position would require at least the level of accounting knowledge required by financial clerks – which is less than a bachelor's degree or its equivalent - it does not establish what higher level of knowledge, if any, would be required to perform the particular duties proposed for the proffered position.

The preparation of balance sheets, profit and loss statements, tax reports, information on accounts payable, and payroll reports for an outside payroll service; making entries to accounts; use of an accounting system to reconcile bank statements; tracking and submission of marketing expenses; tracking equipment locations; and use of databases to prepare reports on costs of service and maintenance equipment are clearly within the scope of financial clerk occupations as described in the *Handbook.* Furthermore, as vaguely and abstractly as they are described, it is not evident that the duties of financial analysis, financial statement preparation, sales-progress reporting, auditing and audit reporting, implementation work on accounting and account control procedures, creating and implementing general accounting systems, and supervision are also not compatible with the financial clerk positions described in the *Handbook* or with an intermediate level of accounting work, such as a junior accountant position not requiring a bachelor's degree in accounting (*see* the comments on junior accountants at page 23 of the *Handbook's* 2002-2003 edition).

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

Also, the petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The *first* alternative prong assigns specialty occupation status to a proffered position if it has a requirement for at least a bachelor's degree in a specific specialty, and if that requirement is common to the industry in positions which are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As discussed above, the petitioner has not established that its proffered position is a genuine accountant position or any other type for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, the record contains no submissions from a professional association about degree requirements, or from industry sources on hiring and recruiting practices.

The accountant job-vacancy announcements from other firms have been considered, but, for several reasons, they have little probative value. They are too few to establish an industry-wide practice. The evidence of record does not establish that the firms advertising are similar to the petitioner, as the regulation requires. The generalized descriptions of the duties of the proffered position do not provide a sufficient basis to conclude that it is parallel to the advertised positions. The evidentiary value of the job vacancy announcements is also diminished because the record does not establish that they are representative of the advertisers' history and usual course of recruiting and hiring for the type of positions advertised sufficient to establish that the degree requirement is common in the industry.

The petitioner also has not established that the proffered position qualifies under the *second* alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). Under this provision, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. Nor has the petitioner satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), that is, proposed duties that are so specialized and complex as to require knowledge associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not establish the specialization, complexity, or uniqueness required by these criteria.

Counsel contends, in part, that the description of the proposed duties so closely resembles the *Handbook's* discussion on accountants that the "job duties and responsibilities required of [the beneficiary] are sufficiently complex to justify a finding of a specialty occupation as an 'Accountant.'" The petitioner has not provided CIS with sufficient performance information. The generalized duty descriptions in the record do not convey that actual execution of the proposed duties would require a baccalaureate level of accounting knowledge, and it is the actual performance requirements that determine whether a position qualifies as a specialty occupation.

Finally, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

In light of the statutory and regulatory definitions of specialty occupation (cited earlier in this decision), this criterion has several evidentiary elements. First, the petitioner must demonstrate that it has an established history of hiring for the proffered position only persons with at least a bachelor's degree or equivalent. Second, this bachelor's degree or equivalent must be in a specific specialty that is characterized by a body of highly specialized knowledge. Third, the petitioner must also establish that both the nature and the level of highly specialized knowledge that the bachelor's degree or equivalent signifies are actually necessary for performance of the proffered position.

Consequently, a petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

The critical element, then, is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The evidence of record indicates that the petitioner has not in fact sought to hire only persons with a bachelor's degree, or its equivalent, in accounting. The petitioner's newspaper advertisement in the record establishes that the petitioner has deemed acceptable bachelor's degrees in accounting, business administration, economics, or a related field. Moreover, according to its letter of reply to the RFE and the resumes in the record, of the four staff accountants that have been hired in the past, two have bachelor's degrees with no concentration in accounting: one asserts a bachelor's degree in commerce – marketing management; the other, a bachelor's degree in business administration with a focus in Information Technology.[2] Thus, the record indicates that the petitioner itself did not insist on a bachelor's degree level of

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[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.

[2] It should be noted that, because the petitioner has not provided supporting diploma and transcript information, it has not established the degrees held by the persons it has previously hired. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, 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).

knowledge in accounting. Accordingly, counsel errs in asserting that the petitioner has satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.