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U.S. Citizenship
and Immigration
Services



FILE: EAC 02 112 52550 Office: VERMONT SERVICE CENTER Date: FEB 25 2004

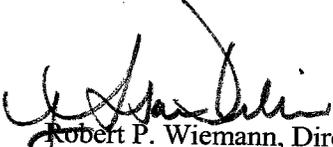
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 hotel/motel 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail,

in part: preparing and maintaining a motel budget; preparing a balance sheet, profit and loss statement, and other financial documents; establishing a table of accounts; computing taxes owed; predicting revenues and expenditures; reporting motel finances; and determining accounting needs. The letter accompanying the petition stated that the petitioning entity was established for the purpose of operating a motel in King George, Virginia. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in accounting.

In finding that the proffered position was not a specialty occupation, the director stated, in part, that: (1) the submitted evidence was inadequate to establish that the position was a specialty occupation; (2) the petitioner did not have sufficient work to employ an accountant; (3) no evidence was submitted to establish it is common in the industry to employ a full-time accountant; and (4) a bookkeeper, clerk, or someone with less than a four-year degree could perform the duties of the position.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel claims that the petitioning entity was organized to acquire and operate a motel and restaurant in Virginia, with a projected annual gross income of \$300,000 to \$400,000, and acquire and operate motels, hotels, and other business opportunities. Counsel further claims that the petitioner manages properties. Counsel states that the beneficiary will handle the accounting for rental properties earning \$25,452 per year; a convenience store earning \$31,800 net income per year; and the recent acquisition of eight apartment units with projected net income of \$12,057. According to counsel, the accountant will assist the petitioner with financial decisions involving acquisitions. Last, counsel states that the petitioner's present accountant holds a four-year degree in accounting.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook* (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)).

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. In addition, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. Here, with respect to the duties of the proffered position, the AAO will disregard counsel's statement on appeal that the beneficiary's duties will encompass more than accounting responsibilities for the motel and restaurant in Virginia because counsel's statements refer to facts that come into being after the filing of the petition.

The AAO will also disregard counsel's assertions about the beneficiary's duties made in counsel's response to the request for evidence. 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 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. Counsel's response to the request for evidence materially changed the beneficiary's job description; therefore, the AAO will not consider such changes in this proceeding.

Counsel's claim that the proffered position is an accountant is without merit. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* discloses that the duties of the proffered position do not resemble those of an accountant. In the first place, none of the proffered position's duties involve the level of responsibility of an accountant. A review of the *Handbook* reveals that the director correctly concluded that the duties of the proffered position resemble those of financial clerks such as bookkeeping and accounting clerks. For example, bookkeeping and accounting clerks tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. Bookkeeping clerks produce financial statements, and prepare reports and summaries. According to the *Handbook*, employers usually require that candidates for bookkeeping and accounting clerk positions hold associate degrees. Thus, the proffered position fails to qualify as a specialty occupation under the first criterion.

The petitioner fails to satisfy the second criterion. There is no evidence that would show that the position is unique and can be performed only by a person possessing a bachelor's degree or that the degree requirement is common to the industry in parallel positions among similar organizations.

Furthermore, there is no evidence in the record that would show the petitioner normally requires a degree or its equivalent for the position. Thus, the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) is not established.

The fourth criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) - that the nature of the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree - is also not satisfied. The *Handbook* reports that a person holding less than a bachelor's degree will be able to adequately perform the duties of the proffered position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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