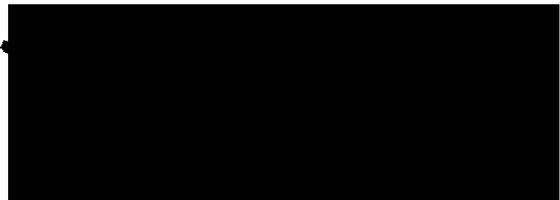




U.S. Citizenship
and Immigration
Services



FILE: LIN 03 131 52650 Office: NEBRASKA SERVICE CENTER

Date: JUN 22 2004

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.

for Robert P. Wiemann, Director
Administrative Appeals Office

Administrative Data System
[Illegible text]

DISCUSSION: The service center 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 company that provides website hosting and design services and Internet marketing. It seeks to employ the beneficiary as an 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 because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation. On appeal, the petitioner submits a brief.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

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 I-129 petition; the petitioner's March 11, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: entering details of the accounting and bookkeeping records of the company including all bank transactions; recording receipts and expenditures; tracking invoices; accounts payable; maintaining a chart of accounts; preparing various financial statements such as profit and loss statements and balance sheets; preparing financial projections based on information provided by the president; preparing any necessary payroll forms and tax returns; preparing customer reports; filing; copying; and answering the phones and e-mail inquiries. The petitioner indicated that a qualified candidate for the job would possess an accounting background and bookkeeping experience.

The director found that the proffered position was not a specialty occupation because the job is not an accountant position; it is a bookkeeper or accounting clerk position. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that the beneficiary has attained a bachelor's degree, and so she has met the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A), which states that a bachelor's degree is normally the minimum requirement for entry into the particular position. In addition, the petitioner resubmits the documentation that had been submitted in response to the director's request for evidence.

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 *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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. 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 does not concur with the petitioner that the proffered position is that of an accountant. There are elements of an accountant position in the proffered position, but the majority of the position description parallels that of a bookkeeper or accounting clerk. The AAO notes that the petitioner even calls the position a bookkeeper/accountant. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a bookkeeper job.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for accountants. It is true that an accountant would generally be considered a specialty occupation, but it has been determined that the proffered position is not actually for an accountant. In addition, there is no evidence to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The majority of the advertisements are from far larger companies than the petitioner's and in different industries. Thus, the advertisements have little relevance.

The petitioner submitted an opinion letter from an assistant professor of finance at Hofstra University, stating, "[T]he position is a professional-level position in the area of accounting."

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 this portion of the director's denial of the petition.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be that of an accountant and a specialty occupation. The beneficiary holds a bachelor's degree in business administration with a concentration in finance from a United States university. As discussed above, 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 *Handbook* states "[m]ost accountant...positions require at least a bachelor's degree in accounting or a related field" and that even beginning positions in the Federal Government require a bachelor's degree with at least 24 semester hours of concentration in accounting. In this case, there is no evidence that the beneficiary has completed the kind of accounting coursework referenced in the *Handbook*.

On appeal, the petitioner submits a transcript from the beneficiary's first two years of college, prior to transferring to the university that granted her degree. In the director's request for evidence, the director stated, "[I]t does appear that the beneficiary completed several courses in accounting; however, it does not appear that the beneficiary achieved a concentration or emphasis in this area. Therefore, please describe how the beneficiary's education/training uniquely qualifies her for the proffered position." The petitioner replied to this request by quoting from the Hofstra professor's letter, giving his opinion that the beneficiary was qualified for the proffered position. The transcript provided on appeal indicates that the beneficiary took a number of accounting classes, although no evidence was submitted to indicate that these courses would be equivalent to a concentration in accounting. 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). The purpose of a Request for Evidence (RFE) is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner provided four affidavits in response to the director's request. None of them, however, meets the terms of the regulations. The director specifically requested that the affidavits "clearly indicate that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation," as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). None of the affidavits provides this information. The petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation.

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.