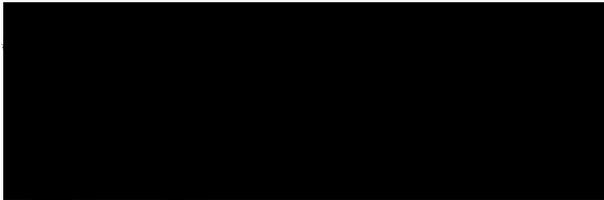




U.S. Citizenship
and Immigration
Services

52



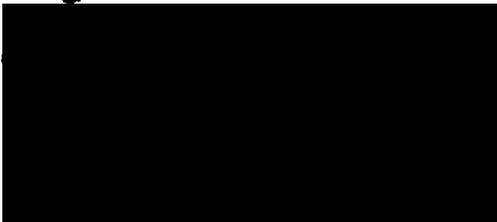
FILE: WAC 02 069 51686 Office: CALIFORNIA SERVICE CENTER Date:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 temporary and permanent staffing service 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 states that the proffered position qualifies as a specialty occupation.

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.

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 December 14, 2001 letter; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to the December 14, 2001 letter, the beneficiary would perform duties that entail analyzing records of business operations, trends and costs, projected and actual revenues, financial commitments and obligations to project future revenues and expenses; preparing reports on business revenues and expenses for corporate executives; analyzing financial information detailing assets, liabilities, and capital; preparing balance sheet and the profit and loss statement to summarize current and projected company financial position; establishing computer-based general accounting; providing technical assistance about corporate budgets; and implementing cost controls. The petitioner's June 20, 2002 letter stated that the beneficiary's services were sought as a budget analyst, and the petitioner delineated duties that differed from the previously described accountant duties. For both positions, the petitioner stated that a candidate must possess a bachelor's degree in accounting, commerce, or finance, and have two years of experience.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). According to the director, the record contained a contract that the petitioner had entered into with Ramada Inn in which it was to provide the beneficiary's services to Ramada Inn at its business location in Orange, California. The director informed the petitioner that Ramada Inn did not operate at the location specified in the contract and the Form I-129. The petitioner informed the director that it learned that Ramada Inn had sold its franchise and changed its name, causing a suspension of the contract. The director stated that the petitioner then decided to place the beneficiary in its office in a budget analyst job, a position which the petitioner alleged was substantially similar to an accountant job. According to the director, the petitioner submitted a company letter and supporting documents for a budget analyst position without withdrawing the initial petition and filing a new petition. Citing *Matter of Izumii*, 22 I&N 169 (Assoc. Comm. 1998), the director stated that a petitioner may not make material revisions to a deficient petition to make it comply with CIS requirements. The director therefore denied the petition.

On appeal, counsel states that the petitioner submitted a new petition in its response to the request for evidence because of the unanticipated event with Ramada Inn. Counsel contends that courts allow for recourse, such as the petitioner has taken by filing a different petition, in this kind of situation. Counsel contends that the case of *Matter of Izumii* is not law; laws are intended to live life and not to maim. Counsel emphasizes that the petitioner has always been the beneficiary's employer, even when the beneficiary was to perform services for Ramada Inn. Thus, counsel contends no material change has taken place with the petition. Counsel asserts that the initial petition was never deficient until the unforeseen event with Ramada Inn.

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 record of proceeding contains the initial petition filed on December 20, 2001, and the unfiled, non-receipted petition for a budget analyst submitted in response to the request for evidence. Counsel's assertion, that no material change has taken place with the petition because the petitioning entity has always been the beneficiary's employer, is not convincing. The petitioner not only materially altered the title of the proffered position from "accountant" to "budget analyst" and the responsibilities as described in the initial petition, but it submitted a new petition and accompanying documentation for the budget analyst job. 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 Corp.*, 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. Consequently, the AAO will disregard the latter petition, which has not been filed and will consider only the petition and its accompanying evidence of record.

The AAO first considers 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)).

In determining whether a 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 *Handbook* for its information about the duties and educational requirements of particular occupations.

According to the *Handbook*, the duties of the offered position are congruous with those performed by bookkeeping, accounting, auditing and financial clerks. For example, the record shows that the petitioner's accountant will analyze financial information detailing assets, liabilities, and capital; and prepare balance sheets, profit and loss statements, and other reports to summarize the company's current and projected financial position. According to the *Handbook*, such duties encompass those performed by bookkeeping, accounting, auditing and financial clerks:

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 post debits and

credits, produce financial statements, and prepare reports and summaries for supervisors and managers . . . handle the payroll, make purchases, prepare invoices, and keep track of overdue accounts.

More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on account . . . They may also review invoices and statements to ensure that all information is accurate and complete . . . Auditing clerks verify records of transactions posted by other workers.

Financial clerks . . . record all amounts coming into or leaving an organization . . . keep track of a store's inventory

The *Handbook* states that employers require most financial clerks to have at least a high school diploma, and for bookkeepers and accounting clerks, they often require an associate's degree in business or accounting. Thus, the petitioner fails to establish the first criterion by proving that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As previously discussed, the *Handbook* reveals that bookkeeping, accounting, auditing and financial clerks do not require a bachelor's degree. Accordingly, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that counsel's assertion, that the initial petition was not deficient until the unforeseen event with Ramada Inn, is not persuasive. The record of proceeding contains the contractual agreement, dated February 12, 2000, that was entered into by the petitioner and Ramada Inn. Contractual language in this agreement explicitly provided for the contract's automatic termination if either party to the contract sold its business. The contract stated:

This agreement shall terminate automatically on the occurrence of any of the following events . . . [s]ale of business of either party . . .

Thus, by the very terms of the contract, the parties anticipated the contract's automatic termination in the event that a business is sold.

The AAO notes that a discrepancy existed in the contracts. The February 12, 2000 contract was allegedly signed by the petitioner and Linda L. Mapes, the general manager of Ramada Inn. However, the subsequent

contract, dated December 1, 2001, stated that its terms and conditions were being signed by "the authorized representatives of both [REDACTED] Precision Placement Services." Yet, [REDACTED] was never previously mentioned as a contractual party, and the beneficiary was not yet employed by the petitioning entity in any capacity although he signed the December 1, 2001 contract as an employee. In fact, the employment contract entered into between the petitioner and the beneficiary indicated that the beneficiary would begin employment with the petitioner upon the approval of the I-129 petition.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, there is no evidence in the record of proceeding that would explain these discrepancies.

The AAO notes that the initial I-129 petition indicated that the beneficiary was to provide services as an accountant for Ramada Inn at its location in Orange, California. Given the impossibility of this occurrence due to the sale of Ramada Inn to a different company and the automatic termination of the petitioner's contract with Ramada Inn, the petitioner fails to establish eligibility for the requested benefit. *See* 8 C.F.R. § 103.2(b)(1).

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.