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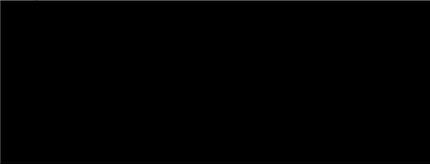
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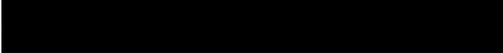
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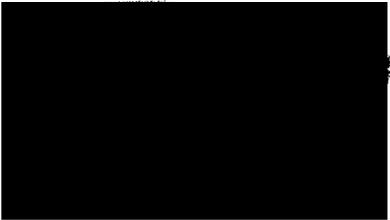


FILE:  Office: CALIFORNIA SERVICE CENTER Date: APR 05 2005

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.

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 computer reseller 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 the proffered position is 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 attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail budget planning, cost accounting, financial analysis, and preparation of management and governmental reports; analyzing financial information and preparing financial reports; compiling and analyzing financial information to prepare entries to accounts; documenting business transactions, and analyzing financial information detailing assets, liabilities, and capital; preparing balance sheets and profit and loss statements; auditing contracts, orders, and vouchers, and preparing reports to substantiate individual transactions prior to settlement; and establishing, modifying, documenting, and coordinating the implementation of accounting and accounting control procedures. The petitioner stated that a candidate for the proffered position must possess a baccalaureate degree in accounting/commerce or its equivalent, or in a related field.

In the denial letter, the director stated that the actual duties of a position, not its title, determine whether a position is a specialty occupation; that the beneficiary's possession of a degree in a related area does not guarantee that the position is a specialty occupation; and that performing specialty occupation duties that are incidental to the primary function of a position is insufficient to establish that the duties qualify as those of a specialty occupation. The director stated that although the beneficiary may, on occasion, perform duties relating to accounting, the beneficiary's primary duties are those of a financial record keeper. The director referenced information about bookkeeping, accounting, auditing clerks in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). Although the director found that the submitted job postings establish that an accountant is a specialty occupation, the director concluded that the job duties and companies in the postings differed from the proposed position. The director stated also that the petitioner does not normally require a specific bachelor's degree; that the proposed duties and stated level of responsibility do not indicate complexity that is beyond what is normally encountered in the occupational field; and that the evidence did not show that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that CIS traditionally has focused on an employer's past employment practices; that the beneficiary will replace a former employee who held a degree; and that similar companies employ degreed accountants. According to counsel, CIS arbitrarily determined that the beneficiary's job duties were those of a bookkeeper, and maintains that the response to the request for evidence explains the petitioner's need for an accountant. Referencing the *Dictionary of Occupational Titles (DOT)* and the *Handbook*, counsel explains that they show that the beneficiary's duties exceed those of a bookkeeper. Counsel contends that the director abused his discretion: he did not explain the bases for his conclusion that the beneficiary's duties are performed by bookkeepers. Counsel asserts that an accountant is different from a bookkeeper; they analyze business transactions, whereas bookkeepers document them. Citing to the court's decision in *Unico American Corp. v. Watson*, 1991 WL 11002594 (C.D. Cal. 1991), counsel states that CIS should have accorded

deference and given weight to the petitioner's judgment and need for the services of an accountant rather than rely on generic job classifications in the *Handbook* and *DOT*.

Upon review of the record, the petitioner has not established the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past that had been filed by the employer on behalf of another beneficiary. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the document submitted by counsel is not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel asserts that the proffered position is a specialty occupation based on information contained in the *DOT*. However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and the *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *DOT*.

To satisfy the regulation at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2), the petitioner must establish that 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

Counsel's December 17, 2003 letter, submitted in response to the request for evidence, described the percentage of time the beneficiary would spend on each duty and the petitioner's need for the services of an accountant. This letter is relevant, though 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).

The AAO disagrees with counsel's statement that the beneficiary's duties are performed by an accountant. The *Handbook* explains that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook*, management accountants — also called cost, managerial, industrial, corporate, or private accountants — record and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, and cost and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

Some of the duties described in the *Handbook* do not apply to the proposed position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not be part of an executive team. Nor will the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities. Given this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. Consequently, a bachelor's degree in accounting or a related field — which the DOL states is required for a management accountant — would not be required for the proposed position.

Counsel asserts that accountants analyze business transactions, whereas bookkeepers document them. However, the AAO finds that many of the beneficiary's duties are performed by bookkeeping, accounting, auditing, and financial clerks as described in the *Handbook*, which states:

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. . . .

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are correct, mathematically accurate, and properly coded.

The beneficiary will prepare financial reports; compile and analyze financial information to prepare entries to accounts; document business transactions and analyze financial information detailing assets, liabilities, and capital; prepare balance sheets and profit and loss statements; audit contracts, orders, and vouchers; and prepare reports to substantiate individual transactions prior to settlement. Similar to this, bookkeeping, accounting, and auditing clerks update and maintain accounting records that tabulate profit and loss reports, verify records of transactions, reconcile billing vouchers, produce financial statements, prepare reports and summaries for supervisors and managers, and handle accounts payable and receivable.

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. According to the website for Skyline College, a community college located in San Mateo, California, (www.skylinecollege.net) an associate in science degree with a major in accounting would involve coursework dealing with the fundamentals of financial accounting principles and concepts, balance sheets, income statements, cash flow statements, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system using tools such as QuickBooks, QuickBooks Pro, or Peachtree, which is an integrated commercial accounting software package that is used to review, differentiate, and interpret accounting concepts and data in a multitude of business situations. Thus, an associate's degree is sufficient to provide fundamental knowledge about accounting techniques which serve the needs of management and facilitate decision making, budget planning, cost accounting, and financial analysis.

In the appeal brief, counsel cites an unpublished decision of a federal district court in California. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be

given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The ten job postings are not sufficient to satisfy the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. Either the employers in the postings differ from the petitioner, a computer reseller, or no information is provided in them about the nature of the employer. ██████████ Inc. and ██████████ are manufacturers; Best Software, BenefitStreet, and CitySoft Inc. are software developers; Captec is a real estate company; MSC Industrial Direct Company, Inc. is publicly-traded; and ██████████ Company is a food company. No information in the postings describes Mesa Management and Sanford Rose Associates. Because the employers in the postings differ in nature from the petitioner, they fail to establish that a specific degree requirement is common to the industry in parallel positions among *similar* organizations.

The evidentiary record does not establish that the particular position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Again, the *Handbook* reveals that many of the beneficiary's duties do not rise to the level of an accountant.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires that the employer show that it normally requires a degree or its equivalent for the position. Counsel asserts that the petitioner's prior accountant held a baccalaureate degree, which is the company's normal degree requirement.

Neither the petitioner's previous employment of an accountant with a baccalaureate degree nor its job announcements are enough to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether 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 limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already discussed, the evidentiary record is insufficient to establish that the proffered position requires a baccalaureate degree in a specific specialty.

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.

The evidence in the record is inadequate to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which 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. The *Handbook* describes the duties of the proffered position as analogous to those of bookkeeping, accounting, auditing and financial clerks, which are occupations that do not require a bachelor's degree. And as already discussed in this decision, the beneficiary's duties are not of the same caliber as an accountant's.

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.