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U.S. Citizenship
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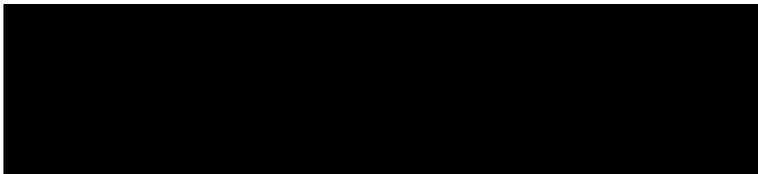


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 11 2005

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:



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 *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 states it is an auto body repair business servicing the San Francisco Bay area, with six employees. It seeks to employ the beneficiary as an accountant. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response; and (4) Form I-290B, with a letter from counsel. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's August 4, 2003 letter of support; and counsel's September 11, 2003 response to the director's request for evidence, including a August 21, 2003 letter from the petitioner.

In its letter of support, the petitioner stated it needed an accountant to "ensure timely billing, payment, and accurate and readily available financial information," describing the specific duties to be performed by the beneficiary as follows:

- Analyze financial information and prepare financial reports;
- Manage all aspects of accounting, payroll, finance and reporting in accordance with GAAP and FASB regulations;
- Be responsible for all aspects of the month-end closing process including coordination with the revenue group on the revenue close;
- Prepare payroll, including accrual of payroll taxes, preparing payroll data, reviewing payroll tax returns, and performing bank reconciliation;
- Reconcile inter-company payables/receivables and accrual of interest monthly;
- Be responsible for fixed assets accounting, preparing balance sheet account reconciliation, reconciling accounts including the general ledger and process analysis, and preparing general journal entries;
- Be responsible for accounts payable including wire transfers and distributions adjusted to accrual basis;
- Handle all cash receipts and accounts receivable, also adjusted to accrual basis;
- Prepare and review accounts receivable analytical reports on a monthly basis, and prepare monthly cash flows; and complete analytic reviews of balance sheets and income statements;
- Prepare internal financial statements;
- Interface with customers and insurance companies regarding all aspects of accounts receivable; and review and properly account for vendor contracts and arrangements;

- Manage time and attendance records, work on continuous system improvements and implementation of additional functionality, ensure all deadlines and turn-around times are met, and manage daily activities;
- Manage timely preparation of financial statements to include support schedules and balance sheet reconciliation; and
- Identify, understand and properly account for financial issues and exposures.

In its August 21, 2003 response to the director's request for evidence regarding the proffered position, the petitioner emphasized its need for the beneficiary to ensure timely and accurate billing of its clients; eliminate the rising costs of retaining contracted bookkeeping services; provide greater company control over financial information, the accuracy of that information and any potential problems, analyze financial information and prepare financial statements; handle its payroll and monitor incomes and expenditures; and prepare timely financial statements.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO first turns 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; and 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 considered by CIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (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)).

The evidence of record does not establish that the beneficiary would in fact be working as an accountant, that is, performing duties that require the theoretical and practical application of the highly specialized accounting knowledge that a person attains by a bachelor's degree, or its equivalent, in accounting. The decisive question is not whether the petitioner's position requires knowledge of accounting principles -- 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 DOL *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO considered the relevant information from the current, 2004-2005 edition 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. To the extent that it is described in the record, the proffered position appears to be one of these non-accountant positions.

The evidence about the proffered position and its duties indicates that the beneficiary would require some knowledge of accounting principles, but it does not establish that the accounting knowledge would have to be

on a par with what an accountant possesses by virtue of at least a baccalaureate degree or the equivalent in accounting. The petitioner has not established that the proffered position and its duties exceed the scope of the financial clerk positions described in the *Handbook* or an intermediate position between a regular financial clerk's and a true accountant's, such as a junior accountant position not requiring a bachelor's degree in accounting. As stated at page 71 of the *Handbook's* 2004-2005 edition:

Many graduates of junior colleges and business and correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.

On appeal, counsel states that the director's determination that the petitioner's position is that of a bookkeeping, accounting or auditing clerk, as described by the *Handbook*, ignores the fact that the duties of the proffered position would require the beneficiary to perform duties beyond those engaged in by bookkeepers, specifically to provide financial analysis to the petitioner, and to assess and apply the depreciation schedule to each of the petitioner's fixed assets, employment that counsel compares to an accountant's responsibility for asset management. The AAO does not agree with counsel's analysis.

Counsel asserts that the beneficiary's analysis of financial statements means that she is also responsible for "finding potential issues, providing solutions, and developing strategies, policies and procedures that would prevent such issues from existing in the future." However, the AAO rejects such as an interpretation of the beneficiary's analytical duties as there is no evidence in the record to support counsel's statements in this regard. The assertions of counsel, in the absence of documentation, do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). The petitioner has stated only that the beneficiary will provide it with financial analysis, but has not indicated what would be involved in such analysis. Accordingly, the AAO concludes that the analytical duties noted by the petitioner are, in light of the position's focus on the creation and maintenance of financial records, more in keeping with the reporting duties described with regard to bookkeepers, than with the type of analysis performed by accountants as asserted by counsel. Counsel has also compared the beneficiary's responsibility for fixed asset accounting with an accountant's management of a company's fixed assets. However, these activities are not comparable. One is a record-keeping function, while the other involves management responsibilities.

Counsel's reading of the *Handbook's* discussion of the occupation of bookkeeping, accounting, and auditing clerks fails to appreciate the complexity of the work done by those employed as financial clerks. Although counsel finds the duties of the proffered position to "far exceed" those of a bookkeeper, the *Handbook* clearly indicates that bookkeepers, particularly "full charge" bookkeepers, perform an increasingly broad range of financial duties, including preparing financial reports and summaries for supervisors and managers. Further, the *Handbook's* discussion of the job outlook for bookkeepers, on page 438, states that full-charge bookkeepers now perform many of the same duties as accountants.

Accordingly, the AAO concludes that, to the extent they are described in the record, the duties of the proffered position, including those specifically discussed by counsel on appeal, do not appear to exceed those of a full-charge bookkeeper. As the occupation of bookkeeping, accounting and auditing clerks does not require those seeking employment to have a baccalaureate or higher degree, or its equivalent, the AAO finds

that the proffered position does not qualify as a specialty occupation under the requirements of the first criterion at 8 C.F. R. § 214.2(h)(4)(iii)(A).

To establish that the proffered position qualifies as a specialty occupation under either of the two prongs of the second criterion -- a specific degree requirement is common to the industry in parallel positions among similar organizations, or the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty -- counsel, on appeal, submits letters from three other auto body repair businesses, which state they require their in-house accountants to have baccalaureate degrees. However, these three letters do not establish a degree requirement as the norm within the auto body repair industry.

The letters provided by three other auto body repair firms, which attest that those firms employ in-house accountants, are not persuasive. The limited extent to which these firms describe their accountants' duties does not establish that these employees are in fact engaged in accountant-level duties, that is duties whose performance requires the practical and theoretical application of highly specialized accounting knowledge attained by at least a bachelor's degree in accounting. The descriptions of the proposed duties of the other firms' accountants are too general to establish that the positions have substantially similar performance requirements. Also, the three firms address only their current staffing, and they do not establish a history of recruiting and employing only degreed individuals for what they describe as accountant positions. Finally, the three firms have not documented their assertions.

In addition, the AAO finds the record to contain no evidence that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Accordingly, the AAO concludes that the petitioner is unable to establish its position as a specialty occupation under either prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; or 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 determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the employment histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, in response to the director's request for evidence, the petitioner stated that the proffered position is newly created, created specifically for the beneficiary. Accordingly, the petitioner does not have a hiring history with regard to the position and is, therefore, unable to establish its position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has again reviewed the duties of the proffered position to determine whether they reflect a

higher degree of knowledge and skill than would normally be required of a full-charge bookkeeper or, perhaps, represent an amalgam of jobs that require different skills and qualifications. However, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that normally needed by bookkeepers who routinely work in demanding and complex businesses. Further, the employment, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills not normally possessed by a full-charge bookkeeper. As a result, the AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director's request for evidence did not specifically ask the petitioner for proof that the proffered position was that of an accountant versus that of bookkeeper and, therefore, did not provide the petitioner with an opportunity to address the issue that is the basis for denial. However, counsel misunderstands the purpose of a request for evidence. Such a request is intended to provide a petitioner with an opportunity to provide missing evidence. It is required only when initial evidence of eligibility is missing. In other instances, the issuance of a request for evidence is discretionary. 8 C.F.R. § 103.2(b)(8). In the instant case, the petitioner provided a detailed description of the duties of its proffered position at the time of filing. Accordingly, CIS was not obligated to request additional information about those duties.

For reasons related in the preceding discussion, 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.