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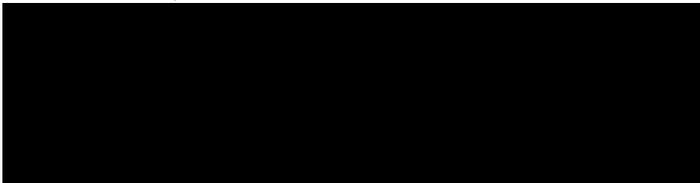
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FILE: WAC 02 275 50218 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2005

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 real estate firm, with seven employees. It seeks to employ the beneficiary as a budget analyst 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 he determined the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) previous counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B. The AAO reviewed the record in its entirety before issuing 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 a budget analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the list of duties provided by the petitioner’s first counsel at the time of filing; and a second list of duties submitted by the petitioner’s subsequent counsel in response to the director’s request for evidence. The descriptions of the proffered position provided at the time of filing and in response to the director’s request for evidence do not reflect the same position within the petitioner’s organization.

At the time of filing, the petitioner described employment in which the beneficiary would have served as a financial manager, specifically indicating that the beneficiary would, among other duties, be responsible for overseeing the personnel functions of its budget, financial and accounting departments. However, in response to the director’s request for evidence, the petitioner revised its initial description to outline a more hands-on role for the beneficiary with regard to its budget and finances. For the purposes of this analysis, the AAO will accept the duties of the proffered position as revised by the petitioner in response to the director’s request for evidence. These duties are as follows:

- Compiles data or information gathered or recorded earlier regarding figures and items in previous years’ budgets (if acting alone); studies and analyses these past figures and items, and arrives at specific amounts for each kind of expenditure for current and subsequent expenses; validates and justifies these amounts or the proposed budgets to management;
- Ensures that specific funds are available for an unforeseen need, like acquisition of capital assets or a substantial increase in business and/or emergencies in the business;
- Formulates policies affecting financial adjustments due to additional costs and expenses, not necessarily included in the current budget;
- Assists management in the sourcing of funds for the company whenever the need arises;
- Maintains on-going and continuing consultation with management affecting changes in budgets, and facilitates short-term and long-range financial operations; and
- Recommends budget revisions especially in relation to personnel promotions and current fiscal adjustments due to present operations and economic needs.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO 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 the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

As the petitioner has identified its proffered position as that of a budget analyst, the AAO turns first to the 2004-2005 edition of the *Handbook* and its discussion of this occupation at pages 72-73. According to the *Handbook*, budget analysts

[p]lay the primary role in the development, analysis, and execution of budgets, which are used to allocate current resources and estimate future financial requirements

[I]n private sector firms, a budget analyst examines, analyzes, and seeks new ways to improve efficiency and increase profits

Budget analysts have many responsibilities in these organizations, but their primary task is providing advice and technical assistance in the preparation of annual budgets. At the beginning of each budget cycle, managers and department heads submit proposed operational and financial plans to budget analysts for review

Analysts examine the budget estimates or proposals for completeness, accuracy, and conformance with established procedures, regulations, and organizational objectives. Sometimes, they employ cost-benefit analysis to review financial requests, assess program tradeoffs, and explore alternative funding methods. They also examine past and current budgets and research economic and financial developments that affect the organization's spending

After this initial review process, budget analysts consolidate the individual departmental budgets into operating and capital budget summaries Budget analysts then help the chief operating officer, agency head, or other top managers analyze the proposed plan and devise possible alternatives if the projected results are unsatisfactory

Throughout the remainder of the year, analysts periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified . .

. . . In order to avoid or alleviate deficits, they may recommend program cuts or reallocation of excess funds Analysts also may be involved in long-range planning activities such as projecting future budget needs.

. . .

Budget analysts . . . develop guidelines and policies governing the formulation and maintenance of the budget, but they also measure organizational performance, assess the effects of various programs and policies on the budget

Although the AAO finds certain similarities between the above description and the petitioner's description of its proffered position, it does not find these similarities to establish the proffered position as that of a budget analyst. Instead, the AAO, like the director, concludes that the proffered position is most closely aligned to that of a bookkeeper, employment described by the *Handbook* at pages 437-438:

Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those which tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. They have a wide range of skills and knowledge from full-charge bookkeepers who can maintain an entire company's books to accounting clerks who handle specific accounts.

In small establishments, *bookkeeping clerks* handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers....They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

The petitioner's description of its position, as provided in response to the director's request for evidence, indicates that the beneficiary would have responsibility for tracking and developing financial information for use by the petitioner's managers, the type of work just described as being performed by bookkeepers in smaller business enterprises. In monitoring the petitioner's financial transactions, the beneficiary would be required to ensure that adequate funds remain available for unforeseen needs, identify the financial adjustments necessary to accommodate additional costs or expenses, prepare reports and summaries on the status of funds, and identify sources of funding available for use by the petitioner. While these activities would clearly require the beneficiary to work with the petitioner's budget, they are not the duties of a budget analyst, whose principal activity involves budget development and analysis.

On appeal, the petitioner again revises its description of the duties to be performed by the beneficiary, identifying the following new responsibilities: preparation and justification of budget restraints based on past expenditures; allocation of funds from budget to spending priorities based on study of company programs; introduction of policies that promote efficient employee performance; and analysis of accounting records to determine funding resources for acquisition of capital assets and profit-oriented programs. The AAO will not, however, consider these additional job responsibilities.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of*

Michelin Tire Corp., 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the duties of the proffered position are those listed in response to the director's request for evidence, which appear to be those of a bookkeeper, as previously discussed.

Having determined the proffered position to be that of a bookkeeper, the AAO turns to the educational requirements for this type of employment. The *Handbook*, at page 434, states the following regarding the educational requirements imposed on those who seek employment as financial clerks, including bookkeeping clerks:

Most financial clerks are required to have at least a high school diploma. However, having completed some college is becoming increasingly important, particularly for those occupations requiring knowledge of accounting. For occupations such as bookkeepers, accounting clerks, and procurements clerks, an associate's degree in business or accounting often is required. Some financial clerks have bachelor's degrees in business, accounting, or liberal arts. Although a degree is rarely required, many graduates accept entry-level clerical positions to get into a particular company or to enter the finance or accounting field with the hope of being promoted to professional or managerial positions. Some companies have a set plan of advancement that tracks college graduates from entry-level clerical jobs into managerial positions. Workers with bachelor's degrees are likely to start at higher salaries and advance more easily than those without degrees.

As entry-level employment for bookkeepers may be obtained by those without a baccalaureate degree or its equivalent, the AAO concludes that the proffered position of bookkeeper does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion, may qualify it under one of the three alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has submitted no evidence to establish its employment as a specialty occupation under either prong 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. In response to the director's request for evidence, previous counsel asserted that the position of budget analyst is common to the petitioner's industry as it is "almost always a necessity given the fact that business enterprises must improve . . . business." However, the requirement of the first prong is not that the proffered position be common to the petitioner's industry but that the petitioner's degree requirement be common to its industry in parallel positions among similar organizations.

Counsel also contended that the degree requirement imposed by the petitioner was sufficient to establish the proffered position as a specialty occupation under the second prong of the criterion. However, a petitioner's

desires cannot dictate whether a position qualifies as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

To establish the proffered position as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO generally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the record contains no evidence of the petitioner's past hiring practices. In response to the director's request for evidence, previous counsel, once again, relied upon the degree requirement imposed by the petitioner as proof of the petitioner's hiring practices. However, the petitioner's degree requirement for its proffered position cannot serve as proof of its normal hiring practices. Therefore, the record does not establish the proffered position as a specialty occupation under the third criterion.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. To determine whether the proffered position meets the requirements of the fourth criterion, the AAO has, once again, reviewed the duties listed by the petitioner in response to the director's request for evidence. It finds no evidence, however, to indicate that the beneficiary's duties would require greater knowledge or skill than that normally needed by bookkeepers who routinely work in demanding and complex businesses. Further, the job, 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 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, the petitioner notes that the Dictionary of Occupational Titles (*DOT*) assigns a Specific Vocational Preparation (SVP) rating of 7 to the occupation of budget analyst. He contends that this rating indicates that the duties of the position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. However, the AAO has determined that the proffered position is not that of a budget analyst and, therefore, this information is not relevant to these proceedings. Moreover, the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

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.