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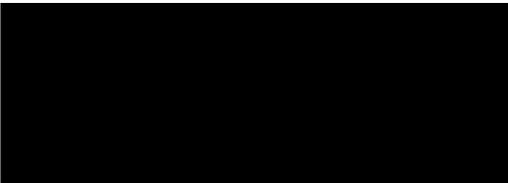


FILE: WAC 04 065 50110 Office: CALIFORNIA SERVICE CENTER Date: **AUG 10 2005**

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 business providing its clients with bookkeeping and tax preparation services. It seeks to employ the beneficiary as an accountant. 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) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with a letter from counsel. 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 an accountant. Evidence of the beneficiary’s duties includes: the Form I-129 and the list of duties provided by counsel in response to the director’s request for evidence. As described, the duties of the proffered position include:

- Preparation of computerized income statements, business control percentages, detailed payroll ledgers, sales taxes, quarterly payroll taxes, payroll taxes, payroll tax depositories, W-2s, and workers compensation insurance payroll reports for Persian clients, including the pickup and delivery of bookkeeping data;
- Preparation of business personal property tax affidavits;
- Filing for federal and state identification numbers;
- Applying for Form ATF9 for businesses involved in selling alcoholic beverages;
- Filing for fictitious business names;
- Preparation of bank reconciliation;
- Preparation of payroll, sales tax and other business returns;
- Assisting in audit and review engagement; and
- Preparation of individual, corporate and fiduciary income tax returns.

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 an accountant, the AAO turns first to the 2004-2005 edition of the *Handbook* and its discussion of this occupation. As stated at pages 68-69, job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is that of public accountants, who:

[p]erform a broad range of accounting, auditing, tax, and consulting activities for their clients, who may be corporations, governments, nonprofit organizations, or individuals. For example, some public accountants concentrate on tax matters, such as advising companies of the tax advantages and disadvantages of certain business decisions and preparing individual income tax returns. Others offer advice in areas such as compensation or employee healthcare benefits, the design of accounting and data-processing systems, and the selection of controls to safeguard assets. Still others audit clients' financial statements and report to investors and authorities that the statements have been correctly prepared and reported. Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.

The director in his denial identified the duties of the proffered position as being more aligned with those performed by bookkeeping, accounting, and auditing clerks. This employment is described in 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.

More advanced accounting clerks may total, balance, and reconcile billings vouchers; ensure completeness and accuracy of data on accounts; and code documents, according to company procedures. These workers post transactions in journals and on computer files and update the files when needed. Senior clerks also review computer printouts against manually maintained journals and make necessary corrections. They may review invoices and statements to ensure that all the information appearing on them is accurate and complete, and they may reconcile computer reports with operating reports.

Having reviewed the duties of the proffered position and the discussion provided by the *Handbook*, the AAO, like the director, concludes that the proffered position is most closely aligned to the occupation of bookkeeping, accounting and auditing clerks. While the petitioner's description of its position indicates that the beneficiary would require some knowledge of accounting principles, it has not established that the

accounting knowledge would be on a par with what an accountant possesses by virtue of at least a baccalaureate degree or the 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. In the instant case, the duties of the proffered position – the preparation of financial reports and forms, as well as tax returns – do not appear to exceed the responsibilities of a full-charge bookkeeper, or an individual in an intermediate position between a bookkeeper and accountant, such as a junior accountant position. The AAO notes that the *Handbook*, at page 438, states that “full-charge bookkeepers” now perform many of the same duties as accountants.

On appeal, counsel significantly expands upon the proffered position's duties, as provided in response to the director's request for evidence. She now states that, in addition to the duties already listed by the petitioner, the beneficiary would be expected to provide accounting, auditing, tax and consulting activities for the petitioner's clients, and would advise companies of the tax advantages and disadvantages of certain business decisions. Counsel further asserts that the beneficiary would offer advice to clients in such areas as compensation and employee health care benefits, the design of accounting and data processing systems, and the selection of controls to safeguard assets. She would also audit clients' financial statements and attest to investors and authorities that such reports have been correctly prepared and reported. Finally, counsel states that the beneficiary would also assume some of the duties normally performed by management accountants, including providing budgeting, performance evaluation, cost management and asset management services to the petitioner's clients, as well as analyzing and interpreting clients' financial information to advise them on business decisions. The AAO will not, however, consider these additional and significantly more complex 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 remain those listed in response to the director's request for evidence and appear to be those of a contract bookkeeper or junior accountant, as previously discussed.

Having determined the proffered position to be that of a bookkeeper or junior accountant, the AAO turns to the educational requirements for these occupations. 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.

For those seeking employment as junior accountants, the *Handbook*, at page 71, states:

[M]any 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.

As entry-level employment for both bookkeepers and junior accountants may be obtained 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. Counsel, on appeal, asserts that as the proffered position is that of an accountant, the discussion of the occupation's degree requirement in the DOL *Handbook* establishes that a degree requirement is the minimum requirement for any type of accounting work. Counsel also contends that the proffered position can be established as a specialty occupation on the basis of its complex and unique nature. She states that the client services provided to the Persian business community are both complex and unique, and can only be performed by an individual with a degree. However, counsel's statements on appeal do not satisfy the requirements of the second criterion. In the absence of documentation, the assertions of counsel will not satisfy the petitioner's burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. It indicates only that, at the time of counsel's response to the director's request for evidence, the petitioner was seeking copies of its past job vacancy announcements. On appeal, counsel does not provide these copies, nor reference the petitioner's efforts to obtain them. She states only that the petitioner contends it requires individuals seeking employment as accountants to hold bachelor's degrees. However, simply going on record without supporting documentary

evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. On appeal, counsel emphasizes that the duties of its proffered position do meet the specialized and complex threshold of the fourth criterion. As characterized by counsel, the petitioner requires that the beneficiary have the highest-level credentials, experience and education, including a degree in accounting, as she would perform her duties without supervision. 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.

Instead, to determine whether the proffered position has met 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 to indicate that the beneficiary's duties would require greater knowledge or skill than that normally needed by full-charge bookkeepers or junior accountants who routinely work in demanding and complex businesses. Further, the position, 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 or junior accountant. 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).

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.