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FILE: WAC 04 089 50669 Office: CALIFORNIA SERVICE CENTER Date: DEC 01 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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 provides tax and insurance services and seeks to employ the beneficiary as an accountant. The petitioner 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 does not qualify as a specialty occupation, and because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal the petitioner submits a brief stating that the offered position qualifies as a specialty occupation, and that the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

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

[A]n 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 are 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) the 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) the Form I-290B with counsel’s brief. 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 I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Oversee and manage the petitioner’s financial structure including the preparation of financial reports;
- Assist in the preparation of business management plans for clients and be involved in tax planning and preparation;
- Record and analyze the financial information of the petitioner and prepare profit and loss statements for each accounting period, prepare management operation reports, the monthly budget, cash flow projections, and balance sheets projecting the petitioner’s assets, liabilities, and capital;
- Compile and analyze client’s financial information detailing assets, liabilities, and profit and loss statements, including other reports summarizing the current and projected company financial position;
- Analyze clients’ financial situations and the feasibility of their expansion programs;
- Handle all tax matters relating to the petitioner, including compliance with all federal, state and local regulations;
- Analyze, report and advise the petitioner regarding tax liabilities and consequences;
- Prepare federal, state, and local tax returns of individual clients, business establishments and other organizations;

- Examine accounts and records and compute taxes owed according to prescribed rates, laws and regulations using a computer system;
- Prepare reports to be submitted to the petitioner detailing the effects of clients' business activities on taxes, and on strategies for minimizing tax liability; and ensure that clients comply with periodic tax payments, information reporting, and other taxing authority requirements.
- Evaluate and analyze past and present operations for effectiveness, efficiency, and conformity with company goals and policies;
- Be responsible for performance evaluation, cost and asset management;
- Hire accounting clerks, as needed;
- Assist clients in devising methods to increase profitability and reduce overhead expenses;
- Orient clients with production, project, sales and financial management principles to assist clients in pursuing and/or maintaining financial soundness and stability.

The petitioner requires a minimum of a bachelor's degree in accounting, management or an equivalent degree for entry into the proffered position.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position appear to be essentially those noted for bookkeepers, accounting or financial clerks, and tax preparers. In the *Handbook*, the Department Of Labor describes, in part, those duties as follows:

Bookkeeping, accounting, and auditing clerks are an organization's financial record keepers. They update and maintain one or more accounting records, including those that tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. . . .

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 the payroll, make purchases, prepare invoices, and keep track of overdue accounts.

. . . .

More advanced accounting clerks total, balance and reconcile billing vouchers, ensure completeness and accuracy of data on accounts, . . . [and] review invoices and statements to ensure that all information is accurate and complete

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

. . . .

The duties of financial clerks vary with the size of the firm. In a small business, a bookkeeper may handle all financial records and transactions, as well as payroll and billing duties. . . .

The *Handbook* further notes that tax preparers prepare tax returns for individuals or small businesses, but do not have the background or responsibilities of an accredited or certified public accountant.

The duties of the proffered position appear to fall within those listed above. As described by the petitioner, they are fairly generic in nature and do not appear to be of such complexity that they require the theoretical and practical application of a body of highly specialized knowledge. For example, bookkeepers, accounting and financial clerks routinely record and analyze the financial information of businesses, prepare profit and loss statements, balance sheets, and other financial statements detailing financial position, and assist in budget preparation in accordance with generally accepted accounting principles.¹ On the other hand, and according to the *Handbook*, management accountants record and analyze financial information of the companies for which they work. Their responsibilities include budgeting, performance evaluation, cost and asset management. They are also usually 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. The duties of the proffered position, as described, do not appear to be of the complexity or strategic importance of those described for management accountants. Taking into consideration the petitioner's organizational structure, staffing and nature of its business, a tax and insurance services provider with one employee and gross annual income of \$309,233, the duties described would routinely be performed in the industry by those with less than a baccalaureate level education. Thus, it cannot be concluded that the duties of the proffered position involve the theoretical and practical application of a body of highly specialized knowledge. The *Handbook* further notes that the majority of financial clerk/bookkeeping positions require at least a high school diploma, but that some college education is becoming increasingly important for occupations requiring knowledge of accounting. An associate degree in business or accounting is often required for accounting and procurement clerks, as well as occupations in bookkeeping. The petitioner has, therefore, failed to establish that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the offered position with regard to the accounting/bookkeeping duties noted above. 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

¹ According to the website for Skyline College, a community college located in San Mateo, CA (www.skylinecollege.net), an associate's degree in business or accounting would involve learning the fundamentals about financial accounting principles and concepts, balance sheets, income statements, cash flow statements, the GAAP, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system using tools such as QuickBooks, QuickBooks Pro, or Peachtree, 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 would provide knowledge about the GAAP and accounting techniques which serve the needs of management and facilitate decision making.

The petitioner also states that the beneficiary will be involved in the preparation of federal, state and local tax returns of individual clients, business establishments and other organizations. In that regard, the beneficiary will examine accounts and records and compute taxes owed according to prescribed rates, laws and regulations. She will also ensure that clients comply with periodic tax payments, information reporting and other taxing authority requirements. These duties are routinely performed by bookkeeping/administrative personnel and tax preparers. The record indicates that the petitioner had in excess of 5,000 clients in the year 2003, yet only claimed a gross annual income of approximately \$300,000 in the same year (the petitioner's 2002 federal income tax return noted on its schedule C that its income tax and insurance services business generated gross receipts of only \$79,689). The petitioner also filed of record a fee schedule for its tax preparation services. That schedule indicated that the petitioner charged the following fees for its services: \$30.00 for preparation of a Form 1040A and 1040 EZ; \$40.00 for preparation of a Form 1040 plus Earned Income Credit schedule; and \$65.00 for preparation of a Form 1040 and Schedule A (long form). The schedule indicated fees ranging from \$10.00 - \$100.00 for preparation of other tax forms. This level of business, fee scheduling, and resulting income is indicative of a tax return preparation business, not one that provides accounting services requiring the theoretical and practical application of a body of highly specialized knowledge. The petitioner states that the beneficiary would also prepare management reports detailing the effects clients' business activities have on taxes and strategies for minimizing tax liability. The record does not, however, contain any documentation corroborating those assertions. Further, the petitioner states that a portion of its income is also generated from providing insurance services, which would further reduce the amount of business income the petitioner realizes from providing tax preparation services. The record does not indicate, however, what, if anything, the petitioner does with regard to providing insurance services. The *Handbook* notes that the most significant source of education or training for tax preparers is moderate-term on-the-job training. The occupation of "tax preparer" does not, therefore, meet the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations, and in support of that assertion submits copies of several job advertisements. None of those advertisements, however, are from organizations similar to the petitioner, and none of them involve tax preparation services. Further, they are for accountant positions and it has been determined that the duties of the proffered position are not those of an accountant. As such, the advertisements are of little evidentiary value and the petitioner has failed to establish the referenced criterion at C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also asserts that it normally requires a degree for the proffered position, yet offers no evidence in support of that assertion. Simply going on the record without supporting documentary evidence is not sufficient for 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 190 (Reg. Comm. 1972)). Further, 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.² To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform 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. The evidence submitted does not establish the criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3).

Finally, the duties of the proffered position appear to be routine for bookkeeper, accounting/financial clerks, and tax preparers. The record does not establish that they are so complex or unique that they can be performed only by an individual with a degree in a specific specialty, or that they are so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties detailed are routinely performed by individuals with less than a baccalaureate level education. The petitioner has failed to established the referenced criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) and (4).

The final issue to be considered is whether the petitioner is qualified to perform the duties of the proffered position. It has been determined that the offered position does not qualify as a specialty occupation, thus, there would be no regulatory requirement that the petitioner possess any specific level of education in order to qualify to perform the duties of that position. The petitioner deems the beneficiary qualified to perform the duties of the position based upon her past education, training, and experience. That determination is one over which the petitioner has sole authority and discretion as the position does not qualify for H-1B status and is not subject to regulation by CIS.

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.

² 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.