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U.S. Citizenship
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FILE: WAC 04 256 52166 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005

IN RE: Petitioner:
Beneficiary:



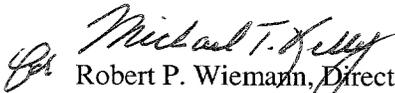
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a bakery with multiple retail outlets. It seeks to employ the beneficiary as an accountant and to classify him 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 on the ground that the record failed to establish that the proffered position qualifies as 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the appeal (Form I-290B). The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes its business as a bakery, specializing in Filipino pastries, with four retail outlets in southern California and contracts with over 60 grocery stores and other businesses. The petitioner states that it was established in 1979 and has 100 employees. In 2002, according to its federal income tax return, the petitioner had gross receipts of \$7,482,420. Because of the company's continued growth, the petitioner states that it needs to hire the beneficiary as a part-time (20 hours/week) accountant to augment its current accounting staff. The duties of the position are described as follows:

[The beneficiary] will prepare, analyze and verify the quarterly and yearly tax returns, perform audits, prepare payroll statements and deductions, monthly expense reports, and financial statements.

[The beneficiary] will handle the preparation of the company's general ledger, monthly and yearly financial reports, monitor information systems, compile and analyze financial information to prepare entries into the accounts. He will detail the company assets, liabilities, and capital and provide tax planning advice. He will review finances and current taxes and devise a long range tax plan and recommend ways to reduce taxes. He will advise and recommend regarding tax strategies, advantages and disadvantages of certain business decisions or transactions. [The beneficiary] will also be responsible for devising a financial system that will help our company establish a more systematic and smooth inventory procedure.

Moreover, [the beneficiary] will prepare the company's balance sheets, profit and loss statements, necessary checks, payroll, tax remittances, and other reports to summarize the company's current and projected financial position. Likewise, he will modify and coordinate implementation of the accounting and accounting control procedures. He will monitor the company's budgeting, performance evaluation, cost and assets management. He will prepare the company's letter correspondence with the existing and prospective clients regarding transactions, financing and billing statements. [The beneficiary] will also analyze the transactions and prepare billing statements.

According to the petitioner, the proffered position requires at least a bachelor's degree in accounting. The beneficiary is qualified for the position, the petitioner declares, by virtue of his bachelor of science in accountancy from De La Salle University in Manila, the Philippines, granted on August 30, 2003.

In his decision the director found that the record failed to establish that the beneficiary would be performing the duties of an accountant in the proffered position. The director noted that the petitioner, in its initial letter in support of the petition, stated that it currently had two employees in its accounting department, both working in support staff roles. In its later submitted organizational chart, however, the petitioner identified six employees in the accounting department, including a finance manager, an accounting manager, an accounting supervisor, two accountants, and an accounting clerk. The petitioner provided no explanation for this conflicting information. The director determined that the petitioner is not engaged in the type of business that requires the employment of seven corporate accountants, and concluded that the beneficiary would be largely performing the duties of a bookkeeping, accounting, or auditing clerk, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The director found the evidence of record insufficient to show that the duties of the proffered position could not be performed by an experienced individual without a baccalaureate degree,

or that the petitioner had in the past required a baccalaureate degree in a specific specialty for the position, or that such a degree is common to the industry in parallel positions among similar organizations to the petitioner, or that the duties of the position are so specialized and complex that baccalaureate level knowledge is required to perform them. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). Finally, the director noted that, according to the evidence of record, some of the petitioner's previously approved H-1B employees had not been paid at the compensation rates stated in the petitions and/or had not been employed for the number of hours stated in the petitions. This evidence, the director stated, added to the petitioner's lack of credibility in the instant proceeding.

On appeal counsel asserts that the duties of the proffered position, notwithstanding some incidental bookkeeping duties, are primarily those of an accountant, an occupation with specialized and complex duties that requires a baccalaureate degree in accounting. Counsel alludes to the advertisements for other accountant positions in the record, all of which require a degree, and asserts that the director failed to consider this evidence of a degree requirement that is common to the industry in parallel positions among similar organizations. Counsel also asserts that there is no proof of fraud in the instant petition.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook*, *supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti Inc. v. Reno, id.*, at 1165-66.

According to the *Handbook* there are four major fields of accounting – public, management, government, and internal auditors – of which management accountant appears closest to the proffered position in this case. As described in the *Handbook*, 2004-05 edition, at 68-69:

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, cost management 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.

Most accounting positions require at least a bachelor's degree in accounting or a related field, as indicated in the *Handbook, id.*, at 70. The *Handbook* goes on to say, however, that some junior accounting positions require less than a baccalaureate degree:

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.

Id. at 71. Thus, although most accounting positions require a baccalaureate degree in accounting or a related specialty, it is possible to enter lower-rung positions in the occupational field with less than a baccalaureate educational background and/or experience as a bookkeeper or accounting clerk.

The *Handbook's* subsection "Sources of Additional Information" (page 74) refers the reader to the Internet site for the American Council for Accountancy and Taxation (ACAT), the professional organization that provides the credentials Accredited Business Accountant®/Accredited Business Advisors® (ABA).¹ That Internet site reveals that a degree in accounting or a related specialty is not required for ABA accreditation. Eligibility for the eight-hour comprehensive examination for the ABA credential requires three years of "verifiable experience in accounting, taxation, financial services, or other field requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination."² "Up to two" of the required years of work experience "may be satisfied through college credit."

The *Handbook* describes the occupation of bookkeeping, accounting, and auditing clerks as follows:

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. All of these clerks make numerous computations each day and increasingly must be comfortable using computers to calculate and record data.

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.

¹ At its Internet site (<http://www.nsacct.org/acat.asp>), the National Society of Accountants describes ACAT as follows:

The **Accreditation Council for Accountancy and Taxation (ACAT)** is an independent accrediting and monitoring organization affiliated with the National Society of Accountants. ACAT accredits professionals in independent practice who have demonstrated measurable knowledge of the principles, practices, and ethical standards of accounting, taxation, information technology and related financial services.

² The ACAT Internet site (<http://www.acatcredentials.org/index.html>) states that the examination tests "proficiency in financial accounting, reporting, statement preparation, taxation, business consulting services, business law, and ethics."

Bookkeepers also prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

In large offices and accounting departments, *accounting clerks* have more specialized tasks . . . such as accounts payable . . . or accounts receivable Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts, to ensure that payments are up to date. More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on accounts; and code documents, according to company procedures.

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. They also correct or note errors for accountants or other workers to adjust

. . . . *Demand for full-charge bookkeepers is expected to increase, because they are called upon to do much of the work of accountants, as well as perform a wider variety of financial transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects [emphasis added].*

Handbook, id., at 437-38. According to the *Handbook*, at 434, a two-year associate's degree in business or accounting is often required for bookkeeping and accounting clerk positions. A four-year bachelor's degree is not required for entry-level positions, the *Handbook* indicates, though many such degree-holders accept bookkeeping and accounting clerk positions to get into the field or a particular company with the aim of being promoted to professional or managerial positions. *See id.* The *Handbook* also indicates that for tax preparers the most significant source of education is on-the-job training. *See id.* at 649.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the duties of the position normally require a degree in a specialty field. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The record in this case does not establish that the proffered position requires a baccalaureate degree in accounting or a related specialty. While the position may include some duties that involve accounting functions, the AAO is not persuaded that they are at a level of specialization or complexity that they require the theoretical and practical application of a body of highly specialized knowledge and a baccalaureate degree or its equivalent in the field of accounting or a related specialty field. The petitioner has submitted no information on appeal to explain the conflicting information in its initial letter and subsequent organizational chart as to the number of employees it already has performing accounting functions. The petitioner's statement that the accountant position slated for the beneficiary would manage

the functions performed by the employees identified in the initial letter is inconsistent with the job titles in the organizational chart, which lists those two support staff personnel as the accounting manager and the accounting supervisor. The organizational chart also lists four other employees in the accounting department – including a finance officer, two accountants, and an accounting clerk. The petitioner has not provided job descriptions for any of those positions, or explained how the duties of the proffered position would correspond with the already existing positions. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner.

The proffered position also lacks important attributes of a management accounting position, as described in the *Handbook*. For example, the *Handbook* indicates that management accountants are involved in strategic planning or new-product development, usually as part of an executive team, and prepare financial reports for nonmanagement groups like stockholders, creditors, regulatory agencies, and tax authorities. These functions are not reflected in the petitioner's description of the proffered position's duties. Thus, the scope of the proffered position lacks both the breadth and the depth of a management accounting position.

Based on the evidence of record, the AAO agrees with the director that the proffered position is a combination bookkeeping, accounting, and auditing clerk, as described in the *Handbook*. A baccalaureate or higher degree is not the normal minimum requirement for entry into bookkeeping, accounting, and auditing clerk positions, though the *Handbook* indicates that employers often require a two-year associate's degree in business or accounting.³ Since bookkeeping, accounting, and auditing clerks do not require a baccalaureate degree in accounting or a related specialty, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner has submitted a series of internet announcements for accountant positions as evidence that a baccalaureate degree is the minimum educational requirement for entry into the occupation. Since the record in this petition fails to establish that the beneficiary would be performing the services of an accountant, the internet announcements are not persuasive evidence that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. The AAO also notes that not all of the advertised positions require a baccalaureate degree in accounting or a related specialty. Thus, the proffered position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in

³ According to the website for Skyline College, a community college located in San Mateo, California, (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, and break even analysis, as well as 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.

accounting or a related specialty, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), counsel asserts that all of its accountants have baccalaureate degrees, though it does not indicate whether they are in a specific specialty. The petitioner was advised in the RFE to provide evidence of the degrees held by its previously hired accountants, as well as copies of the degrees of the two employees identified in the initial letter as working in the accounting department. In the response to the RFE counsel asserted that all of the petitioner's employees in the accounting department have baccalaureate degrees in business administration or accounting, but no copies or other documentary evidence of such degrees was submitted. With respect to the two individuals whose degrees were specifically requested, counsel asserts that they are no longer in the employees' possession. Thus, the evidence requested by the director has not been submitted. Simply going on record without supporting documentary evidence does not satisfy the petitioner's burden of proof. *See 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)). In the response to the RFE counsel also referred to a previous job posting of the petitioner's accountant position as evidence that applicants for the position must have a baccalaureate degree. The job posting submitted for the record, however, simply announces the accounting position without specifying what sort of educational degree is required. Unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For the reasons discussed above, the AAO determines that the record fails to show that the petitioner normally requires a degree in a specific specialty for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2 (h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The AAO agrees with the director that the duties of the position do not exceed the occupational scope of an experienced bookkeeping, accounting, or auditing clerk and could be performed by an experienced individual with less than baccalaureate level knowledge in accounting or a related specialty.

Thus, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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