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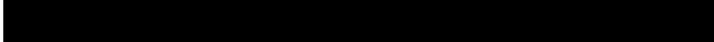
U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 002 51037 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 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.

Robert P. Wiemann

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 is an apparel wholesaler, with 2 employees. It seeks to employ the beneficiary as an accountant 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 that 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 evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (3) Form I-290B, with counsel's letter. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary, based on another filing, was previously granted H-1B status for the period January 17, 2001 to October 1, 2003. Under the portability provisions of section 105 of the American Competitiveness in the Twenty-First Century Act of 2000, section 214(n) of the Act, 8 U.S.C. § 1184(n), an H-1B beneficiary may begin working for a new employer as soon as that employer files an H-1B petition on behalf of the alien. The petitioner in the instant case filed its petition to extend the beneficiary's H-1B employment and status on October 1, 2003.

However, a copy of the beneficiary's 2002 Form 1099, submitted by the petitioner in response to the director's request for evidence, shows the petitioner to have employed the beneficiary in some capacity prior to the filing of the instant petition. Accordingly, although this issue is not before the AAO, the record indicates that the beneficiary may have violated the terms of his H-1B admission and may not, therefore, be eligible for an extension of H-1B status.

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 September 22, 2003 letter of support; and counsel’s July 1, 2004 response to the director’s request for evidence. As described by counsel, the duties of the proffered position would require the beneficiary to:

- Prepare, review for accuracy, and submit monthly financial statements such as balance sheets, profit and loss statements, cash position reports and projections (20 percent of the beneficiary’s time);
- Monitor all project budgets, and prepare variance reports and project cost analyses (10 percent of the beneficiary’s time);
- Verify accuracy on payment of goods and review purchased items to ensure proper posting and control of accounting records (20 percent of the beneficiary’s time);
- Provide analysis and reconciliation of balance sheet and nominal accounts (15 percent of the beneficiary’s time);

- Analyze accounting procedures at periodic intervals to determine efficiency and adherence to the financial controls in effect, proposing changes or improvements in operations when necessary (5 percent of the beneficiary's time);
- Monitor and control inventories, and periodically audit the perpetual inventory records for accuracy, assisting with physical inventories (10 percent of the beneficiary's time);
- Oversee all banking procedures, and maintain the check register, preparing checks for all company obligations (10 percent of the beneficiary's time); and
- Assist in the preparation of quarterly and annual tax returns, and prepare the necessary reportorial requirements and remittances for government agencies (10 percent of the beneficiary's time).

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)).

In his denial, the director determined that the record failed to establish that the petitioner engaged in the type of business that typically requires the services of an accountant. However, the discussion of the occupational title of accountants and auditors in the *Handbook* does not support the director's conclusion. It indicates, instead, that accountants perform in a range of business settings, working throughout private industry and government. The fact that the petitioner is a wholesale apparel business would not preclude its employing the beneficiary as an accountant. Accordingly, the AAO withdraws the director's finding in this regard.

The petitioner has identified its proffered position as that of an accountant. Therefore, the AAO turns first to the 2004-2005 edition of the *Handbook* and its discussion of this occupation.

As stated at pages 68-69 of the *Handbook*, 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 management accountants, who:

[r]ecord and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, cost management, and asset management 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 AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would require the beneficiary to have an understanding of accounting principles. However, the performance of duties requiring accounting knowledge does not establish the proffered position as that of an accountant. The question is not whether the petitioner's position requires knowledge of accounting principles but rather whether it 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. To make this determination, the AAO must consider the petitioner's business operations.

While the size of a petitioner's business operations is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker as an accountant. In cases where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to establish that the proffered position's accounting duties would require a level of knowledge obtained only through a baccalaureate degree in accounting or its equivalent.

In the instant case, the record establishes the petitioner as a small business grossing less than \$1 million annually.¹ Accordingly, the AAO has reviewed the record for evidence of the petitioner's business operations, as well as its financial structure and operations, to determine whether the accounting employment described by the petitioner would impose a degree requirement on the beneficiary.

At the time of filing, the petitioner indicated that it required the services of an accountant because of the "large number of accounts" it maintained. In response to the director's request for evidence, counsel also stated that the petitioner was "one of the leading jobbers in the off-price apparel industry" with numerous accounts and large cash flows, submitting a copy of a marketing letter from the petitioner to apparel companies indicating its willingness to pay cash for their merchandise.

While the AAO agrees that the management of numerous business or project accounts, as well as significant flows of funds in and out of these accounts, would create a potentially complex financial environment, it does not find the record to support the assertions made by the petitioner and counsel regarding the petitioner's business operations. The record contains no evidence to establish that the petitioner is required to manage numerous accounts, e.g., invoices, purchase orders, business contracts, inventories, shipping reports, or correspondence. Going on record without supporting documentation is not sufficient to meet 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)). Neither does it contain financial documentation to support counsel's assertion that the petitioner's business involves large cash flows. Without supporting documentary evidence, the assertions of counsel do not satisfy the petitioner's burden of

¹ Although the Form I-129 indicates the petitioner's gross annual income is \$100,000, the 2002 federal and state tax returns submitted in response to the director's request for evidence report a much higher figure, \$635,927. The AAO has considered the income reported on the petitioner's tax returns for the purposes of these proceedings.

proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the record does not establish that the financial requirements created by the petitioner's business operations are of sufficient complexity to impose a degree requirement on the beneficiary.

The record also fails to indicate that the petitioner's relatively recent incorporation has resulted in the types of financial obligations – lines of credit, complex depreciation schedules for newly acquired infrastructure or equipment, or loan agreements – that might complicate its financial situation and require the services of a degreed accountant. While the petitioner's 2002 tax return indicates that the petitioner has outstanding loans, the petitioner has submitted no evidence to establish that the terms of these loans or their repayment schedules impose complicated accounting requirements. Nor does the petitioner indicate that it seeks the beneficiary's services with regard to managing this debt or its repayment. Therefore, the record does not establish that the financial obligations incurred by the petitioner in establishing its business require servicing by an accountant.

Additionally, the AAO finds the record to lack documentation of the petitioner's organization, as described at the time of filing. In his request for evidence, the director specifically asked the petitioner to submit quarterly wage reports for its employees, a list of all employees by name, job title and current immigration status, and copies of its payroll summary and documentation of the wages paid to its employees. Although counsel's response to the director references this documentation, the AAO does not find it to be included in the record before it. The only employment-related evidence in the record is a copy of the beneficiary's Form 1099 for 2002, indicating he received "nonemployee compensation" from the petitioner. As a result, the record also fails to establish that the petitioner employs the two individuals claimed on the Form I-129.

For all these reasons, the petitioner has failed to demonstrate that its financial situation or business operations are of sufficient complexity to require the level of accounting knowledge that may only be obtained through a baccalaureate degree in accountancy. Accordingly, the duties of the proffered position are not established as those of an accountant. Instead, they appear more closely aligned to the accounting responsibilities of bookkeepers or junior accountants, employment that does not impose a degree requirement on those seeking entry-level employment.

Educational requirements for financial clerks, including bookkeepers, is discussed at page 434 of the *Handbook*:

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.

With regard to junior accountants,² 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/junior accountant 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.

To establish the proffered employment as a specialty occupation under 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, in response to the director's request for evidence, submitted copies of four Internet job advertisements. This documentation does not, however, satisfy the requirements of the criterion's first prong.

Of the four announcements, none describes a degree requirement in parallel employment among organizations similar to the petitioner, an apparel wholesaler. Instead, the advertisements are published by an apparel retailer, an apparel manufacturer, a manufacturer of unspecified products, and a real estate developer. Moreover, none of the announcements describe duties that are parallel to those of the proffered position. Therefore, the record does not establish that the petitioner's degree requirement is the norm within its industry.

On appeal, counsel contends that the findings of *Matter of General Atomic Company* 17 I&N Dec. 532 (Comm. 1980) allow a petitioner to establish its degree requirement as common to its industry by proving that a degree is a "minimum realistic prerequisite for entry into a profession." Counsel also asserts that the findings of *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989) make the petitioner's size irrelevant when establishing its degree requirement as an industry norm. The AAO does not agree.

² 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 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 that serve the needs of management and facilitate decision-making.

The findings in *Matter of General Atomic Company* focus on whether an immigrant visa beneficiary with an undergraduate degree in civil engineering qualifies as a person of distinguished merit and ability. In *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989), the court concluded that the former Immigration and Naturalization Service (INS) had failed to consider the specific responsibilities of a graphic designer position and, therefore, erred in determining that the position did not require a professional. Therefore, the findings in neither case address the requirements at 8 C.F.R. § 214.2(h)(iii)(A)(2). Despite counsel's assertions to the contrary, a petitioner seeking to qualify its position as a specialty occupation under the first prong of the second criterion must establish that a degree requirement is common to its industry in parallel positions among similar organizations. CIS' reliance on the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) to evaluate whether a position qualifies as a specialty occupation is confirmed by the findings of *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 record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. It contains no evidence that would distinguish the proffered position, based on its unique nature or complexity, from similar non-degreed employment. Accordingly, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

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; and 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.

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 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 petitioner has offered no evidence of its normal hiring practices with regard to the proffered position.

In response to the director's request for evidence, counsel contended that the petitioner's accounting needs had previously been met through outsourcing and that it wished to hire an in-house accountant in order to cut these costs. A review of the petitioner's 2002 federal tax return does not, however, support counsel's statements regarding the petitioner's previous reliance on outside accountants to perform the duties of the proffered position or its desire to cut accounting costs by hiring the beneficiary. The petitioner's 2002 tax return indicates it spent approximately \$1,100 for accounting services, too low an amount to cover an outside accountant's performance of the proffered position's duties and far less than the \$34,000+ it has stated it would pay the beneficiary over the course of a year. Accordingly, the record does not establish that the petitioner currently relies on outside accountants to perform the duties of the proffered position or that its hiring of the beneficiary to replace this outside support would lower its accounting costs. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the record does not establish that the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

To qualify a proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must establish that the nature of the position's 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. As the employment of bookkeepers or junior accountants does not normally impose a degree requirement on those seeking such employment, the petitioner must, therefore, distinguish the duties of the proffered position from those generally performed by bookkeepers or junior accountants.

However, the petitioner's discussion of the proffered position's responsibilities does not indicate that the duties to be performed by the beneficiary would require a greater level of knowledge or skill than that normally possessed by bookkeepers or junior accountants. Neither does the petitioner describe duties that represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications other than those of a bookkeeper or junior accountant. Therefore, in the absence of complex and specialized duties to set it apart from similar types of employment, the proffered position may not be established as a specialty occupation under the fourth criterion.

As already noted, the beneficiary in the instant case was previously approved for H-1B status, based on a Form I-129 petition filed by another employer. However, CIS approval of the prior H-1B petition benefiting the beneficiary does not provide a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For the reasons previously discussed, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the petitioner's appeal is dismissed.

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 met that burden.

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