

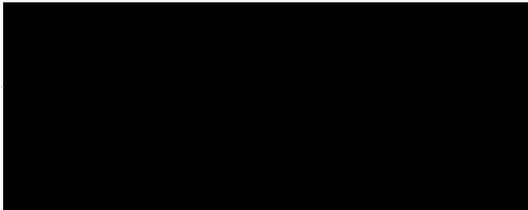
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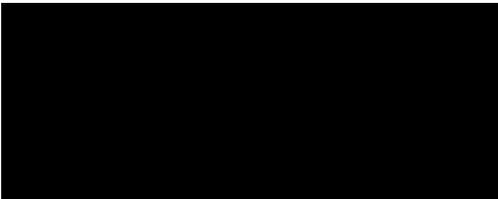


FILE: WAC 03 222 54332 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 2005

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 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 a real estate investment and development firm that seeks to employ the beneficiary as an accountant. The petitioner, therefore, 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 petitioner failed to establish that the duties that the beneficiary would actually perform qualify as a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

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.

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 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. 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 Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail preparing cash flow and budgetary projections and profit and loss statements; preparing and analyzing financial statements; instituting, developing, and modifying a computerized accounting system; researching and explaining tax policies; assisting in Internal Revenue Tax Service (IRS) tax audits; performing financial statement, company compliance, and operational audits; and providing consulting services such as setting up quality control. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree with an extensive amount of accounting/auditing experience. The petitioner found that the beneficiary was qualified for the proffered position because of her educational background, the equivalent of a U.S. bachelor's degree in accounting, and her employment experience.

The director determined that although the duties described by the petitioner would require the theoretical and practical application of highly specialized knowledge obtained through the attainment of a bachelor's degree, the petitioner failed to demonstrate sufficient organizational complexity to establish an ongoing need for an accountant. The director stated that because the petitioner's professed need of an accountant was not readily apparent, he must determine what are the beneficiary's actual duties and determine whether they require the theoretical and practical application of specialized knowledge obtained through the attainment of a bachelor's or higher degree. The director concluded that the actual duties to be rendered by the beneficiary do not qualify as falling within a specialty occupation. The director stated that simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The director stated that the petitioner must establish that there is a reasonable and credible offer of employment that is consistent with the needs of the petitioning organization. According to the director, the petitioner failed to show that the proffered position's duties are normal and customary in similar organizations in the petitioner's industry or that the petitioner has unique and specific needs for an accountant for the specified duration of employment.

On appeal, counsel states that the director concurred that the proffered position required the theoretical and practical application of highly specialized knowledge obtained through the attainment of a bachelor's degree. Counsel relates that the director stated that he was not convinced that the petitioner had sufficient organizational complexity to establish an ongoing need for an accountant, and that he could not, therefore, conclude that the actual services to be rendered by the beneficiary were those of a specialty occupation. Counsel contends that the submitted evidence showed that the petitioner was a bona fide entity with commercial real estate holdings worth millions of dollars, and required the services of an accountant. Counsel refers to partnership agreements, grant deeds, site photographs, appraisal reports, and the organizational chart describing real estate to support his contention. Referring to an H-1B approval notice for

a former employee, counsel contends that CIS has already determined that the proffered position is a specialty occupation. Counsel emphasizes that because the director acknowledged that the beneficiary's duties are encompassed within those of an accountant, the director should have concluded that the proffered position was a specialty occupation as a matter of law. Finally, counsel claims that the director erred by asserting that the petitioner must have a reasonable and credible offer of employment that is consistent with the petitioning entity's requirements. Referring to a prior AAO case, counsel states that in the case the AAO determined that the concept of "speculative employment" had no basis in determining whether an underlying H-1B petition should be approved.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past, and submits a copy of the approval notice. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The AAO first considers 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; 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 often considered by CIS when determining these criteria include: whether the *Handbook* reports that 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Although the director stated that the duties described by the petitioner would require the theoretical and practical application of highly specialized knowledge obtained through the attainment of a bachelor's degree,

the director found that the petitioner failed to demonstrate sufficient organizational complexity to establish an ongoing need for an accountant, and since the petitioner's alleged need of an accountant was not readily apparent, the director stated that he must determine the beneficiary's actual duties and whether they require the theoretical and practical application of specialized knowledge obtained through the attainment of a bachelor's or higher degree. The denial letter concluded by stating that the actual duties to be rendered by the beneficiary would not qualify as falling within a specialty occupation.

Counsel refers to submitted evidence of partnership agreements, an operating agreement, grant deeds, site photographs, appraisal reports, and a chart describing real estate to establish that the petitioner is a bona fide entity with commercial real estate holdings worth millions of dollars, and requires the services of an accountant.

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* reveals that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook*, 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, and cost 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.

The AAO finds that the information in the *Handbook* about accountants and the submitted evidence is not sufficient to establish that the beneficiary would perform the duties of an accountant. Although the petitioner's real estate chart lists 18 properties, its 2000 and 2002 federal income tax returns disclosed that the petitioner actually claims interest in only several real estate properties in Los Angeles, California: 1215 Maple, 1221-1227 Maple, 1301 S. Broadway, and the category of "general expenses." The petitioner's real estate chart reveals that property is owned by Fashion Mall, New Alley Center/Plaza, and California Properties Associates; these properties are not owned by the petitioner. Similarly, not all of the partnership agreements are entered into with the petitioner. For instance, agreements are between Behnam Soroudi, limited partners, and The Fountain Group, New Alley Center, Heritage Group Associates, and Quest Enterprises, and an operating agreement is between Melrose Enterprises, LLC and certain company members. A review of the grant deeds reveals that the petitioner does not have a legal interest in many of them. By way

of example, 777 Investment Group LLC, Heritage Group Associates, and San 12 LLC are shown on grant deeds, and the petitioner is not. The beneficiary, therefore, will not be responsible for many of the properties described in the submitted evidence. Further, none of the evidence showed that the beneficiary will perform duties as described in the *Handbook* such as preparing financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Given that the petitioner has only three employees, a bookkeeper, a property supervisor, and a secretary/receptionist, the beneficiary will not be part of an executive team. Consequently, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proffered position. Accordingly, the evidence contained in the record cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, accountant.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to 30 job postings and a letter from Mohammad J. Virani, a certified public accountant. This evidence is not persuasive. With the job postings, either the nature of the companies in the postings are not disclosed or they differ in nature from the petitioner, a real estate investment and development firm with three employees. For instance, the companies range from product distributors and wholesalers, a drywall, plaster, and painting contractor, a lighting fixture company, product manufacturing companies, a publishing/printing company, a healthcare company, a government agency, and insurance companies to market research companies, a computer consulting company, and a marketing and public relations company. Only one posting is for a real estate/property management company; however, the posting does not describe the size or scope of the company – Southland Real Estate/Property Management Company. Thus, the postings fail to establish that a degree requirement is common to the industry in parallel positions among similar organizations. The letter from Mohammad J. Virani does not discuss the petitioner, its industry, or the specific duties of the proffered position. Consequently, the letter fails to establish that a specific degree requirement is common to the petitioner's industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. As already discussed, the AAO finds that the submitted evidence is not sufficient to establish that the beneficiary would perform the duties of an accountant.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner submitted a document indicating that it previously employed accountants. One accountant was employed from August 2002 to October 2002; another from March 2002 to June 2002; and a third accountant from December 1999 to March 2002 and from December 1994 to November 1999 as an independent contractor.

This evidence is not convincing. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO has already discussed the shortcomings of the submitted evidence. Consequently, the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

As related in the discussion above, 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.

¹ 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.