

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services

U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



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FILE: EAC 03 259 56091

Office: VERMONT SERVICE CENTER

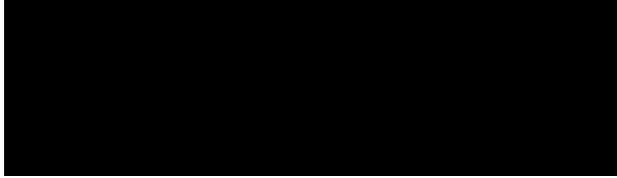
Date: JUN 21 2005

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, 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 is a restaurant and lounge. It and seeks to employ the beneficiary as a budget accountant and endeavors to classify her 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 was not a specialty occupation. On appeal, counsel submits a brief indicating that the proffered position qualifies as a specialty occupation.

The issue to be discussed 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 a budget 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:

- Analyze past and present financial operations of the restaurant, bar and lounge business and estimate future revenues and expenditures to prepare a budget;
- Analyze records of present and past operations, trends and costs, estimated and realized revenues, administrative commitments, and obligations incurred to project future revenues and expenses, using a computer;
- Document revenues and expenditures expected and submit to management;
- Maintain budgeting systems which provide control of expenditures made to carry out activities, such as advertising/marketing, production, maintenance, or planning for catering contracts and special events;
- Advise management on matters, such as the effective use of resources and assumptions underlying budget forecasts; and
- Interpret budgets to management.

The petitioner requires a minimum of a bachelor's degree in business administration with a major in finance or its equivalent for entry into the proffered position.

In response to the director's request for evidence, the petitioner submitted additional duties to be performed by the beneficiary which were not within the scope of duties initially presented in support of the Form I-129 petition. For example, the petitioner indicates that the beneficiary would also: conduct weekly inventories of wines, liquors, beers and raw materials; evaluate weekly or monthly procurement costs through price canvassing; establish the "standard cost" of menu items in consultation with chefs and bartenders; determine

if the desired profit margins are being obtained relative to sales and cost of goods sold; evaluate pricing and costing of "party packages or catering" to determine profitability; and monitor daily the chefs' and bartenders' utilization of ingredients or mixtures. These are duties that would normally be performed by food service managers, not accountants in the industry. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The additional duties submitted, therefore, will not be considered.

The remaining duties listed by the petitioner in support of the Form I-129 petition (the petitioner's letter of August 25, 2003) refer to those normally performed by a budget accountant as described in the *Dictionary of Occupational Titles (DOT)*. The occupation of accountant is a specialty occupation, normally requiring those seeking entry-level employment to have a bachelor's degree in a related field. However, while the petitioner has identified its position as that of a budget accountant, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention. A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used in the *DOT* in discussing an occupation title, e.g., a budget accountant applies principles of accounting to analyze past and present financial operations and estimates future revenues and expenditures to prepare a budget, or maintains budgeting systems which provide control of expenditures made to carry out activities, such as advertising and marketing, production, maintenance, or to project activities. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In the instant case, the petitioner has offered no description of the accounting duties beyond the generalized terms describing the position in the *DOT*. It cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). As previously noted, CIS must examine the actual employment of the alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. The petitioner's description of the accounting duties, however, is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of an accountant. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation – employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation with regard to the accounting duties described, for which it is seeking the beneficiary's services.

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the director's denial of the I-129 petition shall not be disturbed.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

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