

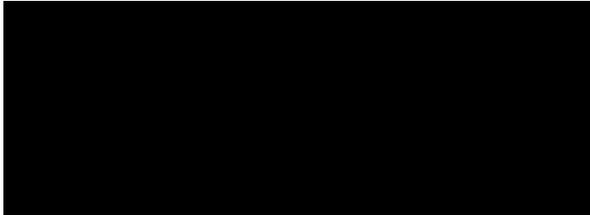
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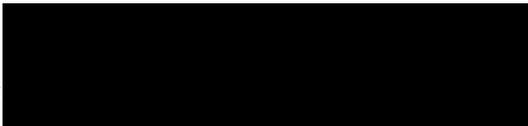


U.S. Citizenship
and Immigration
Services



FILE: WAC 03 139 51332 Office: CALIFORNIA SERVICE CENTER Date: NOV 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.

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 general contractor and developer that seeks to employ the beneficiary as a part-time accountant. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 is not a specialty occupation. The director found further that the petitioner had not complied with the terms and conditions of a previously approved petition that was filed on behalf of an H-1B financial analyst. On appeal, counsel submits a brief and additional evidence, including an academic opinion.

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 a part-time accountant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's March 24, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: preparing, analyzing, and verifying the quarterly and yearly tax returns; performing audits; preparing payroll statements and deductions, monthly expense reports, and financial statements; preparing the general ledger and monthly and yearly financial reports; monitoring information systems; compiling and analyzing financial information to prepare entries into the accounts; detailing the petitioner's assets, liabilities, and capital; providing tax-planning advice; devising a financial system to provide more systematic and smoother inventory procedures; preparing balance sheets, profit-and-loss statements, necessary checks, payroll, tax remittances, and other reports to summarize the petitioner's current and projected financial position; modifying and coordinating the implementation of accounting-control procedures; analyzing transactions; and preparing billing statements. The petitioner indicated that the beneficiary is qualified for the proffered position based on her education, knowledge, and accounting-related experience.

The director found that the proffered position was not a specialty occupation because the job is not primarily that of an accountant position; it is more closely related to bookkeeping, accounting, or auditing clerk positions. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of an accountant, and is not a bookkeeper or accounting clerk position. Counsel narrates the proposed duties and states that almost all of them match the duties of an accountant. Counsel also states that even if some of the beneficiary's duties overlap with those of a bookkeeper, the beneficiary's primary duty is to perform accounting work. He states further that an outside accountant is currently performing the proposed duties for the petitioner, which is a stable and high volume company maintaining a gross annual income of several million dollars. Counsel cites to a court decision to state that the petitioner's size bears no rational relationship to the need for a professional.

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.

The AAO turns first 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; 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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Counsel states that the beneficiary's duties are performed by an accountant. The

Handbook discloses that the proffered position's duties do not rise to the level of an accountant. The *Handbook*, 2004-2005 edition, 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.

Some of the duties described in the *Handbook* do not apply to the proffered position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not be part of an executive team. Nor will the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities. Given this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. 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.

The *Handbook* further states:

Accountants and auditors held about 1.1 million jobs in 2002. They worked throughout private industry and government, but 1 out of 5 wage and salary accountants worked for accounting, tax preparation, bookkeeping, and payroll services firms. Approximately 1 out of 10 accountants or auditors were self-employed.

Many accountants and auditors are unlicensed management accountants, internal auditors, or government accountants and auditors; however, a large number are licensed Certified Public Accountants. Most accountants and auditors work in urban areas, where public accounting firms and central or regional offices of businesses are concentrated.

The record reflects that the petitioner was incorporated in 1988, and currently has four employees, one of whom is an H-1B financial analyst. Evidence in the record, namely a copy of "Part 5" of the visa petition filed on behalf of the petitioner's financial analyst, reflects that the financial analyst is a full-time employee. As the director points out in his decision, however, evidence in the record reflects that the petitioner has not compensated its financial analyst on a full-time basis, in accordance with the terms and conditions of the correspondent petition and, therefore, the petitioner's credibility is in question. On appeal, counsel asserts that the error was a typographical mistake and "consequently the person filling the form, not knowing of the mistake regarding checking the wrong box, typed '40' hours per week." Counsel submits a letter from the petitioner and copies of payroll documentation as supporting documentation. Counsel's assertion and additional evidence are noted. The record, however, does not contain contemporaneous supporting evidence, such as copies of the entire visa petition filed on behalf of the petitioner's financial analyst, the correspondent labor condition application, and supporting documentation. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec.

582, 591-92 (BIA 1988). Simply asserting that the reported full-time employment status was a clerical error does not qualify as independent and objective evidence. Going on 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). The AAO notes that independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO further notes that if there is a material change in the terms and conditions of employment from that set forth in the petition, the petitioner should file an amended petition, with fee. 8 C.F.R. § 214.2(i)(E). In view of the foregoing, the petitioner has not demonstrated that the proffered position is that of an accountant. A review of the Bookkeeping, Accounting, and Auditing Clerks job descriptions in the *Handbook* confirms the accuracy of the director's assessment to the effect that, the job duties parallel the responsibilities of these positions. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for bookkeeping, accounting, and auditing clerk jobs.

The record contains an opinion from a university professor who asserts, in part, that positions such as the proffered position require a bachelor's degree in accounting. The writer makes his opinion "based on the documents presented to me," but does not describe the documents he reviewed in reaching his conclusion, and provides no evidence in support of his assertion. Going on 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*, 14I&N Dec. 190 (Reg. Comm. 1972)).

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the petitioner is currently using an outside accountant with a bachelor's degree. The record, however, does not contain any evidence of the educational background of the petitioner's outside accountant and, therefore, the petitioner has not met its burden of proof in this regard. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent,

in a specific specialty. The petitioner states that it is currently using an outside accounting firm to do its accounting work, but that the cost is high. The petitioner's 2002 tax return indicates that it paid \$6700 in accounting fees; the proposed yearly salary of the beneficiary is more than double this amount at \$17,420. The evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.