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*Dr*

FILE: WAC 03 107 50973 Office: CALIFORNIA SERVICE CENTER Date: **NOV 15 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 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 distributes and sells frozen Mexican avocado pulp. It 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 on the ground that the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional 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 petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary explains and recommends options involving the following reports: monthly profit and loss, balance sheet, expenses by vendor, income by customer, and graphic. The beneficiary will have monthly discussions with management about financing. With accounts receivables, the beneficiary will handle invoicing; posting of payments; collections; customer credits; reports for accounts receivable aging, cash flow, customer balance, and open invoices; and will update the price and customer lists. With accounts payables, the beneficiary will post invoices, make payments, handle reports such as the accounts payable aging, vendor balance, and the transaction list by vendor; and will request vendor credits and update the vendor list. The beneficiary will handle wire transfers, monthly loan applications and payments, customer payments, and payroll tax payments; will be responsible for payroll, federal and state tax returns, and purchasing such as looking for new products, visiting existing suppliers, placing orders with suppliers, and preparing projections for suppliers; and will handle office supplies, and training and accounting computer program updates. For the proposed position the petitioner requires a bachelor's degree or its equivalent in accounting.

The director stated that the proposed duties reflect those of bookkeeping, accounting, and auditing clerks as those occupations are described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reveals that those occupations do not require a baccalaureate degree. Not all of the proposed duties, the director stated, are at the level of an accountant as a significant amount of the beneficiary's time will be spent performing bookkeeping duties. The director discussed *Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000) and *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm. 1988).

On appeal, counsel states that the director's decision was conclusory, and failed to discuss the submitted evidence. Counsel emphasizes that the director found that the proposed position had some duties "at the level of an accountant" and that those duties would occupy the majority of the beneficiary's time. Counsel asserts that neither the regulations nor the Act require that the beneficiary spend all of his time performing the duties of an accountant. Counsel contends that the director failed to properly consider the proposed duties in the context of the *Handbook's* description of a management accountant.

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 proposed position is not a specialty occupation.

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

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 often turns to the *Handbook* for information about the nature and educational requirements of occupations.

Counsel asserts that the proposed position resembles an accountant. However, the evidence in the record and the *Handbook's* information do not reflect this. The *Handbook* reports that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. Of these fields, the AAO finds that the closest category to the proposed position is the management accountant. The *Handbook* relays:

*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.

The proposed duties differ from those described in the above passage. 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 is not part of a management team as the petitioner has only one employee: the beneficiary. The beneficiary will not prepare financial reports for the described nonmanagement groups; nor will he provide budgeting, performance evaluation, and cost and asset management. In light of the disparity between the proposed position and the *Handbook's* description of a management accountant, the scope and complexity of the beneficiary's duties and responsibilities differ from those 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 proposed position.

Furthermore, the level of income generated by the petitioner, the number of employees, and the volume of transactions have a direct and substantial bearing on the scope and depth of the beneficiary's proposed duties. Responsibility for one employee and for income of \$295,933, which the petitioner generated in 2000, differs

vastly from responsibility associated with a far larger income or for many employees. The evidence in the record, an invoice of about \$600 for the month of July from AmeriCold Logistics (the company that warehouses the petitioner's product), and a report entitled "Sales by Customer Summary," do not suggest that the proposed duties would have a scope and depth requiring a baccalaureate degree in accounting. The AmeriCold Logistics invoice indicates that the proposed duties are associated with a single food product: avocado pulp, whether fine or chunky; and the submitted sales report lists about 54 buyers, mostly supermarkets, with sales totaling \$308,693 for January through August 2003. In the context of this evidence, which shows that the beneficiary will not be responsible for many products and will not have responsibility for a large revenue stream, the AAO finds that the proposed duties as described by the petitioner do not have the scope and depth of those of an accountant, which is an occupation requiring a baccalaureate degree in accounting or a related field.

The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submitted no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner show that its particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. In the context of the income generated by the petitioner (\$308,693 in 2003), and following a review of the submitted evidence of an invoice from AmeriCold Logistics, a report entitled "Sales by Customer Summary," income tax records, and the DE-6 Forms reflecting that the beneficiary is the sole employee of the company, the evidence in the record fails to portray the proposed duties as so complex or unique as to require a baccalaureate degree in accounting or a related field. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner must show that it normally requires a degree or its equivalent for the position. The record of proceeding reflects that the beneficiary was previously employed by the petitioner in the proposed position in the TN-2 nonimmigrant classification. However, 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 (5<sup>th</sup> 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results:

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<sup>1</sup> 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.

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. As conveyed in this decision, the evidence of record fails to portray the proposed duties as requiring a baccalaureate degree in accounting or a related field.

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 them is usually associated with the attainment of a baccalaureate or higher degree. In the context of the submitted evidence, which the AAO has already discussed, the proposed duties do not have the specialization and complexity that would require a baccalaureate degree in accounting or a related field. Consequently, the petitioner fails to establish the last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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