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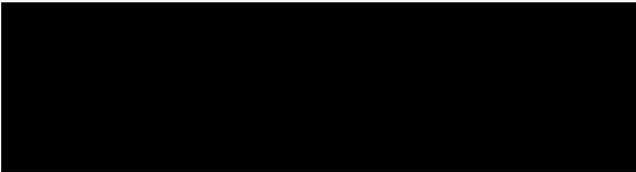
FILE: WAC 03 022 50581 Office: CALIFORNIA SERVICE CENTER

Date: OCT 03 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 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 a garment manufacturer, with two outlets and 167 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 the proffered 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) former counsel's response to the director; and (4) Form I-290B, with a letter from current counsel and new evidence. The AAO reviewed the record in its entirety before reaching its decision.

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, a 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.

The petitioner states that it seeks the beneficiary's services as a financial accountant. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's October 22, 2002 letter of support accompanying the Form I-129; and former counsel's January 6, 2003 response to the director's request for evidence. At the time of filing, the petitioner stated the beneficiary would be required to:

- Perform the analysis and preparation of financial statements, profit and loss statements, cash management, financial forecasting, account reconciliation and audit programs;
- Develop corporate financial forecasts and current financial statements based on market trends and evaluate the company's capital expenditures; and perform feasibility studies and conduct special analyses as required by management;
- Maintain a computerized accounting system to track and monitor all activities relating to the control of accounts payable and receivable; perform payroll and employee benefits calculations; assist in the preparation of company tax returns; and ensure maintenance of accurate expenditure records to document and monitor disbursements, sales and tax payments;
- Review and analyze the company's financial performance and make recommendations to management concerning proposed profitability enhancement plans; prepare evaluations of corporate capital expenditures; develop company financial forecasts and current financial statements; and conduct special financial analyses as requested by management; generate monthly reports highlighting year-to-date performance; perform financial forecasting to set company goals and long-range strategies; and prepare projections and financial forecasts for transactions being performed or contemplated by the company; and
- Evaluate use of alternative courses of action, such as the impact of adding products and/or services on the company's financial performance; liaise with the company's external certified public accountant in the preparation of corporate tax returns; and ensure maintenance of accurate expenditure records to document and monitor disbursements and tax payments.

However, in response to the director's request for evidence, which asked for a more detailed description of the proffered position, the petitioner's former counsel added the following duties to those listed above:

- Handle production planning and costing under close coordination with the production manager;
- Ensure that accurate costing for particular styles and job orders are properly monitored during production transfers;
- Be responsible for liaising with the shipping department and outlet manager to ensure that accurate budgeting and expenditures are properly accounted for and documented;
- Monitor the financial records of the outlets;

- Prepare monthly stock valuation reports;
- Be responsible for the preparation of the outlets' financial statements;
- Coordinate with the packaging and warehouse departments to monitor the movement of stock so that proper methods of inventory are followed;
- Supervise the warehouse department in conducting physical inventory;
- Prepare the monthly financial forecasts for each of the two outlets; and
- Be responsible on production, planning and costing.

The AAO has reviewed both of the above descriptions of the proffered position's duties. With regard to the duties provided by former counsel, the AAO will accept only those that address the beneficiary's responsibility for monitoring financial records and preparing financial statements, as identified by the petitioner at the time of filing.

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). Therefore, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As indicated by the director in his denial, the additional duties presented by former counsel in response to his request for evidence represent a material change to responsibilities described by the petitioner at the time of filing. Accordingly, for the purposes of these proceedings, the duties of the proffered position are those described by the petitioner in its October 22, 2002 letter of support.

On appeal, counsel asserts that the duties listed by former counsel in his response to the director's request for evidence did not alter the nature of the position, but simply added further detail to the description already provided by the petitioner. The AAO does not agree. The additional duties listed by former counsel cannot be viewed as elaborating on the responsibilities described by the petitioner at the time of filing, which were strictly limited to the financial arena. The additional duties identify an operational role for the beneficiary, requiring her to manage certain aspects of the petitioner's operations. Regardless of whether some or all of these additional duties may be performed by in-house accounting personnel working in the manufacturing industry, as counsel contends, they, nevertheless, represent a material change to the job responsibilities described by the petitioner at the time of filing and, therefore, will not be considered.

While the AAO would normally turn next to an analysis of whether the duties identified at the time of filing establish the proffered position as a specialty occupation, it finds the record to contain evidence – the petitioner's organizational chart and former counsel's statements regarding the duties of the petitioner's existing accounting personnel in his response to the director's request for evidence – that calls into question the petitioner's initial description of its position and its offer of employment to the beneficiary as an accountant at the time of filing.

The organizational chart submitted in response to the director's request for evidence indicates that the petitioner has two accountant positions, one of which is currently filled. This incumbent accountant, who is assisted by an accounting supervisor, is shown by the chart to be responsible for the petitioner's financial transactions – accounts payable, accounts receivable, payroll and sales. Therefore, the chart, on its face, contradicts the petitioner's assertion at the time of filing that the proffered position would require the beneficiary, among other responsibilities, to maintain a computerized accounting system to track and monitor

all activities relating to the control of accounts payable and receivable, perform payroll and employee benefits calculations, and ensure the maintenance of accurate expenditure records to document and monitor disbursements, sales and tax payments. Moreover, former counsel's January 6, 2003 response to the director, which indicates that the incumbent accountant is also responsible for the petitioner's audit programs and for preparing financial statements, including the analysis required to develop them, also undermines the petitioner's initial description of the proffered position, which assigned these responsibilities to the beneficiary.

The petitioner's initial description of the proffered position as that of an accountant is also brought into question by the role its organizational chart assigns to the second accountant position. Although counsel, on appeal, contends that the volume of the petitioner's financial transactions supports its hiring of a second accountant, the placement of the vacant accountant position on the petitioner's organizational chart indicates that the beneficiary would supervise the petitioner's production, shipping, and outlet managers, and, by logical inference, the operations they manage. The lines of responsibility drawn on the chart show all three managers as reporting to the petitioner's top management through the beneficiary. In the absence of any discussion or documentation to provide an alternate explanation, the AAO finds the organizational chart to indicate that the beneficiary's role within the petitioner's organization would be other than that of an accountant, regardless of the duties listed by the petitioner at the time of filing.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. If such inconsistencies cannot be explained, the doubt cast upon the petitioner's evidence may 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, 591-592 (BIA 1988). In the instant case, the inconsistencies in the record remain unresolved. As a result, the AAO finds the record to offer no reliable description of the duties of the proffered position, and, therefore, to preclude an analysis of the proffered position under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). While it notes the evidence in the record that addresses these criteria, including the new evidence counsel submits on appeal, the AAO will not consider such evidence in light of its determination regarding the inconsistencies in the petitioner's description of the proffered position. Therefore, the petitioner has failed to establish that the duties of the proffered position qualify it as a specialty occupation.

These same inconsistencies also undermine the petitioner's contention that the beneficiary would function as an accountant within its organization. A petitioner must establish that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). The petitioner has not established that it will employ the beneficiary as an accountant. For this reason, as well, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation.

The AAO notes that the basis for its decision differs from that of the director. However, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

For reasons related in the preceding discussion, 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.

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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.