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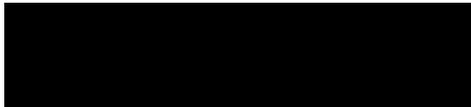


DL

FILE: WAC 04 204 50818 Office: CALIFORNIA SERVICE CENTER

Date: JUN 07 2006

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, Chief
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 and insurance agency that seeks to employ the beneficiary as an accountant and to classify him 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 basis that the proposed 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 bachelor's or higher degree, but one in a specific specialty that is directly related to the proposed position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B with brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes the Form I-129 with attachments and company support letter and the petitioner's response to the RFE. According to this evidence, the beneficiary's duties would include:

- Preparing, examining, and analyzing accounting records, financial statements, and other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards (15%);
- Computing taxes owed and preparing tax returns, ensuring compliance with payment, reporting and other tax requirements when necessary (20%);
- Analyzing business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses or to provide advice (10%);
- Reporting to management regarding the finances of the establishment (5%)
- Establishing tables of accounts, and assigning entries to proper accounts (5%);
- Developing, implementing, modifying, and documenting record keeping and accounting systems, making use of current computer technology (10%);
- Preparing forms and manuals for accounting and bookkeeping personnel, and directing their work activities (10%);
- Surveying operations to ascertain accounting needs and to recommend, develop, and maintain solutions to business and financial problems (5%); and
- Working with Internal Revenue Service agents when necessary (2%).

The director stated that many of the proposed duties reflect those of an accountant as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*); but that sole reliance on duties resembling those of an accountant as that occupation is described in the *Handbook* is misplaced. The director discussed the *Handbook's* description of accountants, and stated that the petitioner does not have the organizational complexity, scale of business, or engage in the type of business to require the services of a part or full-time accountant. The director also found that the proposed duties more closely resembled those of a bookkeeper, not an accountant. The director stated that since the petitioner did not employ financial clerks, which is an occupation that does not qualify as a specialty occupation, the beneficiary would perform these duties. The director stated that the evidence is insufficient to show that the proposed duties could not be performed by an experienced person whose educational training falls short of a bachelor's degree. The director concluded that the petitioner failed to establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director erred in reclassifying the position from an accountant to a bookkeeper. Counsel asserts that the primary way to distinguish the work of accountants from that of bookkeepers is that accountants engage in financial analysis and bookkeepers do not. Counsel cites over 10 cases where the AAO overturned the director's denial of H-1B petitions for accountants. Counsel asserts that those cases included a combination of clerical and accounting duties, as does the instant petition. Counsel asserts that the instant petition is similar to those petitions and should therefore be approved. Counsel asserts that the size of the petitioner's business should not be the determinative factor in deciding whether the proposed position is a specialty occupation and cites *Young China Daily v. INS*, 742 F. Supp. 552 (N.D. Ca. 1989). Finally, counsel asserts that the proposed position is a specialty occupation under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner need only satisfy one of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is

a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has failed to establish that the proposed position meets any 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.

As a preliminary matter, the AAO will address counsel's assertion that the AAO should approve the instant petition because it has approved others similar to the instant petition. Counsel also submits a copy of an H-1B approval notice by the petitioner on behalf of the beneficiary and the approval notice for an accountant petition counsel previously filed for a different beneficiary and different petitioner. This record of proceeding does not, however, contain all of the supporting evidence submitted in the cases counsel cites and refers to. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the positions offered in those prior cases were similar to the position in the instant petition.

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 cases were similar to the proposed position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions 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).

To determine 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 highly specialized knowledge and the attainment of a bachelor's degree in a specific field of study as the minimum for entry into the occupation.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the petitioner has identified its proposed position as that of an accountant, the AAO turns first to the *Handbook's* discussion of this occupation. According to the *Handbook*, accounting duties vary widely among four major fields of accounting: public, management, government, and internal. The closest category to the proposed position is that of management accountants, who:

[r]ecord 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.

Based on the above discussion, the AAO does not find that the petitioner's general description of the duties of the proposed position reflects the scope or complexity of a position that requires at least a bachelor's degree

in accounting or a related specialty. While it agrees that the duties of the proposed position, as described, indicate that the beneficiary would require some knowledge of accounting principles, these duties do not establish that the position requires a bachelor's degree level of knowledge in the field. The decisive question is not whether the petitioner's position requires knowledge of accounting principles – which it does – but whether it is one that requires the level of accounting knowledge that is acquired by at least a bachelor's degree, or its equivalent, in accounting. Many of the duties described in the above passage in the *Handbook* do not apply to the proposed position, such as strategic planning or new product development. The complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. Counsel asserts that just because the beneficiary is not part of a formal accounting department or team does not disprove his responsibilities as an accountant, but did not submit documentation to establish these responsibilities, e.g. examples of the accounting work he has performed for the petitioner. 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 Obaigbena*, 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).

To the extent that they are described in the record, the duties of the proposed position – which include preparing and analyzing accounting records and preparing tax returns – more closely resemble the accounting responsibilities performed by bookkeepers and other financial clerks or a junior accountant. Based on the record before it, the AAO finds the duties of the proposed position, including the reporting responsibilities identified by the petitioner, fall within the typical employment of a full-charge bookkeeper, who in addition to serving as businesses' financial record keepers, may also be responsible for the development of financial statements, as well as the preparation of the type of financial reports and summaries described by the petitioner. The petitioner stated that the beneficiary will prepare, examine, and analyze accounting records and financial statements, compute taxes owed and prepare tax returns, and establish tables of accounts. These duties are performed by bookkeeping, accounting, and auditing clerks or junior accountants who, according to the *Handbook*, update and maintain accounting records that tabulate profit and loss reports, verify records of transactions, produce financial statements, prepare reports and summaries for supervisors and managers, and handle the payroll. The *Handbook* notes the growing use of financial software to enter and manipulate data. The AAO notes that the *Handbook* states that full-charge bookkeepers are called upon to “do much of the work of accountants.”

To determine whether the proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(I) - a bachelor's or higher degree or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the particular position - the AAO turns to the 2006-'07 *Handbook's* discussion of the educational requirements for individuals in this field. The *Handbook* states the following regarding the education and experience requirements imposed on those who seek these jobs:

Capable accountants and auditors may advance rapidly; those having inadequate academic preparation may be assigned routine jobs and find promotion difficult. Many graduates of junior colleges and business and correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their

employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.¹

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the American Council for Accountancy and Taxation (ACAT), an independent accrediting and monitoring organization affiliated with the National Society of Accountants. The ACAT does not require a degree in accounting or a related specialty to issue a credential as an Accredited Business Accountant® /Accredited Business Advisor® (ABA). Eligibility for the eight-hour comprehensive examination for the ABA credential requires only three years of “verifiable experience in accounting, taxation, financial services, or other fields requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination.” Up to two of the required years of work experience may be satisfied through college credit.²

The *Handbook* further states the following regarding job opportunities for full-charge bookkeepers:

Demand for full-charge bookkeepers is expected to increase, because they are called upon to do much of the work of accountants, as well as perform a wider variety of financial transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects.

Thus, individuals can do accounting work as bookkeepers or junior accountants with either associate’s degrees, bachelor’s degrees, or with relevant work experience in the field. The petitioner failed to establish that the proposed position exceeds these job levels. Since individuals with two and four-year degrees and even those with high school diplomas who gain accounting skills and perform well can work at these jobs, the petitioner has failed to establish that the proposed position is a specialty occupation under 8 C.F.R. § 14.2(h)(4)(iii)(A)(I).

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) - a degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies “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 job announcements submitted with the RFE either do not describe the duties of the announced positions with sufficient particularity to determine if they are similar to the proposed position, or are from companies dissimilar

¹ According to the website for Skyline College, a community college located in San Mateo, CA (www.skylinecollege.net), an associate’s degree in business or accounting would involve learning the fundamentals about financial accounting principles and concepts, balance sheets, income statements, cash flow statements, the GAAP, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system. Thus, an associate’s degree would provide knowledge about the GAAP and accounting techniques that serve the needs of management and facilitate decision-making.

² Information provided by the ACAT website (<http://www.acatcredentials.org/index.html>). The *Handbook* identifies the ACAT website as one of several “Sources of Additional Information” at the end of its discussion of the occupation of accountants.

to the petitioner, a real estate and insurance agency with two employees³. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 bachelor's degree or its equivalent for the proposed position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. This criterion is not a factor in this proceeding as the petitioner states that this is a newly created position. In the absence of an employment history for the proposed position, the petitioner failed to establish that the position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. A petitioner satisfies the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to 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 bachelor's or higher degree in a specific field of study. The duties, as listed by the petitioner, appear to be typical of a full-charge bookkeeper or junior accountant position. On appeal, counsel asserts that only a person with a bachelor's degree in accounting can perform the duties required by the proposed position. Counsel has not submitted any documentary evidence to establish that the proposed duties bring a uniqueness, complexity, or specialization to the position that requires or is usually associated with a bachelor's degree in accounting. 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*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that the proposed position is a specialty occupation based upon the complexity or uniqueness of its duties.

As related in the discussion above, the petitioner has failed to establish that the proposed position is a specialty occupation. Accordingly, the AAO will 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.

³ The AAO notes that the record contains inconsistent information concerning the number of employees. The petitioner indicates on the form I-129 that it has two employees. The organizational chart reflects six employees. 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). The petitioner has not offered an explanation for the inconsistency and has not submitted objective evidence to explain which statement is correct.