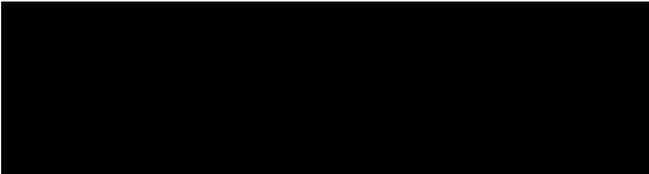


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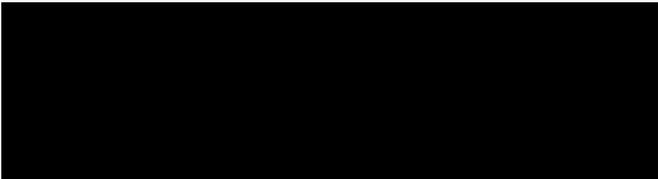
Dr

FILE: WAC 04 800 44435 Office: CALIFORNIA SERVICE CENTER Date: JUN 12 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 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 nursing staffing company, comprised of four limited liability companies, employing a total of 765 individuals, with a gross annual income of \$8.2 million. It seeks to employ the beneficiary as an accountant/auditor 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 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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The record indicates that the beneficiary was previously granted H-1B status for the period June 15, 2002 to June 1, 2005, and that her employment ended with her previous employer on April 29, 2004. The instant petition was filed on June 24, 2004.

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, the 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner seeks the beneficiary’s services as an accountant/auditor. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s June 21, 2004 letter of support; and the petitioner’s response to the director’s request for evidence. As described by the petitioner, the beneficiary would perform duties that entail:

- Conducting internal audits to assess and verify the accuracy of the company’s financial records and the efficiency of operations;
- Establishing audit objectives and procedures and writing audit plans for the company;
- Reviewing and developing recommendations for the appropriate internal control measures to improve efficiency and avoid fraud;
- Examining each department and reviewing daily operations;
- Interviewing employees to gather data, check the effectiveness of internal controls and determine possible duplication of work;
- Analyzing information systems, management procedures and internal controls;
- Reviewing accounting systems to determine proper recording of financial transactions;
- Analyzing data to check for possible discrepancies, fraud, waste or mismanagement;
- Determining whether the data processing systems that are currently in effect produce the desired reports to evaluate the effectiveness of internal control and security of operations; and
- Devising controls for modified computer applications designed to promote operational efficiency and prevent fraud.

The director determined that the record contained inconsistent information because the employer identification number (EIN) listed on the Form I-129 and the labor condition application (LCA) did not match

the EIN on the petitioner's tax returns. On appeal, counsel states that this was the result of a clerical error, and that the EIN on the Form I-129 and the LCA was that of the beneficiary's previous employer. Counsel provides evidence to support this assertion. The AAO finds that the petitioner has resolved this inconsistency and overcome this element of the director's denial.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director found the duties described by the petitioner to reflect many of those performed by accountants, but determined that the petitioner did not have the type of business or the organizational complexity and scale to require the services of a full- or part-time accountant. While, as discussed below, the AAO does not find the record to demonstrate that the petitioner would employ the beneficiary in a position requiring a degreed accountant, it has reached its conclusions on grounds other than those relied upon by the director.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity, nor operate the type of business that would require an accountant. The 2006-2007 edition of the *Handbook* indicates that accountants work throughout private industry and government, helping to ensure that the "Nation's firms are run efficiently, its public records kept accurately, and its taxes paid properly and on time."¹ It does not indicate that accountants are employed solely by public accounting, payroll services, and tax preparation firms; computer accounting systems, software developers, government agencies or academic institutions, as stated by the director. Accordingly, the petitioner's intention to employ an accountant may not be discounted based on its type of business. Neither does the fact that the petitioner does not have an accounting/bookkeeping staff establish that it would not employ the beneficiary to perform the duties of an accountant. Therefore, the AAO withdraws the director's findings in this regard.

The petitioner has identified its proffered position as that of an accountant/auditor. Therefore, the AAO turns first to the 2006-2007 edition of the *Handbook* and its discussion of this occupation.

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos001.htm.

The *Handbook* describes the job duties of an internal auditor as follows:

Internal auditors verify the accuracy of their organization's internal records and check for mismanagement, waste, or fraud. Internal auditing is an increasingly important area of accounting and auditing. Internal auditors examine and evaluate their firms' financial and information systems, management procedures, and internal controls to ensure that records are accurate and controls are adequate to protect against fraud and waste. They also review company operations, evaluating their efficiency, effectiveness, and compliance with corporate policies and procedures, laws, and government regulations.

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would require the beneficiary to have an understanding of accounting principles. However, the performance of duties requiring accounting knowledge does not establish the proffered position as that of an accountant. The question is not whether the position requires knowledge of accounting principles but rather whether it is one that normally requires the level of accounting knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting. To make this determination, the AAO considers the petitioner's business operations.

The petitioner asserted that the duties of the proffered position were highly technical and complex and that it was work that could not be performed by an individual who did possess at least a baccalaureate degree in accounting or a related field.

On appeal, counsel re-states the duties of the position, and asserts that the director erred in assuming that some of the duties are those of a bookkeeper or accounting clerk. Counsel also states that the director was incorrect in stating that the petitioner does not engage in the type of business for which an accountant or auditor would normally be hired. Counsel refers back to the petitioner's letter of support regarding its size, work and complexity, and states the a company with 765 workers and multiple branches is the type of company which needs an accountant/auditor to ensure that it does not find itself in a situation involving fraud and waste.

Counsel asserts that the petitioner's DE-6 information and tax information differs from that supplied in the petitioner's Form I-129 due to the nature of the petitioner's company as separate limited liability companies with branches outside of California. No evidence is supplied to support this assertion, however. 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).

The AAO notes that the duties described by the petitioner, if performed for only one of the petitioner's entities, do not appear to require accounting knowledge beyond that held by junior accountants, employment that does not impose a degree requirement on those seeking entry-level employment. It is only when combined with the complexity imposed by the petitioner's multiple business operations that the duties of the

proffered position may require a level of knowledge that can be acquired only through a baccalaureate degree in accounting or its equivalent.

The *Handbook's* discussion of the occupation of accountants clearly indicates that accounting positions may be filled by individuals holding associate degrees or certificates, or who have acquired their accounting expertise through experience:

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 or business or 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.

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 In addition, The Institute of Internal Auditors also offers a credentialing option, the Certified Internal Auditor® designation. CIA candidates must hold a bachelor's degree or its equivalent from an accredited college-level institution, but there is no requirement for that degree to be in a specific specialty.³

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in accounting,⁴ the AAO turns to the record for information regarding the nature of the petitioner's business operations. While the size of a petitioner's business operations is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B

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

³ http://www.theiia.org/?doc_id=5

⁴ 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.

worker as an accountant. The AAO reviews the record for evidence that a petitioner's operations are of sufficient complexity to establish that the proffered position's accounting duties would require a level of knowledge obtained only through a baccalaureate degree in accounting or its equivalent.

In the instant case, the record indicates that the petitioner is a group of four limited liability companies operating as a partnership, with two of the companies based in California. The director found that the petitioner's statement that it had 725 employees was inconsistent with the DE-6 forms indicating that it had approximately 200 employees. On appeal, counsel states that the petitioner has 200 employees in California, as represented on the DE-6 forms, a California reporting form. The balance of the petitioner's employees is outside California and, therefore, not represented on the DE-6 forms. The director makes the same finding of inconsistency regarding the petitioner's tax documents; the documents submitted indicated a total income of \$3.9 million, rather than the \$8.2 million stated on the Form I-129. Counsel states on appeal that \$3.9 million represents the income from the petitioner's two California offices and, again, that the balance is from the offices outside California. The size of its business operations – 725 employees and \$8.2 million in gross income – is not independently documented in the record. 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 did not establish the nature of the business enterprise for which the beneficiary would provide services. The record does not establish whether the beneficiary would be working for one of the petitioner's limited liability companies, for the two companies in California, or for the entire organization. In its letter of support, the petitioner stated that it has offices in Los Angeles, San Francisco, San Diego, Pittsburgh, Louisiana and New York. It also stated that each of its four limited liability companies corresponds to an individual branch office, but it did not explain which of its sites were branch offices, and which were some other type of office.

The AAO has also reviewed the record for a discussion of the petitioner's business operations to understand the financial requirements imposed by these apparently distinct operations and their relation to the beneficiary's duties. However, the record contains no evidence to indicate how the petitioner's business operations relate to one another organizationally or financially, including whether they have separate and unique financial operations or share a single budget and accounting system. As noted above, 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)).

As the record fails to establish the specific accounting position for which the petitioner is seeking the beneficiary's service or the type of financial structure within which the beneficiary would work, the duties of the proffered position have not been established as sufficiently complex to indicate that the petitioner would employ the beneficiary as a management accountant. Instead, as the record is currently constituted, the duties appear more closely aligned to accounting responsibilities that may be performed by junior accountants, employment that does not impose a baccalaureate degree requirement on those seeking entry-level employment. Therefore, the petitioner has not established the proffered position as a specialty occupation

under the first criterion at 8 C.F.R. § 214.2(h)(4)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The proffered position is not that of a management accountant, but a junior accountant, employment that the *Handbook* indicates may be performed by individuals who have associate's degrees in accounting or who have an appropriate level of experience. Accordingly, the proffered position has not been established as a specialty occupation under the first prong of the second criterion based on the *Handbook's* discussion of the standard degree requirement for management, public and government accountants and auditors. As the petitioner has submitted no evidence to prove that its degree requirement for the proffered position is common in parallel positions among similar organizations, it has failed to establish the proffered position as a specialty occupation based on the practices in its industry.

The AAO also concludes that the record before it does not establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) -- the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner has submitted no evidence regarding its hiring practices. Accordingly, the record does not establish the proffered position as a specialty occupation under the third criterion.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by junior accountants. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills other than those of a junior accountant. As a result, the record fails to establish that the proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.