

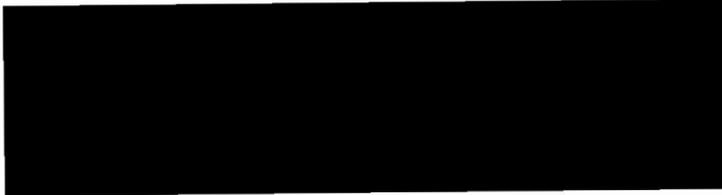
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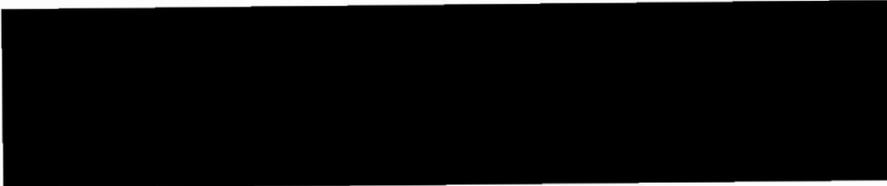
FILE: WAC 04 201 51353 Office: CALIFORNIA SERVICE CENTER Date: **JUL 12 2006**

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.

for Michael T. Kelly
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 business operating a restaurant, a delicatessen and a catering service, with 35 employees. It seeks to extend its employment of the beneficiary as an accounting manager 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 based on his determination that the record failed to establish the proffered position as 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) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 accounting manager. Evidence of the beneficiary’s duties includes: the Form I-129 and the petitioner’s July 7, 2004 letter in support of the petition. As stated by the petitioner, the duties of the proffered position would require the beneficiary to:

- Oversee and direct the accounting and financial reporting functions of all the petitioner’s operations, including tax return preparation, bookkeeping, maintenance of all accounting ledgers, and preparation of the petitioner’s balance sheet and profit and loss statements; and
- Advise the petitioner on cash management and financial planning.

The petitioner states the position requires the minimum of a baccalaureate degree or its equivalent in accounting, plus four years of relevant experience, or an advanced degree in a related field.

To make its determination whether the employment just 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 to require nor the organizational complexity to support 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’s organization and type of business preclude it from employing 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 report that the accountants are employed solely by public accounting, payroll services, and tax preparation firms; computer accounting systems, software developers, or government agencies, as stated by the director. Accordingly, the petitioner’s need for an accountant may not be discounted based on its type of business. Neither does the director’s finding that the petitioner does not employ an accounting/bookkeeping staff establish that it would not employ the beneficiary to perform the duties of an accountant.² Therefore, the AAO withdraws the director’s findings in this regard.

The petitioner has stated that the proffered position is that of an accountant and has offered a brief description of the position that lists duties that would typically be performed by a degreed accountant. As discussed by the 2006-2007 edition of the *Handbook*, management accountants, the category of accounting most closely aligned to the two duties listed by the petitioner, are individuals who:

[r]ecord and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management They analyze and interpret the financial information that corporate executives need in order to make sound business decisions. They also prepare financial reports for other groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, management accountants may work in various areas, including financial analysis, planning and budgeting, and cost accounting.³

However, while the above discussion is generally reflected in the petitioner’s description of the duties of the proffered position, this similarity does not establish the proffered position as that of a management accountant, which would impose a degree requirement on the beneficiary. The duties outlined by the petitioner at the time of filing offer no meaningful description of the beneficiary’s day-to-day responsibilities.

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

² The AAO notes that the petitioner’s organizational chart indicates that it employs an accounting assistant manager and an accounting staff member.

³ *Occupational Outlook Handbook*, 2006-2007 Edition., at www.bls.gov/oco/ocos001.htm.

They do not indicate the specific accounting-related tasks that would be performed by the beneficiary in connection with the petitioner's restaurant/delicatessen/catering business, a surprising deficiency in that the beneficiary is the incumbent of the proffered position.

On appeal, counsel contends that the duties described in the *Handbook* for management accountants form the core of the job the beneficiary performs for the petitioner and that these activities have been described by the petitioner in its request for an extension of the beneficiary's H-1B status. He further asserts that a decision by the petitioner to scale back its business was based on financial analysis provided by the beneficiary, a decision that has improved its financial health. Counsel notes that the beneficiary regularly provides financial reports for the petitioner's sole stockholder and external auditor, and prepares monthly reports for the petitioner's management, scrutinizing its budgeting, sales, costs/expenses, depreciation, and investment, providing both overviews and more "fine-grained analysis." He submits a copy of what he indicates is a sample of that monthly reporting performed by the beneficiary. Counsel's statements do not, however, establish the proffered position as a specialty occupation under the requirements of the first criterion.

Counsel's assertion that the petitioner has described the duties of a management accountant in filing the Form I-129 are supported by the record. However, as previously noted, a general description of the type of duties performed by management analysts is insufficient to establish the proffered position as a specialty occupation. A petitioner may not establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. As discussed above, a petitioner, in establishing a position as a specialty occupation, must describe the specific duties or tasks to be performed by a beneficiary in relation to its particular business interests. In the instant case, the petitioner has offered no such description.

Counsel has also asserted that the petitioner relies on the beneficiary's financial analysis for its business decisions, citing a 2004 business decision to downsize and submitting a translated copy of a financial report that he indicates is an example of the type of financial analysis performed by the beneficiary on a monthly basis. However, counsel's statements regarding the beneficiary's role in the petitioner's decision to reduce the size of its business and his preparation of monthly financial reports are not supported by the record. The petitioner has submitted no evidence related to its business operations in 2004, including the streamlining of those operations. Further, the copy of the translated financial report submitted on appeal cannot be identified as having been prepared by the beneficiary. It does not carry the beneficiary's signature, nor is it accompanied by a transmittal letter/memorandum that would indicate the beneficiary as its author. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

As previously noted, the AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no meaningful description of the proffered position's

responsibilities, it does not establish that the duties of the position are accounting duties that would require a level of accounting knowledge that is signified by at least a bachelor's degree or its equivalent in accounting. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – 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. In the instant case, the petitioner has submitted no evidence to establish the petitioner's degree requirement is the norm within its industry, nor has it contended that the position is more complex or unique than similar, but non-degreed, employment. Accordingly, the record does not establish the proffered position as a specialty occupation under either prong of the second criterion. Moreover, the petitioner's failure to provide a specific and detailed description of the proffered position's duties would also preclude it from establishing the position as parallel to any degreed employment within similar organizations in its industry or from distinguishing it as more complex or unique than similar, but non-degreed employment.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

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 the 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 a copy of its organizational materials and related materials that indicate that the accounting personnel to be supervised by the beneficiary – the accounting assistant manager and the accounting staff member – both hold degrees. These materials indicate that the petitioner's accounting assistant manager has a master's degree in business administration from the California State University at Hayward, and that the accounting staffer holds a baccalaureate degree in sociology from Boise State University. Counsel, on appeal, also asserts that the petitioner's last three accounting managers held baccalaureate or higher degrees in relevant fields. However, the record does not support the petitioner's claims regarding its normal hiring practices.

While the AAO notes that the organizational chart materials show the accounting assistant manager to have a master's degree related to accounting,⁴ the information provided is inconsistent with the December 31, 2003 quarterly wage report submitted by counsel in response to the director's request for evidence. The individual identified on the organizational chart as the accounting assistant manager is not listed on the 2003 wage

⁴ The chart materials indicate that the accounting staffer holds a degree in sociology, an academic field that is not directly related to her employment. In establishing its normal hiring practices under the third criterion, a petitioner must prove that it has a history of requiring degrees directly related to the proffered employment.

report. Neither is the accounting staffer.⁵ This inconsistency is not addressed by the petitioner or by counsel. Accordingly, the AAO will not consider the information provided by the petitioner regarding the two members of its accounting staff and the degree held by its accounting assistant manager. 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 point to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel's listing on appeal of the names and degrees of prior incumbents of the proffered position is also insufficient to establish the petitioner's normal hiring practices, as the record offers no documentation of the petitioner's previous employment of these individuals or the degrees counsel claims they hold. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Therefore, the record does not establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Further, in the absence of a meaningful description of the duties of a proffered position, a petitioner may not establish that it normally requires a degree to perform such duties.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel contends that the petitioner has satisfied the requirements of the fourth criterion based on the fact that the duties of the proffered position mesh with the *Handbook's* description of the duties performed by management analysts. However, as previously discussed, the petitioner may not use the *Handbook's* discussion of management accountants to establish the duties of the proffered position. In that the petitioner has failed to provide a list of the day-to-day tasks that would be performed by the beneficiary as its accounting manager, it is precluded from establishing them as being of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel raises concerns about the director's consideration of the record under the second and third criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) when his request for evidence did not ask the petitioner to establish the petitioner's degree requirement as an industry standard or to document its past hiring practices regarding the proffered position. However, the regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence only in instances "where there is no evidence of ineligibility, and initial evidence of eligibility is missing." The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Further, even if the director had committed a procedural error by failing to solicit further evidence with regard to the second and third criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and (4), it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has been provided with an opportunity to supplement the record on appeal and has done so. The AAO has considered the additional evidence provided

⁵ The beneficiary is, however, identified in both documents.

by the petitioner. However, as previously discussed, that evidence has been found insufficient to establish the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO notes that the petitioner has been employing the beneficiary as an H-1B worker in the proffered position, based on a previously approved petition. CIS' approval of this earlier petition does not, however, establish a basis for approving the instant Form I-129.⁶

The record does not indicate whether the director reviewed the record on which the prior decision was reached. However, if that record contained no evidence beyond that found in the instant case, then CIS would have erred in approving the previously filed petition. CIS is not bound to approve applications or 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). Further, each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Moreover, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.), *aff'd*, 248, F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.

⁶ In response to the director's request for evidence, counsel submitted a copy of a 2004 CIS memorandum entitled *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*. This guidance indicates that Service Center adjudicators are to give deference to previous approvals where there is no material change in underlying facts. Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004). However, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).