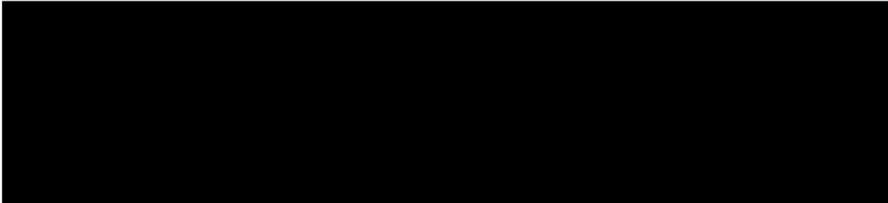


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FILE: WAC 04 060 51534 Office: CALIFORNIA SERVICE CENTER Date: **MAR 27 2006**

IN RE: Petitioner:
Beneficiary:



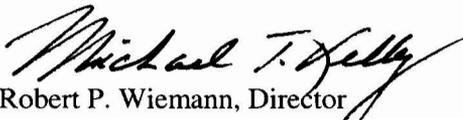
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 staffing company that seeks to employ the beneficiary as a budget accountant. The petitioner 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 because the petitioner did not establish that the proffered position was a specialty occupation. The director also stated that the petitioner did not establish that it would be the actual employer of the beneficiary. On appeal, the petitioner submits a letter.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 a budget accountant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 17, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: consolidating financial information and economic indicators gathered for annual budget preparation; preparing the company's annual budget; preparing a report showing the result of operation, as compared to the budget, for management monthly performance review; and preparing monthly financial forecasts to support management in attaining the annual budget. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in business administration with a major in accounting, banking and finance or management.

The director found that the proffered position was not a specialty occupation.

On appeal, the petitioner states that it would be the actual employer of the beneficiary. The petitioner also states that it is a staffing agency, and that it will place the beneficiary at its client site, but that the beneficiary would be the petitioner's employee.

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 proffered position is not a specialty occupation.

The AAO turns first 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; 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 Department of Labor's *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. 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 petitioner has not provided enough detail about the position to establish that the beneficiary would actually be working as a budget accountant or what the beneficiary would do in that position on a daily basis.

The issue is not whether a budget accountant is a specialty occupation, because it normally is, but whether the petitioner has established that the beneficiary would be performing the duties of a budget accountant. A petitioner cannot 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.

This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In the instant case, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. The petitioner has not established that it will employ the beneficiary as a budget accountant or that it will place the beneficiary in a job as a budget accountant; it cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Although the record contains a staffing agreement between the petitioner and its client, the site where the beneficiary will work, the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the client. The description is identical to the general one provided in the letter of support; therefore, the petitioner has not demonstrated that the work that the beneficiary will perform for the client is a budget accountant or that it will qualify as a specialty occupation. Thus, the petitioner has not established the first criterion.

Specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook*, management accountants—also called cost, managerial, industrial, corporate, or private accountants—record and analyze 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.

Very few of the duties of a management accountant as described in the *Handbook* apply to the proffered position. 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 record does not reflect that the beneficiary will be part of an executive team. Nor is there any evidence that the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, or regulatory agencies. Given this significant dissimilarity, the range of the proffered position's duties and responsibilities do not rise to the level of an accountant. Consequently, a bachelor's degree in accounting or a related field—which the Department of Labor states is required for a management accountant—would not be required for the proffered position.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry, nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (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 degree or its equivalent for the position. There is no evidence in the record regarding the petitioner’s client’s past hiring practices. In *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), the court held that the Immigration and Naturalization Service, now CIS, reasonably interpreted the statute and the regulations when it required the petitioner to show that the entities ultimately employing the foreign workers require a bachelor's degree for all employees in that position. The court found that the degree requirement should not originate with the employment agency that brought the workers to the United States for employment with the agency’s clients.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As noted above, the position description lacks detail about how the beneficiary would perform this position; therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 director found that the petitioner did not establish that an employer-employee relationship existed and that the petitioner, which does not provide direct accounting services, is an agent as defined at 8 C.F.R. § 214.2(h)(2)(i)(F). The AAO concurs with the director and finds that an employer-employee relationship between the petitioner and the beneficiary does not exist. The regulation at 8 C.F.R. § 214.2(h)(4)(ii) defines an employer as an entity that has an employer-employee relationship "as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work" of an employee. Although the staffing agreement states that the petitioner is the employer for “all purposes,” and that the petitioner would pay the beneficiary’s salary, the agreement does not indicate who will control the beneficiary's work or maintain authority. It does, however, state that the client can find the beneficiary incompetent and dismiss her from her position. The employment agreement between the petitioner and the beneficiary states that the petitioner shall direct and control the work of the beneficiary, including hiring, retaining, and terminating her services, but as noted, the staffing agreement does not reflect this information. The petitioner has not established that it is the actual employer of the beneficiary. The AAO concurs with the director's determination that the petitioner is an agent as defined in 8 C.F.R. §214.2(h)(2)(i)(F). The director found that the petitioner did not submit an itinerary of services the beneficiary would be providing; however, the staffing agreement submitted in response to the director's request for evidence meets the requirements of an itinerary. It provides the name and address of the actual employer, the name and address of the company where the beneficiary would be placed, and the duration of the position, as required by 8 C.F.R. § 214.2(h)(2)(i)(F)(2).

An H-1B alien 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. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this

case, the petitioner did not establish that the beneficiary would be coming to the United States to perform services in a specialty occupation.

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.