

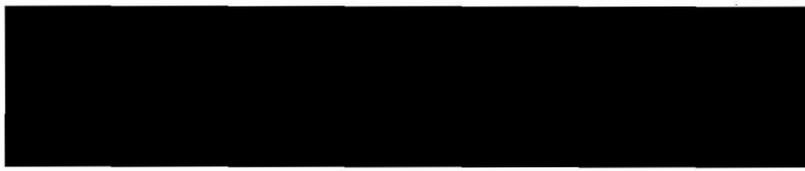


U.S. Citizenship
and Immigration
Services

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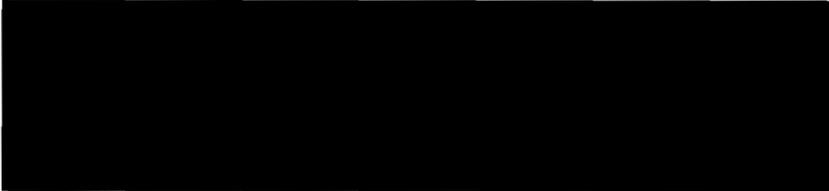
FILE: LIN 05 014 52751 Office: NEBRASKA SERVICE CENTER Date: **MAY 09 2006**

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 hospitality company specializing in the acquisition and operation of hotels and motels. It seeks to employ the beneficiary as a controller. The petitioner, therefore, 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 finding that the proffered position is not a specialty occupation and the beneficiary is not qualified for a specialty occupation. Counsel submitted a timely appeal and brief.

The AAO will first consider the director's conclusion that the proffered position is not a specialty occupation.

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 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) the Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the request for evidence; (4) the director's denial letter; and (5) the Form I-290B, the appeal brief, and additional documentation.

The petitioner is seeking the beneficiary's services as a controller. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's support letter. According to the petitioner's October 14, 2004 letter, the beneficiary's duties are as follows: plan, organize, and direct the petitioner's financial activities; oversee and analyze financial information; review and evaluate budgeting, revenue performance, and cost and asset management; advise in business decisions; prepare and submit financial reports for creditors, regulatory agencies, and tax authorities; conduct internal audits and perform duties involving financial analysis and business and strategic planning; and supervise financial activities. The petitioner asserts that it requires a bachelor's degree in a related field for the proposed position.

In denying the petition, the director stated that the petitioner submitted no evidence showing that they were in the process of acquiring or operating other hotels or motels; or that the offered position qualified as a specialty occupation. The director also found the beneficiary was not qualified for a specialty occupation.

On appeal, counsel states that the petitioner neglected to submit all of its evidence in response to the request for evidence, and that the evidence submitted with the appeal, including information from the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) about financial managers and the petitioner's December 22, 2004 letter, shows that the offered position qualifies as a specialty occupation. Counsel asserts that the petitioner's president, with the assistance of clerks, previously was responsible for the financial management of the company. It has become necessary to hire an in-house controller as the president cannot manage operations, marketing, and business development and act as controller, counsel states. Counsel contends that the educational evaluation submitted on appeal demonstrates that the beneficiary is qualified for the offered position, and he indicates that the submitted approval notices reflect that CIS previously found the beneficiary eligible for a specialty occupation.

Upon review of the record, the petitioner has not established that the proffered position is a specialty occupation.

The AAO first considers 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 *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)).

In determining 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 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 AAO notes that the petitioner's December 22, 2004 letter, submitted on appeal, expanded on the beneficiary's duties and added new responsibilities. For example, the new responsibilities include the "review of general market variables"; and "assessment of the company's pricing strategies, cost benefit analyses." On appeal, 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 the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The information provided by the petitioner on appeal clarified and provided more specificity to the original duties of the position, but it also added new duties to the job description. Therefore, the analysis of whether the proposed duties qualify as those of a specialty occupation will be based on the job description submitted with the initial petition.

Counsel states that the offered position is that of a controller. The 2006-2007 edition of the *Handbook* describes a controller as follows:

Controllers direct the preparation of financial reports that summarize and forecast the organization's financial position, such as income statements, balance sheets, and analyses of future earnings or expenses. Controllers also are in charge of preparing special reports required by regulatory authorities. Often, controllers oversee the accounting, audit, and budget departments.

The *Handbook* indicates that a controller requires a bachelor's degree in finance, accounting, economics, or business administration, thereupon qualifying it as a specialty occupation.

Although counsel contends that the position offered here is that of a controller, the petitioner must do more than submit a job description and assert that the position is a specialty occupation. It must submit evidence supporting its contentions. The evidence in the record is comprised of the petitioner's organizational chart, which reflects that it has 7 employees: a general manager/owner, housekeeper, four front desk clerks, and a part owner. The AAO notes that the Form I-129 indicates gross annual income of \$528,000. Although this information is relevant in determining whether the proposed position is that of a controller, the record has no evidence of the financial reports, budgeting, revenue performance, and cost and asset management that the beneficiary will review and evaluate; the financial information and internal audits that the beneficiary will oversee and analyze; or the financial reports for creditors, regulatory agencies, and tax authorities. Without this kind of evidence, the AAO cannot determine whether the proposed position would require the knowledge

associated with baccalaureate-level knowledge in a specific specialty, such as finance, accounting, or economics, which provides analytical skills and knowledge of financial analysis methods and technology that is required of a controller.¹ 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 AAO will now consider whether the proposed duties parallel those of a management accountant. As stated by the *Handbook*, management accountants:

[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. Usually, management accountants are part of executive teams involved in strategic planning or the development of new products. 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.

The AAO finds the above description 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, not all accounting employment is performed by degreed accountants. Therefore, 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, which it does, 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.

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.

It also notes in its description of the work performed by bookkeeping, accounting and auditing clerks that:

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

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos144.htm.

transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects.²

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.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 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 worker as an accountant. In cases where a petitioner’s business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent.

The AAO has already reviewed the evidence concerning the petitioner’s financial operations in relation to the petitioner’s claim that the proposed position is that of a controller. The AAO finds that the same evidence, and for the reasons already described, fails to establish that the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. Thereupon, the petitioner has failed to demonstrate that its financial operations are of sufficient complexity to indicate that it would employ the beneficiary in a position requiring a level of accounting knowledge that may only be obtained through a baccalaureate degree in accountancy. Accordingly, the duties of the proffered position are not established as

² *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos144.htm.

³ 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.

⁴ According to the website for [REDACTED] a community college located in San Mateo, CA [REDACTED] 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.

those of a degreed accountant. Instead, they 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.

The record contains no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): that the petitioner must show that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner show that its particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As discussed under 8 C.F.R. § 214.2(h)(iii)(A)(1), the record lacks sufficient evidence to establish the proposed duties as complex or unique, and thereby normally requiring a baccalaureate degree in accounting, finance, or a related field. As such, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) states that the petitioner must normally require a degree or its equivalent for the position. There is no evidence in the record establishing this criterion.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that 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. As conveyed in the discussion under 8 C.F.R. § 214.2(h)(iii)(A)(1), the record lacks sufficient evidence that would establish that the nature of the proposed duties is specialized and complex, normally requiring a bachelor's degree in accounting, finance, or a related field. Consequently, the petitioner fails to establish this last criterion at 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 on the ground.

And now, the AAO will address whether the beneficiary is qualified to perform a specialty occupation.

The submitted educational evaluations from [REDACTED] and The City University of New York fail to establish the beneficiary's qualifications for a position as a controller. The Silvergate Evaluations, Inc. evaluator concludes that the beneficiary holds the educational equivalent of a bachelor's degree in accounting from an accredited institution in the United States based on the beneficiary's formal education, work experience, and training. According to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), an educational evaluation must be based solely on the beneficiary's education. Here, because the evaluation

includes the beneficiary's work experience and training, it fails to establish the beneficiary's qualifications at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

The City University of New York evaluator concludes that the beneficiary possesses the equivalent of a four-year bachelor of science degree in business administration with a major in accounting from an accredited institution in the United States. Although the evaluator's conclusion is based on a combination of the beneficiary's education, training, and work experience, the record contains no evidence from the beneficiary's prior employers attesting to the beneficiary's employment while at their establishment. Thus, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Consequently, the evaluator's conclusion carries diminished weight in this proceeding.

The AAO observes that the two evaluators reach different conclusions regarding the equivalency of the beneficiary's educational degree. Again, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International. Id.*

Counsel asserts that CIS previously found the beneficiary eligible for a specialty occupation; thus, the beneficiary is qualified for the proposed position. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the qualifications required for the prior position are similar to the requirements for the position in the instant petition. Further, 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).

Based on the discussion above, the petitioner has failed to establish the beneficiary's qualifications for a controller position. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.