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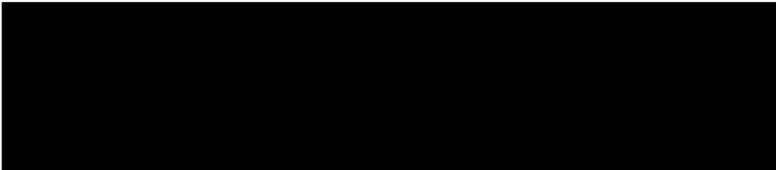
FILE: WAC 03 167 52983 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2006

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 an accounting firm, with five employees. It seeks to employ the beneficiary as a financial analyst 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, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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 states that it is seeking the beneficiary’s services as a financial analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 17, 2003 letter of support; and counsel’s December 3, 2003 response to the director’s request for evidence. This evidence indicates that the responsibilities of the proffered position would require the beneficiary to:

- Develop and monitor operating and capital budgets requirements, preparing financial analyses and forecasts, and analyzing operation[al] activity costs to recommend cost containment measures;
- Assist in [the] production of monthly forecast[s] of operating revenue and expenses for the division by analyzing current month-to-date results compared to the business plan and prior year actuals;
- Troubleshoot issue[s] and inconsistencies with the financial data vis-à-vis changes in organizational structure of a given company;
- Assist in pricing analysis, prepare journal entries and assist in month-end close reporting and operating results analysis;
- Analyze past and present financial operation[s], trends and costs as well as estimated and realized revenues, to prepare budget and project future revenues and expenses;
- Assist in the reconciliation of forecast-vs-actual amounts. Create financial models to aid in business decision-making;
- Interpret financial data to advise management on matters involving effective use of resources and budget forecasts;
- Prepare financial and cost analysis reports to recommend courses of action;

- Produce and analyze various databases of key operating statistics to be used in implementing area operating strategies and in the development of operational goals/objectives; and
- Work on special projects with cross-functional teams within a given organization to provide financial and business support on expansion opportunities and proposals[.]

As reflected in the above list, the petitioner describes the proposed duties in exclusively generalized terms that do not relate the specific work that would be done under their umbrella and do not establish the types and levels of knowledge that would be applied to perform that work.

While the AAO would normally turn first to an analysis of whether the above duties are those of a specialty occupation, this analysis must await the AAO's consideration of the reliability of the evidence submitted by the petitioner concerning its business operations. As discussed below, the director based his denial, in part, on the petitioner's failure to establish the nature of its business and, therefore, whether it would employ the beneficiary in a specialty occupation. For reasons discussed below, the AAO also concludes that the record before it does not reliably document the nature of the petitioner's business, and that the petitioner has failed to prove the beneficiary would be coming to the United States to perform services in a specialty occupation, pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

In his denial, the director found that the petitioner had not established its need for a specialty occupation worker, stating that it had failed to demonstrate the duties of the proffered position or the nature of its business. He specifically noted (a) the failure of the petitioner to submit an IRS-certified Federal Income Tax Return as stipulated in his request for evidence and (b) the discrepancy between the petitioner's descriptions of its staff in an organizational chart dated November 2003 and a June 2003 staff listing, both submitted in response to his request for evidence.

On appeal, counsel states that the petitioner contends there are no inconsistencies in the documentation it has provided. Counsel asserts that the petitioner is an accounting, auditing and management consultancy firm that serves various corporate, partnership and individual accounts, and that the petitioner employs three full-time in-house accountants who perform accounting and auditing functions "necessarily connected with the nature of the petitioner's business." Counsel notes that "[a]ny multi-tasking functions being performed by these accountants are still connected with the petitioner's business operations and do not alter the basic duties and responsibilities of these accountants in the firm." However, counsel's explanation is not persuasive. Counsel has submitted no documentation that would support his contention that the petitioner's accountants have multiple responsibilities that might also support a description of sales representative. In the absence of such documentation, the assertions of counsel do not constitute evidence and will not meet the petitioner's burden of proof. *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 record before the AAO presents it with two distinctly different descriptions of the work performed by three of the petitioner's employees. While these employees are identified as comprising the petitioner's accounting staff in the November 2003 organizational chart supplied by counsel, the staff list of June 2003

identifies them, by name, as sales representatives earning a salary of \$100 per week, plus commissions based on sales.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. If such inconsistencies cannot be explained, the doubt cast upon the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* 19 I&N Dec. 582, 591-592 (BIA 1988). In the instant case, the petitioner has submitted no explanation or document that addresses its differing descriptions of the employment of its workforce. Unresolved, this discrepancy also raises significant questions about the nature of the petitioner's business and the services it provides its clients. If the individuals in question, whom the petitioner states constitute its accounting staff, cannot be reliably identified as accountants, then the petitioner cannot be reliably identified as an accounting firm. As a result, the AAO finds that the petitioner has failed to establish that it operates an accounting business or requires a financial analyst to support an expansion of its accounting operations. Accordingly, the record does not demonstrate that the beneficiary would be coming temporarily to the United States to perform services in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

The AAO now turns to an examination of the duties of the proffered position, which the petitioner asserts are those of a financial analyst.

To determine whether the employment described by the petitioner 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)).

The 2006-2007 edition of the *Handbook* indicates that:

Financial analysts and personal financial advisors provide analysis and guidance to businesses and individuals to help them with their investment decisions. Both types of specialists gather financial information, analyze it, and make recommendations to their clients *Financial analysts* assess the economic performance of companies and industries for firms and institutions with money to invest [*Handbook* at page 85].

As they have been described by the petitioner, the duties of the proffered position do not indicate that the beneficiary would provide the type of investment counseling performed by financial analysts. Instead, they appear to be more closely aligned to the employment of budget analysts who:

[p]lay the primary role in the development, analysis, and execution of budgets, which are used to allocate current resources and estimate future financial requirements

Budget analysts can be found in private industry, nonprofit organizations, and the public sector. In private sector firms, a budget analyst examines, analyzes, and seeks new ways to improve efficiency and increase profits

Analysts examine the budget estimates or proposals for completeness, accuracy, and conformance with established procedures, regulations and organizational objectives They also examine past and current budgets and research economic and financial developments that affect the organization's spending. This process enables analysts to evaluate proposals in terms of the organization's priorities and financial resources.

[B]efore any changes are made to an existing program or before a new one is implemented, a budget analyst must assess the program's efficiency and effectiveness. Analysts also may be involved in long-range planning activities such as projecting future budget needs.

The amount of data and information that budget analysts are able to analyze has greatly increased through the use of computerized financial software programs. The analysts also make extensive use of spreadsheet, database, and word-processing software.

Budget analysts have seen their role broadened as limited funding has led to downsizing and restructuring throughout private industry and government. Not only do they develop guidelines and policies governing the formulation and maintenance of the budget, but they also measure organizational performance, assess the effect of various programs and policies on the budget, and help to draft budget-related legislation[*Handbook* at pages 77-78].

However, while the petitioner's description of the proffered position reflects the above discussion, it outlines the type of duties typically performed by budget analysts rather than the specific tasks to be performed by the beneficiary in relation to the petitioner's accounting business. Therefore, the duties listed for the proffered position do not establish it as a specialty occupation.

To determine whether a position qualifies as a specialty occupation, the AAO requires information regarding the actual responsibilities of a proffered position. 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 description of the proffered position's day-to-day responsibilities in relation to the petitioner's accounting business, it does not establish the proffered position as a specialty occupation under the first criterion at

8 C.F.R. § 214.2(h)(4)(iii)(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 (1) that a specific degree requirement is common to its industry in parallel positions among similar organizations or (2) 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 that responds to either of the criterion's prongs. Moreover, the petitioner's failure to provide a specific, detailed account of the proffered position's duties precludes it from establishing the position as parallel to any degreed positions within similar organizations in its industry or distinguishing it from similar but non-degreed employment based on its complexity or unique nature. The record does not demonstrate that the proffered position qualifies as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 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 proffered position appears to be newly created. In response to the director's request for evidence, counsel indicated that the petitioner was seeking the beneficiary's services in response to an "expansion phase in [its] business environment." Accordingly, the petitioner has submitted no evidence that would establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the proffered position's 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. On appeal, counsel contends that the duties of the proffered position are both complex and sophisticated and "warrant the imposition of a degree requirement [on] any of its would-be holders." However, without supporting documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof in these proceedings. 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). In the instant case, the petitioner has failed to provide a description of the specific, day-to-day duties to be performed by the beneficiary on behalf of its accounting business. It is, therefore, precluded from establishing the offered employment as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) based on the specialization and complexity of those duties.

The AAO notes that, on appeal, counsel indicates that the director determined that the record did not establish the beneficiary as qualified to perform the duties of a specialty occupation. However, the director did not

reach such a conclusion. The findings in his denial are confined to the evidence of record related to the nature of the petitioner's business operations and the duties of the proffered position. As the director's denial did not address the beneficiary's qualifications to perform the proffered position, counsel's statements regarding the beneficiary's academic credentials are not relevant to this proceeding.

For the reasons discussed above, the petitioner has failed to establish that it would employ the beneficiary in a specialty occupation or that the duties of the proffered position qualify it as 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.