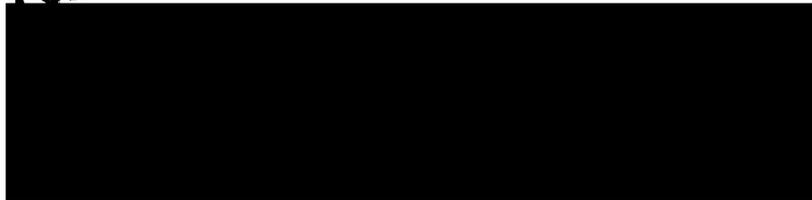




U.S. Citizenship  
and Immigration  
Services

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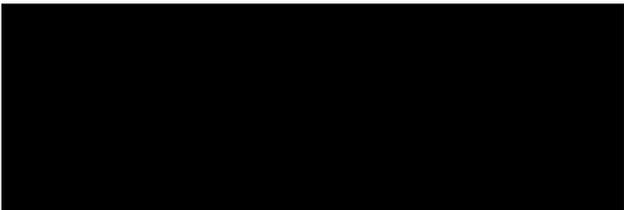
DZ

FILE: WAC 03 007 51415 Office: CALIFORNIA SERVICE CENTER Date: **NOV 13 2007**

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, California Service Center, initially approved the nonimmigrant visa petition. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director to issue a new decision.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated that it was a food services and airport café restaurant business. The petitioner claimed three employees, and a gross annual income of \$60,000 to \$80,000, and a net annual income of \$12,000 to \$15,000. The petitioner noted that it sought to employ the beneficiary as an accountant. Accordingly, the petitioner endeavored 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 record of proceeding includes: (1) the Form I-129 filed October 8, 2002; (2) the director's December 11, 2002 request for further evidence (RFE) requesting clarification regarding the type of classification the petitioner was requesting, either L-1B or H-1B and if an H-1B request was being made, the Labor Condition Application (LCA) filed with the Department of Labor (DOL); (3) the petitioner's submission of an LCA certified by the DOL on February 26, 2003 for the position of accountant/manager/investor in California City, California and a prevailing wage request submitted to the State of California Employment Development Department for an accountant/investor position; (4) the director's February 6, 2004 RFE; (5) the petitioner's April 26, 2004 response to the director's RFE; (6) the approval notice issued May 3, 2004; (7) a September 21, 2004 report issued by the United States Embassy in Manila, Philippines outlining deficiencies in the beneficiary's education and recommending a review of the approved petition and revocation if appropriate; (8) the director's June 15, 2006 notice of intent to revoke approval (NOIR) repeating the derogatory information from the Embassy September 21, 2004 report, as well as referencing some inconsistencies in the record; (9) counsel for the petitioner's rebuttal to the NOIR; (10) the director's September 26, 2006 decision revoking approval of the petition; and (11) the Form I-290B and counsel's brief on appeal. The AAO reviewed the record in its entirety before rendering this decision.

On September 26, 2006 the director revoked approval of the petition determining the petitioner had not established that the beneficiary qualified for the approved classification. On appeal, counsel submits essentially the same brief submitted in rebuttal to the director's NOIR.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or

- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

Although the director properly questioned the beneficiary's qualifications to perform the duties of an accountant, the director did not comply with the notice requirements at 8 C.F.R. § 214.2(h)(11)(iii). To properly issue a NOIR, the director must: (1) specify the part or parts of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which the director proposes to revoke the approved petition; (2) for each section of 8 C.F.R. § 214.2(h)(11)(iii)(A) specified as a basis for revocation, present a detailed statement of the factual grounds that justify the proposed revocation; and (3) specify the time period (of at least 30 days) allowed for the petitioner to submit a response to the NOIR.

The director's repetition of the September 21, 2004 Embassy report without specifying the particular provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) under which he proposed to act is insufficient. In addition, the director's statement that the beneficiary is not eligible for classification under this law does not provide factual grounds for the basis of the NOIR. The record does not contain an educational credential evaluation establishing that the beneficiary is qualified for the position of accountant. The director failed to request an educational credential evaluation. Thus, the petition will be remanded in order for the director to properly issue a notice of intent to revoke.

The NOIR must request evidence to establish that the proffered position is a specialty occupation. The record in this matter does not provide sufficient evidence to demonstrate that the proposed duties of the accounting position require the theoretical and practical application of a body of highly specialized knowledge obtained through a course of study at a bachelor's or higher degree level. The petitioner has limited its information about the proffered position and its duties to a description of general functions. The petitioner's broad description of the duties of the proffered position contains elements that may be associated with a general understanding of accounting and auditing principles; however, the record does not contain evidence that the proffered position will incorporate the duties of an accountant or an internal auditor.<sup>1</sup> The AAO notes that not

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<sup>1</sup> The AAO observes that counsel in rebuttal to the NOIR and on appeal asserts that the position will include duties associated with the duties of an internal auditor and provides generic statements paraphrasing the Department of Labor's *Occupational Outlook Handbook* report on internal auditors. However, the petitioner cannot repeat portions of the generalized descriptions found in the *Handbook* to establish the proffered position is a specialty occupation. Such a generalized description is necessary when defining the range of

all types of employment that require the use and understanding of accounting and auditing principles require degreed accountants or auditors. The question is not whether the position requires knowledge of accounting or auditing principles, which it may, but rather whether it is one that normally requires the level of accounting and auditing knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting.

The petitioner's initial description of the duties of the proffered position in this matter is too general to conclude that the position will require more than a general understanding of accounting and auditing principles such as that attained thorough an associate's degree.<sup>2</sup> 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 or auditor. In matters where a petitioner's business is relatively small, like that in the instant matter, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient scope and/or complexity to indicate that it would employ the beneficiary in an accounting/auditing position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent. The record does not provide evidence that the petitioner's three-employee business with a gross annual income of \$60,000 to \$80,000 is of sufficient complexity to require the employment of a degreed accountant.

The AAO emphasizes that the petitioner in this matter must supply documentary evidence to substantiate its number of employees, its gross and net annual income, and any other documentary evidence that would assist in explaining the complexity of the nature of its business when the petition was filed. Without such documentary evidence, the petitioner has not established that the proffered position is a specialty occupation. In addition, the petitioner must clarify the role the beneficiary will play for the petitioner. The AAO observes that the record presents a confusing summary of the beneficiary's daily duties. The record suggests that the beneficiary will not be entering the United States to work for the petitioner in an accounting position but will be running her own business as a travel agent and accounting service as well be an owner of a separate and third business. It is unclear that the beneficiary would be coming to the United States to perform the duties of an accountant, as noted on the Form I-129, and as required by this visa classification.

Regarding the beneficiary's qualifications to perform the duties of a specialty occupation, the NOIR must also

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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. Moreover, 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).

<sup>2</sup>According to the website for Skyline College, a community college located in San Mateo, CA ([www.skylinecollege.net](http://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.

request evidence that the beneficiary's foreign degree has been evaluated as the equivalent of a four-year degree in accounting from an accredited university in the United States or must present other evidence establishing that the beneficiary is qualified to perform the duties of a specialty occupation.

Further, the AAO observes that the labor condition application (LCA) in the record is certified on February 26, 2003, more than four months after the petitioner filed the petition. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B) requires that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner must obtain a certified LCA from the Department of Labor in the occupational specialty in which the H-1B worker will be employed. The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the Department of Labor when submitting the Form I-129. The Form I-129 filing requirements imposed by regulation require that the petitioner submit evidence of a certified LCA at the time of filing. A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Thus, when the petition was filed it appears that the petitioner had failed to comply with the filing requirements at 8 C.F.R. § 214.2(h)(4)(i)(B).

The AAO finds there is sufficient basis to revoke the approval of the petition in this matter. The record reveals that the petitioner violated requirements of section 101(a)(15)(H) of the Act and paragraph (h) at 8 C.F.R. § 214.2 and that the approval of the petition involved gross error. Thus, the petition may not be approved. Although the AAO finds that the record does not support an approval of this matter, the director failed to adequately articulate the deficiencies of the record in the NOIR. Thus, the matter will be remanded for the director to issue a new notice of intent to revoke containing a detailed statement of all the grounds for revocation. The director must accord the petitioner 30 days to submit evidence in rebuttal as provided in 8 C.F.R. § 214.2(h)(11)(iii)(B). If the new decision is adverse to the petitioner, the director shall certify the matter to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's September 26, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.