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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

SEP 2 6 2007

FILE: WAC 05 200 51567 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

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:

[redacted]

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, denied the nonimmigrant visa petition. 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 home health provider organized in the State of California in [redacted] It employs an indeterminate number of personnel and has a projected 2005 [redacted].[1] It seeks to employ the beneficiary as a part-time auditor. Accordingly, 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 [redacted] The director denied the petition determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meets 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.

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[1] The Form I-129 states that the petitioner employs 4 individuals. In response to the RFE, counsel submitted a quarterly taxable wage report for the second quarter of 2005 listing 15 employees and, in her brief, counsel stated that one employee was not included in the report because that employee began working on October 6, 2005. The Form I-129 states that the petitioner has a gross annual income of $1,404,739 at the time of filing. On appeal, the petitioner submits a corporate tax return indicating gross income of $2,325,941 in 2004.

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 or 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 auditor. Evidence of the beneficiary's duties includes the petitioner's May 11, 2005 letter, counsel's response to the RFE, and counsel's brief on appeal. The petitioner's letter in support of the petition described the duties of the proffered position stating the following:

> As our company is regularly subject to audits by government agencies such as Medicare and/or MediCAL, we need to ensure that our accounting books and contracts are accurate. Hence, her main function is to collect and analyze data to detect deficient controls, duplicated effort, extravagance, fraud, or non-compliance with laws, regulations, and management policies. She will then report to management about asset utilization and audit results, and recommend changes in operations and financial activities. She will prepare detailed reports on audit findings. She will review data about material assets, net worth, liabilities, capital stock, surplus, income, and expenditures. [She] will coordinate with accountant in inspecting account books and accounting systems for efficiency, effectiveness, and use of accepted

> accounting procedures to record transactions. [She] will examine and evaluate financial and information systems, recommending controls to ensure system reliability and data integrity. She will supervise auditing of each contract and determine scope of investigation required. She will prepare, analyze, and verify annual reports, financial statements, and other records, using accepted accounting and statistical procedures to assess financial condition and facilitate financial planning. She will confer with company officials about financial and regulatory matters. [She will] inspect cash on hand, accounts receivable and payable and canceled checks to confirm records are accurate.
>
> Percentage of Time on Each Duty
> 60% of Week[ly] Schedule
> *Review, Evaluation and Analysis*
>
> She will verify the accuracy of the company's records and check for mismanagement, waste or fraud. Among her duties will be examining and evaluating the company financial and information systems, management procedures, and internal controls to ensure that records are accurate and controls are adequate to protect against fraud and waste.
>
> 30% of Week[ly] Schedule
> *Operations*
>
> [redacted] will likewise be tasked with reviewing and evaluating company operations to determine its efficiency, effectiveness and compliance with corporate policies and procedures, laws, and government regulations.
>
> 10% of Week[ly] Schedule
> *Recommendations*
>
> As auditor, we will expect [redacted] to make recommendations to improve our current information systems to allow us greater oversight on operations and financial processes.

In counsel's response to the RFE, she added the following regarding the beneficiary's duties:

> Petitioner is in need of a [sic] Auditor who can perform the various functions of a systems analyst competently without or [sic] minimal supervision. Petitioner does not have the capability or supervisory staff to train and supervise a worker with lesser experience in performing the proposed functions of an Auditor, such as regularly inspecting financial books, examining and evaluating financial systems and recommending appropriate changes to management to support the evolving needs of the Petitioner.
>
> The Petitioner needs a worker who can work independently and assume the full responsibilities of an Auditor in maintaining the integrity of the financial and operations

structure of the business and assuring compliance with regulatory matters while at the same time sustaining the cost-effectiveness of the company['s] operations.

On appeal, counsel gave the following description of the beneficiary's duties:

60% of week[ly] schedule
REVIEW, EVALUATION AND ANALYSIS

- She will collect and analyze data to detect deficient controls, duplicated effort, extravagance, fraud or non-compliance with laws, regulations and management policies.
- She will verify the accuracy of the company's records and check for mismanagement, waste or fraud.
- She will report to management about asset utilization and audit results, and recommend changes in operations and financial activities.
- She will prepare detailed reports on audit findings.
- She will review data about material assets, net worth, liabilities, capital stock, surplus, income and expenditures.
- She will examine and evaluate financial and information systems, recommending controls to ensure system reliability and data integrity.
- She will prepare, analyze and verify annual reports, financial statements and other records, using accepted accounting and statistical procedures to assess financial condition and facilitate financial planning.

30% of week[ly] schedule
OPERATIONS

- She will review and evaluate company operations to determine its efficiency, effectiveness and compliance with corporate policies and procedures, laws, and governmental regulations.
- She will coordinate with accountant in inspecting account books and accounting systems for efficiency, effectiveness and use of accepted accounting procedures to record transactions.
- She will inspect cash on hand, accounts receivables and payables including cancelled checks to confirm records are accurate and also for the purpose of reconciliation of accounts.

10% of week[ly] schedule
RECOMMENDATIONS

- She will make recommendations to improve current information systems to allow greater oversight on operations and financial processes.
- She will confer with company officials about financial and regulatory matters.

To make its determination as to whether the employment described in the record 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)* which require that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, or that 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 AAO first turns to the 2006-2007 edition of the *Handbook* for its discussion of internal auditors, the category of accounting most closely aligned to the duties described by the petitioner. As stated by the *Handbook*, internal auditors:

> verify the accuracy of their organization's internal records and check for mismanagement, waste, or fraud. Internal auditing is an increasingly important area of accounting and auditing. Internal auditors examine and evaluate their firms' financial and information systems, management procedures, and internal controls to ensure that records are accurate and controls are adequate to protect against fraud and waste. They also review company operations, evaluating their efficiency, effectiveness, and compliance with corporate policies and procedures, laws, and government regulations. There are many types of highly specialized auditors, such as electronic data-processing, environmental, engineering, legal, insurance premium, bank, and health care auditors. As computer systems make information timelier, internal auditors help managers to base their decisions on actual data, rather than personal observation. Internal auditors also may recommend controls for their organization's computer system, to ensure the reliability of the system and the integrity of the data.[2]

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and acknowledges that the petitioner would desire the beneficiary to have an understanding of some basic accounting principles. However, degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties wherein some accounting knowledge is necessary does not establish the proffered position as that of an accountant. The question is not whether the petitioner's 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.

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

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.

The *Handbook* 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 transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects.[3]

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the Accreditation 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.[4]

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, 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 matters 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.

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

[4] 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.

At the time of filing, the petitioner indicated that it was established in 2001, employed four individuals, provided home health services, and had a gross annual income of $1,404,739.00, and did not provide a net annual income. In response to the director's RFE, counsel provided an organization chart including six employee names and their respective positions and a quarterly taxable wage report for the quarter ending June 30, 2005 listing 15 employees. The AAO notes that three of the six employees listed in the organization chart are not included in the quarterly taxable wage report. Furthermore, counsel did not provide information regarding the positions filled by the employees listed in the quarterly wage report but not included in the organization chart. The petitioner's letter of support indicates that the beneficiary will be assigned "at one of the Petitioner's facility [sic] [redacted] thus suggesting that the petitioner has several locations. The record does not establish the size of the facility where the beneficiary will work. In addition, the AAO is unable to determine the petitioner's actual income. In her letter dated December 12, 2005, and in the Form I-290B dated April 12, 2006, counsel stated that the petitioner has estimated gross revenues of over $1 million dollars. In her appeal brief dated May 8, 2006, counsel states that the petitioner has "grown tremendously the last four years and has generated a [sic] gross sales of $2,325,941.00 for 2004 and has increased gross annual sales for 2005 estimated at about $2.8 million dollars." As evidence of the petitioner's income, counsel provides a redacted copy of the petitioner's 2004 sales by customer summary and an incomplete 2004 Internal Revenue Service Form 1120 (IRS Form 1120).[5] The 2004 sales by customer summary provides a total of $2,377,664.02 while the IRS Form 1120 lists $2,330,197.00 for gross receipts or sales.[6] The brief in support of the appeal indicates that the petitioner is a non-profit company, strictly regulated and monitored by the state. Yet the corporate tax return does not reflect the petitioner's non-profit status.[7] Thus, the organizational hierarchy is unclear. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such insistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record does not contain sufficient documentation related to the petitioner's financial operations or organizational structure that would shed light on the complexity of the accounting work to be performed by the beneficiary, e.g., financial documents or reports that evidence the complexity of the petitioner's financial operations. While the AAO recognizes the highly regulated nature of the healthcare industry, the petitioner has not described the specific duties to be performed by the beneficiary in relation to its home healthcare business. 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 petitioner has not provided documentary evidence establishing that it has a complicated financial situation and thus that its business has the complexity of financial operations to require that the proffered position requires a degree in accounting.

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[5] The AAO notes that that counsel only provided four pages of the IRS Form 1120.

[6] The amount listed on line 1c of the IRS Form 1120, $2,325,941, is the balance of the gross receipts or sales less returns and allowances.

[7] The Form 990, Return of Organization Exempt from Income Tax, is the appropriate return for a non-profit company.

In its letter of support, the AAO notes that the petitioner references the *Occupational Information Network O*Net OnLine (O*Net).* However, the AAO does not consider *O*Net* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *O*Net* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Furthermore, the SVP rating of 7.0 to <8.0 assigned by *O*Net* to the occupation of auditor does not indicate that a bachelor's degree in a specific specialty is required. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. The SVP rating does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The duties of the proffered position are not established as the duties of a degreed accountant. Instead, as initially described, the duties are generic and almost identical to the description provided by the *Handbook*. The petitioner must do more than recite the duties of an occupation from the *Handbook*; it must describe those duties in relation to its home healthcare business so that CIS can analyze whether a degree is required to perform them. The evidence submitted by the petitioner is insufficient to establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(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 matter, the petitioner has not submitted evidence that establishes either prong of the criterion.

To establish its degree requirement as the norm within its industry under the first prong of the criterion, the petitioner submits several job advertisements for auditors. None, however, satisfy the requirements for establishing an industry standard. Of the advertisements submitted, none of the organizations appear similar to the petitioner, a company providing home health services. Instead, the organizations publishing the advertisements are from a hospice, a hospital, a provider of disability medical evaluations, a staffing company, and a provider of home healthcare products and clinical services. The advertisements for LifePath Hospice and Palliative Care and QTC Management do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. The advertisements for Spectrum Health, Volt Services Group, and Apria Healthcare provide sufficient information, and counsel states as much in her brief on appeal, to enable the AAO to conclude that the companies are much larger than the petitioner in size, number of employees and complexity of business. The only advertisement that provides a meaningful description of the position advertised or lists duties like those required by the petitioner is that of Volt Services Group. However, Volt Services Group is the largest business segment of Volt Information Sciences, inc., a Fortune 1000 Company and therefore cannot be considered a similar organization to that of the petitioner. As observed above, the petitioner has not provided evidence that the proffered position incorporates duties that require an analysis of complex and intricate financial principles, but rather has provided a generic description of duties. Therefore, the proffered position may not be established as a specialty occupation based on an industry-wide degree

requirement or its complex and unique nature. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it 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 response to the director's RFE and on appeal, counsel states that the petitioner has previously hired personnel with a bachelor's degree requirement and includes the diplomas for its accountant and its systems analyst. However, the petitioner has not shown that it has hired an individual with a bachelor's degree for the position of auditor. The petitioner has not established a history of hiring degreed accountants for its auditor position.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. As noted above, the petitioner's organizational hierarchy, and the beneficiary's role within its organization, has not been established. The scope of the beneficiary's auditing duties in the context of the petitioner's home healthcare business has not been described. To the extent that they are depicted in the record, the duties of the proposed position 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. The evidence of record fails to establish that the proffered position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

In addition, as the director determined in his decision, the record contains an inconsistency regarding the beneficiary's duties. In its May 11, 2005 letter of support, the petitioner states that the beneficiary will "supervise auditing of each contract and determine scope of investigation required." In his decision, the director explains that on the "organizational chart there are no positions for the beneficiary to supervise, there are no accounting clerks, bookkeepers, auditing clerks, [or] accounts receivable clerks." On appeal, counsel provides the same organizational chart previously submitted and removes all mention of the duty to supervise from the list of duties in her brief. 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). Moreover, counsel fails to address this issue on appeal. Neither counsel nor the petitioner offers an explanation or clarification regarding this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, 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 (BIA 1988). 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 evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.