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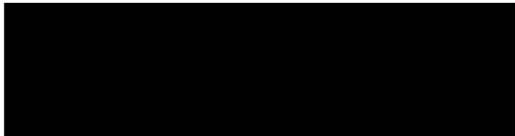


FILE: WAC 07 046 52837 Office: CALIFORNIA SERVICE CENTER Date: **MAR 31 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, 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 provides computer and management consulting services, claims to employ ten personnel, and to have a gross annual income of \$800,000. It seeks to employ the beneficiary as an accounting consultant. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On May 9, 2007, the director denied the petition determining that the record did not establish that the petitioner had an accounting position available to offer to the beneficiary. Counsel submits a letter and a new contract on appeal.

The record of proceeding before the AAO contains: (1) the Form I-129 filed December 4, 2006 and supporting documentation; (2) the director's February 28, 2007 request for additional evidence (RFE); (3) the petitioner's March 22, 2007 response to the director's request; (4) the director's May 9, 2007 denial letter; and (5) the Form I-290B, counsel's letter and supporting documentation submitted on appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner had a specialty occupation position available for the beneficiary at the time of filing the petition and whether the proffered position is a specialty occupation position. To meet its burden of proof in this regard, the petitioner must first 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.

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.

The petitioner seeks the beneficiary's services as an accounting consultant. In a November 22, 2006 letter appended to the petition, the petitioner indicated the beneficiary would perform the following duties:

1. Analyze and compile financial information and prepare financial reports. Oversee operations in all areas of accounting.
2. Analyze changes in costs to determine effects on expenditure. Oversee the establishment, modification, and coordination of accounting and business management procedures.
3. Inform the undersigned on such matters as the effective use of resources and assumptions underlying budget forecasts.
4. Compile, consolidate and analyze financial information to prepare accounts documenting business transactions with regard to accounts receivable and accounts payable. Prepare monthly income schedules.
5. Perform an internal audit of daily payments, especially during tax season, involving cash and other forms of payments by individual clients to tally with consulting services. Investigate, trace and report any discrepancy.
6. Prepare profit and loss statements and analyze balance sheets and budgets. Install and operate appropriate computer-based budgeting system.
7. Prepare reports regarding assets, net-worth, liabilities, income and expenditure. Examine, maintain and reconcile disbursements and bank records.
8. Analyze past and present financial operations, costs, estimated and realized revenues and obligations incurred to project future revenues, expenses and profitability.
9. Submit regular accounting and financial reports to the external auditor. Periodically interface with said external auditor in that regard.

The petitioner noted that due to the internal nature of the position, the State laws and regulations of New Jersey did not require that the holder of the position be licensed or regulated. The Form ETA 9035E shows the work location is in River Edge, New Jersey in the position of accounting consultant.

On February 28, 2007, the director issued an RFE, requesting evidence that the proffered position incorporated the duties of a specialty occupation. The director also requested clarification of the nature of the petitioner's business and any evidence that established that it required the services of an accountant, even though it may not be the standard within the industry.

In a March 22, 2007 response, the petitioner explained that the position had been established since 1999 when the petitioner's accountant also functioned as a consultant to the petitioner's client, [REDACTED], a seafood restaurant in New York, as well as auditing the petitioner's books and setting up controls to allow the petitioner to grow as a company. The petitioner noted that it had employed an individual in this position until 2005 when the previous employee resigned and the petitioner and [REDACTED] had not renewed their agreement. The petitioner indicated that it sought to fill the vacancy to: "(1) continue company growth; (2) recover lost revenue that came from [its] restaurant client when the previous accountant left, and (3) expedite development of our web-based accounting solution." The petitioner provided copies of contracts and invoices with [REDACTED] wherein the petitioner agreed to provide administrative services to [REDACTED]. The last contract entered into with [REDACTED] ended June 30, 2005. The petitioner also provided copies of bills from various clients and utilities, including a bill from its independent certified public accountant, to establish that it is a *bona fide* business. The petitioner submitted a copy of its organizational chart depicting a president/marketing consultant; three vice-presidents/consultants in the fields of systems, software, and infrastructure; three consultants in the fields of restaurants (2) and technical writing; an office manager; an administrative assistant; and a vacant position for the accounting/financial consultant. The petitioner further provided copies of its business licenses and its 2005 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for S Corporations, showing gross receipts or sales of \$741,178.

On May 9, 2007, the director denied the petition. The director observed that the petitioner had not provided evidence that it had continued to provide accounting services to its previous client, [REDACTED], since 2005 and had not provided evidence that it had other new businesses that required the petitioner's services in accounting. The director determined that the petitioner had not adequately explained where or for whom the beneficiary would be working. The director concluded that the record lacked a reliable evidentiary basis to determine that the petitioner's proffer of employment was authentic.

On appeal, counsel for the petitioner notes that the petitioner was initially established as a computer consulting firm but had expanded its business over the years to provide management consulting including accounting services for the restaurant industry. Counsel submitted a copy of a contract entered into between the petitioner and Beta QSR, LLC, dated July 2, 2007 for a one-year term in which the petitioner agreed to supply an accountant's services. Counsel asserts that this document shows that the petitioner has a need for an accountant who will be assigned to Beta QSR, LLC on a consultancy basis.

The AAO finds that in this matter, the petitioner initially sought an accounting consultant that it indicated would be used internally. The petitioner provided an overview of the duties of the proffered position and

indicated that the holder of the position would work internally, thus would not require licensing or registration in the State of New Jersey. In response to the director's RFE, the petitioner added that it needed the services of an accounting consultant to: "(1) continue company growth; (2) recover lost revenue that came from [its] restaurant client when the previous accountant left, and (3) expedite development of our web-based accounting solution." The petitioner's information in response to the director's RFE suggested that the individual in the proffered position would also work outside the petitioner's business when providing consulting services to third party companies. On appeal, counsel for the petitioner confirms that the individual in the proffered position would be working for third party companies.

The AAO observes that if the individual in the proffered position will be providing services to third party companies, the entity ultimately using the beneficiary's services must submit a detailed job description of the duties that the individual will perform and the qualifications that are required to perform the job duties. From this evidence, Citizenship and Immigration Services (CIS) will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

In this matter, the petitioner has not provided a description of the duties the individual in the position will provide for the ultimate end user. The AAO notes that the [REDACTED] contract called for "administrative services" and the petitioner billed [REDACTED] for accounting services. Even if the [REDACTED] contract covered the time period the beneficiary would be employed by the petitioner, which it does not, it did not provide a description of duties sufficient to establish the proffered position as a specialty occupation. Similarly, the contract provided on appeal calls for the services of an "accountant," without providing a detailed description of the actual duties to be performed by the individual in the position. Further, the contract provided on appeal was not in existence when the petition was filed on December 4, 2006. The 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). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The failure to provide a definitive description of the services the beneficiary will provide from the actual user of the beneficiary's services and the failure to provide evidence that a position was available when the petition was filed, requires a denial of the petition.

Regarding the petitioner's initial indication that the individual in the position would work internally for the petitioner, the petitioner has not established that the in-house position is a specialty occupation. To make its determination as to whether the employment described by the petitioner qualifies as a specialty occupation,

the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion 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 that the industry requires a degree.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2006-2007 edition of the *Handbook* for its discussion of management accountants, the category of accounting most closely aligned to the duties described by the petitioner. 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 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.¹

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the internal position and agrees that the petitioner's employment of the beneficiary would require the beneficiary to have an understanding of accounting principles. However, degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties requiring accounting knowledge 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.

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.

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos001.htm.

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.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 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.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, 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. It is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). 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.

At the time of filing, the petitioner stated that it employed ten personnel and had a gross annual income of \$800,000. In the March 22, 2007 response to the director's RFE, the petitioner provided a copy of its 2005 IRS Form 1120S showing a gross revenue of \$741,178 and an organizational chart depicting nine individuals providing consulting services. The AAO has reviewed the record for evidence that the petitioner's business is growing, as well as evidence of its financial structure and operations, to determine whether the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. The AAO does not find any documentary evidence to establish that the petitioner is an expanding business. The petitioner has not submitted any independent documentary evidence of its gross or net annual income for the

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.

year prior to filing the petition or subsequent to the filing the petition. The record does not contain any documentation related to its financial operations or organization that would shed light on the complexity of the accounting work to be performed by the beneficiary. The record does not contain evidence such as audits or sales projections that document a pattern of growth in the petitioner's revenues or business operations. 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)). Neither has the petitioner provided any evidence that would indicate how the petitioner's plans for expansion have affected its financial position. The record does not contain documented evidence of the petitioner's intentions for continued expansion such as tax returns showing complex debt repayment schedules, loan applications, correspondence, or a business plan. Accordingly, the record offers no meaningful evidence to establish that the accounting duties to be performed by the beneficiary in relation to the petitioner's operations or in relation to the petitioner's business expansion plans are sufficiently complex to require the services of a degreed accountant.

In addition, although the petitioner emphasizes its desire to employ an individual with a bachelor's degree in accounting or finance, it is not the petitioner's desire but rather the duties of the position that establish a position as a specialty occupation. The AAO observes that most companies desire to be well organized and to be fully compliant with state and federal tax reporting requirements. Such a desire does not establish a need for an accountant with a bachelor's or higher degree in accounting. The petitioner has not provided sufficient documentary evidence to establish that its internal position is the position of a degreed accountant. Instead, the position appears 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. As a result the petitioner has not established the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the 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 this criterion include 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 the instant matter, the petitioner has not submitted evidence that responds to either prong of the criterion.

The petitioner has not submitted any job announcements, industry letters, or other evidence that would establish a degree requirement is common to the industry for parallel position among similar organizations. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. Although the petitioner contends that the proffered position is a professional position, the petitioner's failure to submit financial information regarding its current business operations and expansion plans precludes it from distinguishing the proffered position from accounting employment that is performed with less than a four-year degree. Again, 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. at 165. The petitioner has failed to establish the second prong of the referenced 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. The AAO acknowledges that the petitioner previously employed an individual to provide administrative services to [REDACTED], but as observed above, the contract with [REDACTED] does not contain evidence that the individual the petitioner previously employed performed the duties of a specialty occupation. The record is deficient in this regard.

Further, in the matter at hand the record does not include evidence that the nature of the petitioner's operations requires a degreed accountant to perform the duties of the position. Moreover, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. Again, 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. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a bookkeeper or a junior accountant. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a bookkeeper or a junior accountant. Again, the petitioner has not provided evidence that its business operations involve intricate and complex financial transactions, specialized tasks related to tax records, or any other substantiating evidence that would elevate the general duties of the position to one that requires a degreed accountant. The totality of the record does not establish that 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. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 this proceeding 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