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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 043 51523 Office: CALIFORNIA SERVICE CENTER Date: FEB 03 2006

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a recently formed business management corporation that is making arrangements to eventually operate and manage a retail food store. In order to employ the beneficiary as its chief financial officer (CFO), 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. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation.

On appeal, counsel contends that the petition should be approved because the petitioner has provided sufficient evidence of the prospective duties of its chief financial officer to establish that he must possess a bachelor's degree in a specific specialty directly related to the position. The AAO disagrees.

At the time the petition was filed, the retail food store enterprise that was to generate most of the duties of the proffered position had not yet begun. Therefore, because the duties that would eventually comprise the proffered position could not be performed by the time that the petition was filed, the position was not subject to classification as a specialty occupation at the time required by regulation.

Additionally, the evidence of record does not establish that the proffered position is a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B with addendum, counsel's brief, and the documents filed with the brief.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

Part 5 of the petitioner’s Form I-129 contains this non-technical description of the job:

Preparing and maintaining cost records and reports for the use in controlling expenditures.
Providing management with cost information required to review direct and indirect costs.
Gathering historical cost data on such activities as material purchases, labor, equipment

depreciation, repairs, operating expenses, etc. Classifying labor, materials, and overhead costs to develop unit standard. Supervising physical inventories to ensure accurate inventory counts. Ensuring that costs are allocated according to established procedures. Preparing journal entries related to fixed asset acquisitions and disposal and gain/loss accounting for fixed assets. Reconciliation of Fixed Asset System to the general ledger. Preparing various income depreciation tax schedules. Recording of all transactions and appropriate asset reclass entries. Preparing reconciliation's [sic] of bank accounts to the general ledger. Various other account reconciliations. Preparing other month-end closing journal entries. Providing accurate analysis of financial statements, trends, and needs to maintain fiscal strength, performance and growth. Participation in the review and analysis of the annual planning process. Utilizing financial/quantitative techniques and analyses to support management decision-making. Providing detailed sales and margin analysis. Analysis of data obtained for evidence of deficiencies in controls, duplication of effort, fraud, or lack of compliance with laws, government regulations, and management policies or procedures. Preparing acceptable working papers that record and summarize data on the assigned audit task. Treasury functions to include payment processing and stop payment with checks. Creating, negotiating and maintaining banking and insurance relationships.

The proposed duties that relate exclusively to the operation of the retail store for which a location has not yet been obtained are not a basis for approval of the petition. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). The petitioner must establish that the position as offered to the beneficiary when the petition was filed is a specialty occupation, and a visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). As indicated in the following paragraph from page 1 of counsel's April 28, 2004 letter responding to the RFE, at the time of the RFE the petitioner had not advanced beyond preliminary steps to start the enterprise that the CFO would oversee:

At the outset, it should be noted that the petitioner is a start-up company. It is still in [the] process of negotiating the purchase of an existing National City-based retail food store. Likewise, the company is currently in lease negotiations with the landlord of the retail site. After the purchase has been consummated, the petitioner will run and manage the retail food store and hire appropriate employees. The company will relocate its operations, and accordingly file its business license/tax application in the city of National City as soon as the purchase contract and lease have been executed and the transfer of ownership has been completed. Also by then the petitioner will apply for a seller's permit and registration with the Board of Equalization. A copy of the lease agreement, floor plan, telephone directory listing, and other media marketing materials will be available only after the ownership transfer.

The record of proceedings includes evidence of a wire transfer of \$75,000; a list indicating initial required funds of \$50,000; projected sales figures for the first two years of \$534,607 and \$588,068, respectively; projected cash flow; a projected balance sheet; projected sales; estimated gross margin; and estimated yearly profit for two years. In response to the RFE, the petitioner submitted a balance sheet reflecting a year-end

balance of \$101,550; articles of incorporation; and registration of name. The petitioner indicated that it was negotiating a lease for the property. On appeal, the petitioner has not submitted a copy of the negotiated lease, and there is no indication of record that the petitioner has yet commenced operations. The petitioner has not established that, at the time of filing, it will employ the beneficiary in a specialty occupation. 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)(I).

The financial projection documents may indicate the petitioner's intent to begin and maintain a business with certain financial assumptions and expectations, but they do not detail any specific matters that would require the CFO to apply a bachelor's degree level of knowledge in accounting or any other specific specialty. Therefore, they are not probative of the minimum educational credentials that the petitioner claims that the beneficiary would need to successfully perform as CFO.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. For an accounting position to qualify as a specialty occupation under this criterion, the position must be such that it requires at least a bachelor's degree, or its equivalent, in accounting or a related specialty.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. Accordingly, the AAO considered the information on accounting duties as presented in the 2004-2005 *Handbook* sections on accountants and auditors (pages 68-72) and bookkeeping, accounting, and auditing clerks (pages 437-438).

The totality of information in the aforementioned sections of the *Handbook* establishes that there are many positions that require knowledge and application of accounting principles, but not on a level attained by at least a bachelor's degree, or its equivalent, in accounting or a related field. Examples found in the *Handbook* are bookkeepers, full-charge bookkeepers, accounting clerks, auditing clerks, and junior accounting clerks. These excerpts illustrate the fact that not all accounting functions require a person with a bachelor's degree in accounting or a related specialty:

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.

(*Handbook*, page 428)

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 and business and 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.

(*Handbook*, page 70)

The *Handbook's* subsection "Sources of Additional Information" (page 74) refers the reader to the Internet site for the American Council for Accountancy and Taxation (ACAT), the professional organization that provides the credentials Accredited Business Accountant®/Accredited Business Advisors® (ABA).¹ That Internet site reveals that a degree in accounting or a related specialty is not required for ABA accreditation. Eligibility for the eight-hour comprehensive examination for the ABA credential requires three years of "verifiable experience in accounting, taxation, financial services, or other field requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination."² "Up to two" of the required years of work experience "may be satisfied through college credit."

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). CIS must determine whether the evidence establishes that performance of the specific duties that comprise 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. What the record reveals about the nature of the specific duties is decisive. A position's title is not persuasive, nor are an employer's hiring standards that exceed the educational level shown to be required by the specific duties.

The petitioner has not established that the proposed duties, as they actually would be performed upon the petitioner's particular business matters, require the theoretical and practical application of a bachelor's degree level of knowledge in accounting or a related specialty. The Form I-129, the response to RFE, and the appeal list generic duties in such general functional areas as cost management (e.g., preparing and maintaining cost records and reports for use in controlling expenditures); preparation and maintenance of financial records (e.g., preparing journal entries related to depreciation and tax depreciation); financial analysis (e.g., preparing balance sheets and income statements and supporting schedules); auditing (e.g., performing audit tasks to ensure compliance with regulations and company policy); and miscellaneous areas such as policy and procedures related to accounting, financial reporting, inventory control, and asset management; treasury functions such as payment processing and stop-payment orders; and "[c]reating, negotiating, and maintaining banking and insurance relationships."

¹ At its Internet site (<http://www.nsacct.org/acat.asp>), the National Society of Accountants describes ACAT as follows:

The **Accreditation Council for Accountancy and Taxation (ACAT)** is an independent accrediting and monitoring organization affiliated with the National Society of Accountants. ACAT accredits professionals in independent practice who have demonstrated measurable knowledge of the principles, practices, and ethical standards of accounting, taxation, information technology and related financial services.

² The ACAT Internet site (<http://www.acatcredentials.org/index.html>) states that the examination tests "proficiency in financial accounting, reporting, statement preparation, taxation, business consulting services, business law, and ethics."

The evidence of record does not convey any details about the specific matters of the petitioner upon which the beneficiary would work, or, consequently, any indication about the level of accounting knowledge required to address those matters. For instance, there is no specific information about the spectrum of costs to be managed; the range of the petitioner's financial records; the financial data that would be analyzed; the nature and complexity of the financial reports with which the beneficiary would be involved; or the assets to be managed. There is no evidence of record that establishes specific types of analysis or judgment required of the beneficiary, or that substantiates a correlation between such analysis or judgment and a bachelor's degree level in accounting or a related specialty. Therefore, there is no factual basis for the AAO to determine the proffered position is one that normally would require least a bachelor's degree, or its equivalent, in accounting or a related specialty. The record of proceeding lacks evidence from which the AAO can conclude that the beneficiary would serve in an accountant or any other occupational category for which the *Handbook* recognizes the need for at least a bachelor's degree level of knowledge in accounting or any other specific specialty.

It is impossible for the AAO to determine where the proffered position fits within the wide spectrum of jobs requiring different levels of accounting knowledge. The evidence of record fails to convey that the beneficiary's specific performance of the record's list of generalized duties would require the theoretical and practical application of highly specialized knowledge attained by at least a bachelor's degree or the equivalent in accounting or any other specific specialty.

The AAO notes that the 2004-2005 edition of the *Handbook* (at page 64) includes CFOs in the Top Executive occupational category. The *Handbook's* "Training, Other Qualifications, and Advancement" section on Top Executives (at pages 66 and 67) reports that a bachelor's degree in a specific specialty is not a normal requirement for this occupational category.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has failed to establish that its proffered position – a person overseeing the financial aspects of a retail food store - is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. The record does not include any submissions from firms, individuals, or a professional association attesting to routine recruitment and hiring practices regarding the proffered position.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). The petitioner's business is a start-up retail food store with initial capital of \$75,000 and one employee. The business transactions which the beneficiary will manage as CFO do not convey the complexity or uniqueness required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The petitioner fails to demonstrate duties so specialized and complex as to be normally associated with a baccalaureate or higher degree in a specific specialty, as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for establishing a history of hiring for the proffered position only persons with at least a bachelor's degree in a specialty occupation is not relevant, as this is a newly formed petitioner without a recruiting and hiring history.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

As always, the burden of proving eligibility for the benefit sought remains entirely 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.