

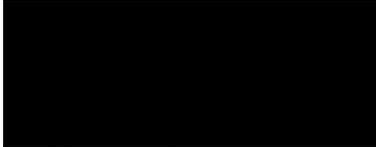
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U.S. Citizenship
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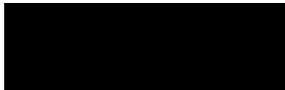


LA

NOV 23 2004

FILE: SRC 03 024 50427 Office: TEXAS SERVICE CENTER Date:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 company that operates a dollar store. It seeks to employ the beneficiary as an auditor. The petitioner, therefore, 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 because the position is not a specialty occupation. Counsel states that it is a specialty occupation and addresses several issues raised by the director with regard to the petitioner's business operations and wages. Counsel submits further documentation.

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.

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 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence, dated May 13, 2003; (4) the petitioner's letter that responds to the director's request, dated July 23, 2003; (5) the director's denial letter;

and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an auditor. The petitioner describes itself as a "sister company" for the Kaiz Corporation and states that it is involved in retail sales. Tax documents provided by the petitioner in its response to the director's request for further evidence indicated that the petitioner is a dollar store. Evidence of the beneficiary's duties includes: the I-129 petition, and the petitioner's letter in response to the director's request for further evidence. According to the petitioner, the beneficiary would audit accounting and statistical data from its stores to verify accuracy; ensure that stores comply with organizational plans, policies, and procedures as prescribed by management; maintain proper accountability of assets through physical counts, inventory, and confirmation; prepare and submit reports on audit results and recommended improvements in current policies and procedures; audit contractors' accounting records and interface with outside auditors; plan and conduct audits of data processing systems and applications to safeguard assets, ensure accuracy of data, and promote operational efficiency; establish audit objectives and devise audit plan; interview workers and examine records to gather data, following audit plan, by computer; analyze data gathered to evaluation effectiveness of controls and determine accuracy of reports and efficiency and security of operations; devise, write, and test a computer program required to obtain information needed for an audit; and devise controls for a computer application to prevent inaccurate calculations and data loss, and to ensure the discovery of errors. The petitioner indicated that a candidate for the position should possess a bachelor's degree with a concentration in accounting or information systems.

The director denied the petition and noted discrepancies in the evidentiary documentation submitted by the petitioner. The director stated that the petitioner had not clarified the legal relationship between the petitioner and the Kaiz Corporation, a company that the petitioner identified as a "sister" company. The director also noted that on the Form C-3, a State of Texas payroll document, the petitioner was identified as doing business as \$1.00 Only, and that [REDACTED] the president, and owner of the Kaiz Corporation, was listed as one of the petitioner's employees. The beneficiary and an individual subsequently described as an occasional employee, were also listed on this form as employees. The director then stated that it was not known who actually worked at the \$1.00 Only stores on a daily basis, and performing such duties as sales, stocking retail items for sale, general clerical work and doing inventory. The director also noted that the petitioner's tax return showed only \$25,000 in wages paid for employees in 2002, a sum of money that did not appear to be commensurate with wages paid to auditors. Finally, with regard to the actual work to be performed by the beneficiary, the director stated that the petitioner had not established that the beneficiary's duties would only be those of an auditor.

On appeal, counsel states the petitioner and its sister company Kaiz Corporation are both owned by [REDACTED] and that this fact establishes the legal relationship between the two companies. Counsel submits copies of the articles/certificate of incorporation, articles of incorporation, and outstanding stock certificates for the Kaiz Corporation, along with the Kariz Corporation's 2002 U.S. Income Tax Return (Form 1120 S). Counsel notes that [REDACTED] also known as [REDACTED] is listed as the sole shareholder of Kaiz Corporation. Counsel further notes that [REDACTED] is also listed as the sole shareholder of the petitioner, in its Federal U.S. Corporation tax forms. Counsel asserts that these documents are sufficient to answer the questions raised by the director as to the business relationship between the two companies.

Counsel contends that the director's focus on the number of paid employees appears to be undue, as case law states that the size of the petitioner is irrelevant in determining whether the petitioner requires the services of a professional. Counsel cites to *Young China Daily v. Chappel*, 742 F. Supp. 552 (N.D. Cal 1989). With regard to the director's comments on the beneficiary's salary level, counsel states that the beneficiary's past wages are only a small indication of whether the proffered position is a specialty occupation. Counsel submits a letter from [REDACTED] that states that both the Kaiz Corporation and the petitioner continue to require an auditor. Counsel asserts that this letter establishes that the beneficiary is to work for one organization that currently has three store locations. Finally, counsel submits financial statements for both the petitioner and the Kaiz Corporation for the first nine months of 2003. Counsel asserts that the combined total revenues from both the Kaiz Corporation and the petitioner, is now over one million dollars and the growth of the companies is due in large measure to their savvy investment in personnel resources. Counsel further asserts that the petitioner should not be penalized for wisely exercising its business acumen and discretion to grow its revenues by initially maintaining tight control on wages, and that the petitioner has healthy assets and can pay the proffered specialty occupation wage.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; 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 often considered by CIS when determining these criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The 2004-2005 edition of the *Handbook* states the following with regard to accountants and auditors:

Accountants and auditors help to ensure that the Nation's firms are run efficiently, its public records kept accurately, and its taxes paid properly and on time. They perform these vital functions by offering an increasingly wide array of business and accounting services to their clients. These services include public, management, and government accounting, as well as internal auditing. Beyond the fundamental tasks of the occupation—preparing, analyzing, and verifying financial documents in order to provide information to clients—many accountants now are required to possess a wide range of knowledge and skills. Accountants and auditors are broadening the services they offer to include budget analysis. . .

The *Handbook* goes on to state:

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 healthcare 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.

Many accountants and auditors are unlicensed management accountants, internal auditors, or government accountants and auditors; however, a large number are licensed Certified Public Accountants. Most accountants and auditors work in urban areas, where public accounting firms and central or regional offices of businesses are concentrated.

As correctly noted by the director, the *Handbook* establishes that an auditor position is a specialty occupation.

The director denied the petition on several grounds, one of which was whether the petitioner had sufficient business to warrant the use of an auditor. To this purpose, the director examined the number of employees, the place of employment, the identification of the actual petitioner, and the nature of the beneficiary's job responsibilities. Most important in this proceeding is the last issue, in that it will determine whether the proffered position is actually an auditor position. Although the petitioner may identify the position as an auditor, the title in itself is not determinative, but rather the actual duties performed by the beneficiary. In this regard, the director's question with regard to who is performing the retail sales and other work duties is very relevant. Based on the evidence in the record, it appears that the beneficiary and the owner of Kaiz Corporation are the only employees of the petitioner, with an occasional third employee. Since the duties of [REDACTED] the president and principal shareholder of both the petitioner and the Kaiz Corporation, are unidentified in the record, it can reasonably be assumed that the beneficiary must perform many job duties that are not on a level equivalent to a specialty occupation. On appeal, the counsel states that the beneficiary is working for two to three companies. Nevertheless, the petitioner has provided no further information on who actually conducts the petitioner's retail business activities. Without more persuasive evidence, the proffered position does not appear to be that of an auditor. Thus, the *Handbook* does not establish that the proffered position requires a baccalaureate degree in a specific specialty for entry into the position.

With regard to parallel positions in similar businesses, counsel provided no further documentation as to academic credentials for similar positions in small retail businesses, such as dollar stores. The petitioner did not provide documentation from professional associations or individuals in the industry as to whether a baccalaureate degree in a specific specialty is required for entry into the profession. The petitioner also did not provide sufficient documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner provided no documentation as to any previous auditors

that it has employed and their academic credentials. In addition, it stated that it had used outside accounting services for its financial and tax documents. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. As stated previously, although the petitioner described the position as an auditor, the petitioner provided no further specific documentation or clarification of the actual duties performed by the beneficiary. For example, there is no evidence in the record that the beneficiary, who has been employed by the petitioner on the basis of a prior H-1B petition approval, has produced any financial or auditing reports for the petitioner. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The *Young China Daily* case cited by counsel is not dispositive in this proceeding. The petitioner in *Young China Daily* clearly established the proffered position was a graphic designer. In the instant petition, questions have been raised and not sufficiently answered as to the nature of the duties of the position currently being performed by the beneficiary, and the identification of the actual employers of the beneficiary, among other issues. The nature of the duties of the position, rather than the size of the petitioner, is the primary factor in this proceeding.

Furthermore, the fact that the petitioner has increased its revenues since the date of filing is irrelevant to this proceeding. 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). 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).

The AAO notes that the instant petition is for an extension of the beneficiary's previously approved H-1B visa status. Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of the position, if it had been determined to be a specialty occupation. The beneficiary's diploma is for a three-year program in commerce with an emphasis on financial accounting and auditing from the University of Bombay, India. [REDACTED] SDR Educational Consultants, Houston, Texas, acknowledged that these three years of university studies were not the equivalent of a baccalaureate degree from an accredited U.S. college or university; however, she combined both the beneficiary's academic studies and work experience in her evaluation report. This report states that the beneficiary had the equivalent of a U.S. baccalaureate degree in business administration and information systems, based upon the beneficiary's education, training and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the AAO only accepts the part of the evaluation that equates the beneficiary's three years of academic studies to three years of similar studies at a U.S. university or college. In addition, although the petitioner can establish that the beneficiary's studies and work experience are the equivalent to a baccalaureate degree in a specific specialty, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), there is insufficient documentary evidence in the record to do so. For this additional reason, the petition may not be approved.

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.