U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

APR 25 2005

FILE: EAC 01 120 54423 Office: VERMONT 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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The AAO granted a subsequent motion to reopen and reconsider, and affirmed its previous decision. The matter is again before the AAO on a second motion to reopen or reconsider. The motion will be granted. The AAO affirms its previous decisions.

The petitioner is a consulting business that seeks to employ the beneficiary as an accountant. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 beneficiary was not qualified to perform the duties of a specialty occupation. The AAO affirmed the director's findings and found further, beyond the decision of the director, that the proffered position did not meet the definition of a specialty occupation.

On second motion, counsel submits an amended, more complex description of the proposed job duties, and asserts that such duties require knowledge of accounting and auditing principles. Counsel states further that the proffered position is primarily that of an accountant rather than a bookkeeper position, and that many similar organizations employ accountants. Counsel also states that the following documentation is submitted as supporting documentation: excerpts from the Department of Labor's *Occupational Outlook Handbook* (*Handbook*); case law; affidavits from professionals; and recent proof of requirements in the industry (Internet job postings). Counsel states that the *Dictionary of Occupational Titles* (*DOT*) assigns the position an SVP rating of 8, which according to counsel, requires a degree to enter into the position.

The more complex description of duties submitted by counsel is noted. A visa petition, however, may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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). As such, for the purposes of this proceeding, the proposed duties of the proffered position are those that are described in the petitioner's January 26, 2001 letter. Furthermore, although counsel states that affidavits from professionals are included as supporting documentation, the record, as it is presently constituted, contains no such affidavits.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) Form I-290B and supporting documentation; (6) the AAO's decision dismissing the appeal; (7) the petitioner's motion to reopen and reconsider; (8) the AAO's decision affirming its previous decision; and (9) the petitioner's second motion to reopen and reconsider. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 26, 2001 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing, examining, and interpreting accounting records; analyzing financial information detailing assets, liabilities, and capital; preparing balance sheet detailing profits and losses; entering accounts in general ledger documenting business transactions; auditing contracts, orders, and vouchers; preparing reports; developing and installing computer system for general accounting; and directing and coordinating activities of other accountants and clerical workers. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in accounting or commerce.

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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO does not concur with counsel that the proffered position is that of an accountant. Although information on the petition indicates that the petitioning entity is a consulting business with 30 employees and a gross annual income of $2.3 million, the record contains no supporting evidence such as federal income tax returns or quarterly wage reports. Furthermore, the proposed duties indicate that the beneficiary would be directing and coordinating the activities of other accountants and clerical workers. The record, however, does not contain any evidence that the petitioner employs such workers. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The *Handbook*, 2004-2005 edition, indicates that management accountants are usually part of executive teams involved in strategic planning or new-product development. Public accountants are generally self-employed or work for accounting firms. In this case, a review of the record in its entirety indicates that the proposed duties are primarily the duties of a bookkeeper or accounting clerk. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree, or its equivalent, is required for a bookkeeper or accounting clerk.

Counsel's reference to and assertions about the relevance of information from the *DOT* are not persuasive. The *DOT's* SVP rating does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. The classification does not describe how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

Counsel also cites case law to demonstrate that an accountant position is a specialty occupation. It is noted that the AAO's decision does not state that the job of an accountant is not a specialty occupation. The AAO concluded correctly that the proffered position is not one of an accountant and, therefore, it does not require a baccalaureate degree, or its equivalent, in a specific specialty.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for accountants. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. One of the advertised positions is that of a financial accountant for Securitas Security Services USA, Inc., a world leader in security, with annual sales of approximately $6 billion and more than 200,000 employees. Another advertised position is that of an accountant for a distribution business; the advertisement, however, does not specify a degree in a specific specialty. Another advertised position is that of an accountant for the New Jersey Meadowlands Commission, a State environmental organization. The petitioner's industry is not in security or environmental-related. Furthermore, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties described in the advertised positions. Thus, the advertisements have no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has 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. In the petitioner's January 26, 2001 letter, the petitioner's human resources manager states as follows: "We have never hired anyone with less than a Bachelor's Degree for this position." The record, however, does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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.

To the extent that they are depicted in the record, the duties 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

The director also found that the beneficiary was not qualified to perform the duties of a specialty occupation because she does not hold a baccalaureate degree in a related area. As stated previously, no evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for a bookkeeper or accounting clerk position. In this case, the record contains an evaluation from a company that specializes in evaluating academic credentials indicating that the beneficiary's foreign bachelor's degree in commerce is equivalent to the completion of three years of undergraduate study in business administration and related subjects at a regionally accredited U.S. university. As such, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petition may not be approved, however, because the proffered position is not 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 previous decisions of the AAO, dated May 14, 2002 and October 2, 2003, are affirmed. The petition is denied.