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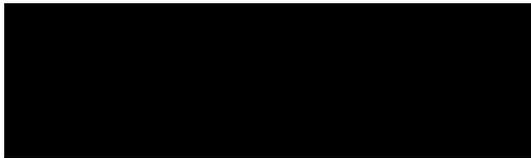
FILE: WAC 03 164 50439 Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005

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 service center director 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 software/hardware development and consulting company that seeks to employ the beneficiary as a cost accountant. 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 because the petitioner did not establish that a bona fide specialty occupation exists for the beneficiary to fill. On appeal, counsel files a brief.

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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) 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 a cost accountant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the April 30, 2003 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: conducting studies and applying general accounting principles to provide the petitioner with detailed cost information, such as material purchases, inventory and labor, for a specific computer system; analyzing manufacturing costs to provide the petitioner's president with periodic reports comparing standard costs to actual production costs; applying accounting principles to analyze past and present financial operations, as well as estimate future revenues and expenditures to aid the company in its budget planning; advising management on the effective use of resources, given the petitioner's contractual obligations; renewing and revising reports to management, specifying factors affecting price and profitability of the product. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in accounting or a closely related field.

The director found that the petitioner did not establish that the proffered position was bona fide. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director did not dispute that the proffered position is a specialty occupation, and that the director erred in determining that the petitioner did not demonstrate its specific need for a cost accountant. Counsel also states that the director should not have stated that the petitioner should have submitted evidence that it is common in its industry to require a bachelor's degree for the proffered position.

The AAO concurs with counsel and the director that a position as an accountant is generally a specialty occupation. The issue that remains, however, is whether the petitioner will employ the beneficiary in the specialty occupation. Upon review of the record, the petitioner has not established that it will employ the beneficiary in an accounting position.

In its letter of support, the petitioner stated that its general accounting work would continue to be handled by an outside firm, but due to the demands generated by its development of an innovative computer system for the music industry, it now needed to hire a cost accountant. In response to the director's request for evidence, counsel submitted a copy of a contract between the petitioner and a national chain of 115 stores that would be selling the new product. The AAO notes that the contract submitted was not signed or executed by either party, and therefore does not establish that a contract exists or that there is a need for a cost accountant to monitor the product, as stated by the petitioner. In addition, the AAO notes that there is no evidence in the record regarding the product beyond the petitioner's brief statement. 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 director had requested that the petitioner provide three years of income tax returns to establish that the petitioner's income was \$750,000 as reported on the Form I-129. In response, counsel states:

It is not clear for what purpose this information is sought as the Administrative Appeals Office has already stated that wage determination and enforcement of their payment with respect to an H-1B worker are the sole responsibility of the Department of Labor. . . . If the purpose of the request is to establish petitioner's legitimacy as a business, petitioner is already submitting its contract with [company purchasing the new product] which bears out petitioner's stated income. We are also submitting an additional contract with one of petitioner's clients which also show substantial revenues.

As noted, the contract that was submitted does not establish the petitioner's ongoing business projects, since it is not executed. The director may ask for information to corroborate any statements made by the petitioner on the Form I-129, or in supporting documentation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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)).

In determining whether a position qualifies as a specialty occupation, 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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Counsel states that the beneficiary's duties are those performed by an accountant. The *Handbook* discloses that the proffered position's duties do not rise to the level of an accountant. The *Handbook* reveals that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook*, management accountants — also called cost, managerial, industrial, corporate, or private accountants — record and analyze the financial information of the companies for which they work.

Other responsibilities include budgeting, performance evaluation, and cost and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

Many of the duties described in the *Handbook* do not apply to the proffered position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not be part of an executive team. Nor will the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities. Given this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. Consequently, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proffered position.

The *Handbook* further states:

Accountants and auditors held about 1.1 million jobs in 2002. They worked throughout private industry and government, but 1 out of 5 wage and salary accountants worked for accounting, tax preparation, bookkeeping, and payroll services firms. Approximately 1 out of 10 accountants or auditors were self-employed.

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.

The record shows that the petitioner, a software and hardware development and consulting company, employs six persons, and earns a gross annual income of \$750,000. In addition, as noted above, the petitioner has not established the existence of the specific project for which it would employ the beneficiary as a cost accountant. Given this context, the record does not establish that the petitioner will employ the beneficiary as an in-house accountant. While the size of the petitioning entity is not relevant in determining whether a position qualifies as a specialty occupation, the level of income generated by the petitioner has a direct and substantial bearing on the scope and depth of the beneficiary's proposed duties. Responsibility for income of only \$750,000 differs vastly from responsibility associated with a far larger income or from a firm that is responsible for the accounting work of many clients. Consequently, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Accordingly, the petitioner has not established 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The second criterion requires the petitioner to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner did not submit any evidence

regarding parallel positions, nor has the petitioner established that the particular position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Because the proffered position is newly created, the petitioner cannot establish that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. There is no evidence in the record that would show that the proffered position's duties rise to the level of an accountant. Consequently, the petitioner fails to establish 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 petitioner will employ the beneficiary in 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.