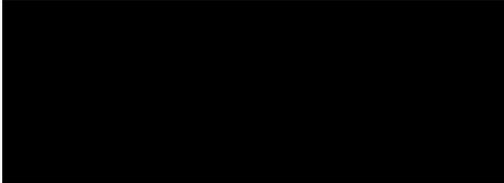


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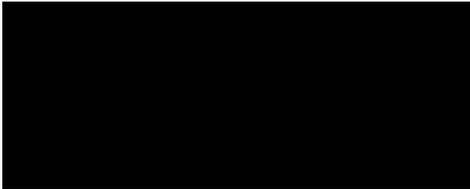
D2

FILE: WAC 04 060 50573 Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2005

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.

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 wholesale and retail warehouse for candy, grocery, and tobacco sales that seeks to employ the beneficiary as a full-time 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief, and a second, supplemental brief after receiving the results of a Freedom of Information Act (FOIA) request to obtain a copy of the record of proceeding upon which the director's decision was based. In his supplemental brief, counsel states that the documentation that he timely submitted in response to the director's request for evidence was never considered. Specifically, counsel points to the service center's Premium Processing Worksheet, which does not specify that a response was received, and to the expert opinion letter, which was not addressed in the director's decision.

A review of the record finds that counsel's response to the director's request for evidence, which includes a letter from the petitioner, dated March 8, 2004, and 10 exhibits, including the petitioner's organizational chart, was, in fact, considered by the director in his denial. Specifically, the director quotes from the second page of the petitioner's March 8, 2004 letter, and also addresses the specifics of the petitioner's organizational chart. Counsel correctly points out, however, that the director's decision does not indicate whether he reviewed the expert opinion letter. This issue will be reviewed further in this proceeding.

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 full-time accountant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's undated 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: preparing financial statements and reports; developing and maintaining budgets and comparing budget costs to actual costs; complying with tax reporting requirements; directing payroll records; maintaining the general ledger; making recommendations to management for improved cash flow and accounting practices; and supervising accounts payable and receivable clerks. The petitioner indicated that the petitioner is a qualified candidate for the job because he possesses a bachelor's degree in business administration and economics with a specialization in accounting.

The director found that the proffered position was not a specialty occupation because the job is not an accountant position; it is a bookkeeper or accounting clerk position. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, in part, that the director ignored the evidence. Counsel states further that the proffered position, which entails supervising both the accounts receivable and accounts payable clerks, is that of an accountant, and is not a bookkeeper or accounting clerk position. Counsel submits copies of a previously submitted opinion from a certified public accountant and Internet job advertisements as supporting documentation.

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. 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, information in the petitioner's undated cover letter and on the petition, which was signed by the petitioner's president on December 17, 2003, indicates, in part, that the petitioner has 17 employees. A review of the petitioner's quarterly wage and withholding report for the quarter ending on December 31, 2003, however, reflects only 12 employees for all three months of that quarter. Furthermore, a review of the petitioner's organizational chart reflects that the petitioner's employee, [REDACTED] holds two positions in the petitioner's organizational hierarchy, that of assistant manager and of accounts receivable clerk. His duties as the assistant manager, which is under the supervision of the general manager, are described as assisting the general manager and answering questions during the general manager's absence. His position of accounts receivable clerk is under the supervision of the accountant. As such, it appears that, in the event of the general manager's absence, the beneficiary would be under the supervision of [REDACTED] and, at the same time, [REDACTED] in the capacity of the accounts receivable clerk, would be under the supervision of the beneficiary. It is not clear, however, how the beneficiary or [REDACTED] could realistically perform in these two positions as reflected on the petitioner's organizational chart. Accordingly, the petitioner's organizational hierarchy is unclear. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). A review of the Financial Clerks job description in the *Handbook*, 2004-2005 edition, confirms the accuracy of the director's assessment to the effect that, the job duties parallel those responsibilities of a financial clerk. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a financial clerk job.

The record contains an opinion from a certified public accountant (CPA), at a CPA firm in Encino, California, who asserts, in part, that positions such as the proffered position require a full-time accountant with a bachelor's degree. The writer, however, does not provide any evidence in support of his assertion. 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)). Furthermore, although the writer points out that in-house accountants are commonly employed in businesses such as Costco, the record does not demonstrate that the employer in the instant petition is similar to Costco, which is the largest wholesale club operator in the United States, with more than 415 membership warehouse stores serving 42 million cardholders in 36 U.S. states and Puerto Rico, Canada, Japan, South Korea, Taiwan, and the United Kingdom. In view of the foregoing, the opinion letter has no relevance.

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for accountant-related positions in Wal-Mart and Smart & Final. 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. The duties of the Wal-Mart position entail: serving as a business advisor on tax research and planning issues; managing all aspects of tax compliance, "audit defense for sales," property, licensing, payroll, corporate income, franchise, and permits, and fees. The duties of the payroll accountant position at Smart & Final, which operates more than 235 non-membership warehouse stores in six western states and northern Mexico, entail: performing multi-state payroll functions; providing accounting support to the benefit plans in projects such as annual 5500 preparation; planning audits; and working with payroll staff and the accounting and human resources staff to ensure proper reconciliation of funding amounts. The petitioner has not demonstrated that the duties described for 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. As counsel does not address this issue on appeal, it will not be discussed further.

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. 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.