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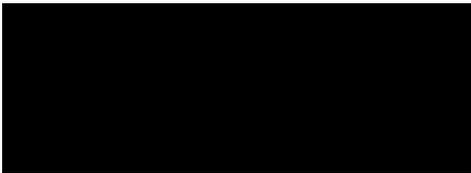
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FILE: WAC 03 267 51743 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 2005

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

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 corporation engaged in the import and export of automotive replacement glass. As authorized by approval of a previous petition to employ the beneficiary as an H-1B nonimmigrant worker in a specialty occupation, pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), the petitioner employs the beneficiary in a position that the petitioner designated as an accountant. In order to continue this employment beyond the period approved in the initial petition, the petitioner endeavors to continue the beneficiary's H-1B classification and extend her stay.

The director denied the petition on the basis that the petitioner failed to establish that the beneficiary's position satisfies any of the specialty occupation criteria set forth in the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A). The crux of the director's decision is that the evidence of record does not establish that the duties of the proffered position exceed those of a financial clerk.

On appeal, counsel contends that the evidence of record establishes that the beneficiary performs the duties of an accountant with a bachelor's degree in accounting. In part, counsel asserts that the director has failed to consider the approval of the previous petition in this case "as additional evidence that the beneficiary will, in fact, be working as an Accountant – a position that [Citizenship and Immigration Services (CIS)] has already deemed a specialty occupation in the previous approval." Counsel also maintains that several aspects of the director's reasoning are erroneous.

As discussed below, the AAO finds that the evidence of record does not establish that the petitioner is proffering a specialty occupation position. Therefore, the appeal will be dismissed, and the petition will be denied. 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, counsel's brief, and the documents filed with the brief.

In response to counsel's partial reliance on the fact that the previous petition had been approved, the AAO notes that approval of a prior petition is not persuasive evidence either that the instant application for extension should be approved, or that the earlier approval was correct.

The director's decision under appeal does not indicate whether he reviewed the prior approvals of the other nonimmigrant petition. Each petition filing 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 the proceeding being appealed. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petition had been approved based on the same evidence contained in the current record, the approval would constitute material and gross error on the part of the director. Prior approvals do not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director's ultimate conclusion that the evidence does not provide a basis for approving the petition is correct. However, the conceptual framework that he applied is flawed in several respects that might lead to an incorrect outcome under circumstances different than those here. The fact that a position involves some non-specialty-occupation duties does not necessarily preclude it from being a specialty occupation position. In circumstances not present here, a position may require a bachelor's degree or its equivalent in accounting even if some of its duties, such as bookkeeping or clerical tasks, do not. The information in the *Handbook* does not suggest or imply that accountant positions are incompatible with any particular business field, or that a petitioner's business must have a certain organizational configuration (such as an accounting department and finance clerks) in order to substantiate the need for an accountant.

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.

The AAO finds that the petitioner has not established that the beneficiary’s position requires the theoretical and practical application of a level of accounting knowledge that is attained by at least a bachelor’s degree, or its equivalent, in accounting or a related specialty. Therefore, the appeal will be dismissed and the petition will be denied.

The Form I-129 entries indicates that the petitioner imports and exports automobile replacement glass, currently employs eight (8) people, and has a gross annual income of \$2,494,598.00. The six positions depicted on the organizational chart submitted into the record are: President; Sales/Operations Manager; Driver (subordinate to the Sales/Operations Manager); Warehouse Manager; Accountant; and Clerk (subordinate to the Accountant).

The petitioner has limited its evidence about its business operations and the matters upon which the beneficiary has been working to statements without concrete details. Consequently, the record lacks a factual basis for the AAO to determine the level of accounting knowledge that the execution of the beneficiary’s duties entail in the particular business context where they are performed.

The petitioner's September 15, 2003 letter of support states that the petitioner has a "well-stocked warehouse of all auto and truck glass needs that include auto glass, windshield/side glass and back glass," and that the petitioner "quotes any size order, including truckload or container order." That letter of support also states that the petitioner is rapidly growing, that it aims to continue to grow to become "the most extensive automotive glass distributor in California and nationwide," and that the need for an accountant is partly a function of an increasing number of clients. The evidence of record, however, provides no documentation of the petitioner's growth, and it provides neither a factual explanation nor documentation of why the petitioner's growth requires a person with a bachelor's degree or the equivalent in accounting or a related specialty. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The letter of support asserts that the beneficiary will continue to be responsible for the petitioner's "overall accounting and financial duties" and that she will continue to review the petitioner's accounting operations and evaluate the efficiency of the petitioner's operations. However, the evidence of record does not provide any meaningful information about the particular accounting and financial matters for which the beneficiary is responsible, or about the aspects of accounting knowledge that the beneficiary must apply in the performance of her position.

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.

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 beneficiary, who is presumed to know the duties that she has been performing, designated her position as "Clerk" on her income tax forms, and, on her resume, provided the following description of her duties, which the AAO finds to be not indicative of a position requiring at least a bachelor's degree in accounting or a related specialty:

- ❑ Verifies detail of business transactions recorded on sales slips, invoices, receipts, check stubs, and printouts.
- ❑ Allocated and posted detail of business transactions to subsidiary accounts in journals and computer files.
- ❑ Reconciled and balance[d] accounts.
- ❑ Compiled reports to show statistics, such [as] cash receipts, expenditures, accounts payable and receivable, profit and loss and other items pertinent to operation of business.
- ❑ Analyzed office operations and procedures such [as] bookkeeping, preparation of payrolls, flow of correspondence, filling and the requisition of supplies.
- ❑ Applied principles of accounting to analyze financial information and prepare financial reports.
- ❑ Prepared balance sheet, profit and loss statement and other reports to summarize current projected company financial reports.
- ❑ Calculated employees wages from company records and time cards[, and] prepared checks for payment of wages.
- ❑ Computed, typed, and mailed monthly statement of customers.
- ❑ Reconciled monthly bank statement.

The evidence of record does not convey any details about the specific matters upon which the beneficiary works, or, consequently, any indication about the level of accounting knowledge required to address those matters. For instance, there is no information about the specific nature of the petitioner's operations, the types and volume of its transactions, the nature of its financial statements, the spectrum of costs to be managed, the extent of the petitioner's financial dealings, the range of the petitioner's financial records, the number and types of accounts the petitioner maintains, specific types of data which the beneficiary would analyze, the size of the petitioner's budget, the number of the petitioner's budget elements, or the nature of the budget/expenses variance issues and trends. 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.

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)).

As already indicated, the petitioner has not established that its proffered position 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 in the petitioner's industry attesting to recruitment and hiring practices. The certifications of recruitment standards from a mortgage corporation and a wholesaler/distributor of diamonds are outside the petitioner's industry, and therefore not probative.

The job vacancy advertisements from other firms that have been submitted into the record are not probative. The advertisements are too few to be indicative of an industry-wide practice. Also, the advertisements are single-instances of recruiting initiatives by the advertising firms: there is no evidence that the advertisements represent exclusive recruiting practices by the advertising firms for the type of positions advertised; and the advertisements do not establish any facts about the firms' hiring practices. Furthermore, the evidence of record about the advertising firms and their specific operations is too generalized to demonstrate that those firms are substantially similar to the petitioner, as required by first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The information about the duties and responsibilities of both the advertised positions and the one proffered here is on a generalized scale that does not support a meaningful comparison of their actual performance and specialty knowledge requirements. Therefore, there is no basis for the AAO to conclude that the advertised positions and the one proffered here are parallel, as required by the regulation.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. As already discussed, the record does not relate specific work associated with the generalized duties described by the petitioner, and the record does not contain any documents that exemplify the nature of the proposed

accounting work. Consequently, there is no evidence of complexity or uniqueness to satisfy the instant criterion, and the petitioner has not established that the proffered position can only be performed by a person with at least a bachelor's degree in accounting or a related specialty.

As the petitioner has not established a history of normally requiring at least a baccalaureate degree or its equivalent in a specific specialty, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is not a factor.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The record of proceeding lacks evidence of specific duties that would establish such specialization and complexity.

The AAO also notes that the appeal does not address a material discrepancy upon which the director focused, namely, the fact that the beneficiary's tax returns identify her occupation as "Clerk," not accountant. The beneficiary is presumed to know the level of work that she has been performing and, in light of the petitioner's decision to not address it, the occupation designation on her tax returns is un rebutted evidence that the position in question does not require at least a bachelor's degree level of knowledge in accounting or a related specialty. 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. As noted by the director, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The Morningside Evaluations and Consulting (MEC) evaluation of the beneficiary's foreign degree and related coursework establishes only that the beneficiary holds the equivalent of a U.S. bachelor's degree in business administration with no specialization or concentration.

That part of the MEC evaluation that declares the beneficiary's experience to be the equivalent of a certain amount of U.S. accounting coursework must be discounted, as section 3 of 8 C.F.R. § 214.2(h)(4)(iii)(D) recognizes a foreign credentials evaluation service's opinion only to the extent that is an "evaluation of education," not work experience. The record does not establish that the MEC evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(C)(1). Accordingly, because it is based partly on an evaluation of experience, the AAO does not accept the MEC conclusion that the beneficiary possesses the equivalent of a U.S. bachelor's degree in accounting. The MEC evaluation of the beneficiary's foreign education establishes that the beneficiary holds the equivalent of a generalized degree in business administration. However, CIS does not recognize a generalized business degree (that is, one without a specific concentration in marketing,

finance, or some other specialized aspect of business) as a degree in a specific specialty as required for a specialty occupation. *See Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). For this reason also, the petition must be denied.

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.