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U.S. Citizenship  
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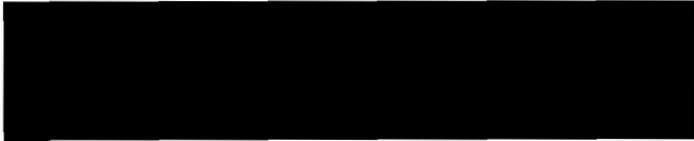


FILE: EAC 07 168 51721 Office: VERMONT SERVICE CENTER Date: **MAR 03 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, 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 wholesale produce distributor and claims to have eighteen employees. It seeks to employ the beneficiary as an accountant. Accordingly, 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 determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's June 5, 2007 request for additional evidence; (3) the petitioner's June 26, 2007 response to the director's request; (4) the director's July 19, 2007 denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also 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.

United States Citizenship and Immigration Services (USCIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS 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 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether 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.

The petitioner seeks the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the Form I-129, counsel's May 22, 2007 letter, and the petitioner's May 17, 2007 offer of employment to the beneficiary. In an attachment to Form I-129, the petitioner indicates that the beneficiary's job duties are as follows:

Examine, analyze, and interpret accounting records for the purpose of giving advice or preparing financial statements, tax and payroll returns; perform review and audit services; install or advise on systems of recording costs or other financial and budgetary data.

In her May 22, 2007 letter, counsel for the petitioner referenced the *Occupational Information Network O\*NET Online (O\*NET)* summary report for accountants and asserted that *O\*NET* indicated most accountant occupations required a four-year bachelor degree. The petitioner's offer of employment to the beneficiary, dated May 17, 2007, merely indicated that the beneficiary would be working forty hours per week as an accountant for a salary of \$1,200 per week.

In a request for evidence dated June 5, 2007, the director requested additional information to establish that the proffered position was in fact a specialty occupation. Specifically, the director requested a more detailed statement describing the beneficiary's proposed duties and day-to-day responsibilities, as well as any

additional information, such as job postings from other companies in the petitioner's industry to show that a bachelor's degree was a standard minimum requirement for the job offered.

In response to the director's RFE, counsel and the petitioner each submitted letters. The petitioner's letter, dated June 26, 2007, provided a detailed overview of the beneficiary's proposed duties. The petitioner stated that the beneficiary's duties, in relevant part, would include:

1. Reconcile balance sheets, inventory records, the general ledger and subledgers; create financial budgets; audit daily entries of transactions by employees in accounts receivable, accounts [ ] payable, inventory, international transactions, exchange rates, and all other financial records to maintain efficiency and accuracy as well as review continued effectiveness of policies and procedures and ensure compliance with U.S. accounting standards; prepare financial information of [the petitioner] in preparation for anticipated upcoming merger with a smaller company and compile and maintain financial records of new company formed by merger. These responsibilities will require approximately 40 percent of the accountant's time each day.

\* \* \*

2. Coordinate and supervise transactions scheduled and performed by other employees, including ordering supplies, delivering inventory, generating payroll checks, accounts receivable, credits and collections, accounts payable, and inventory, to ensure all transactions are performed timely and recorded properly and to monitor the flow of cash receipts and disbursements to ensure business and investment needs of the company are met. These responsibilities will require approximately 14 percent of the accountant's time each day.

\* \* \*

3. Develop, draft and establish company controls, policies, procedures, and inventory and accounting system for recording all financial activities of the business to ensure compliance with U.S. accounting standards, and increase company profitability and the efficiency of its accounting systems; create and implement cash management strategies based on cost analysis, cost control, and long-term goals of the organization. These responsibilities will require approximately 19 percent of the accountant's time each day.

\* \* \*

4. Prepare and submit timely sales tax returns, federal payroll taxes, federal unemployment taxes, state unemployment taxes, partnership tax returns, franchise tax returns, monitor documentation to ensure financial statements and documentation meet IRS requirements. These responsibilities will require approximately 3 percent of the accountant's time each day.

\* \* \*

5. Prepare monthly and year-end financial statements for the company to summarize and forecast the organization's financial position, and prepare projections for future earnings, expenses, taxes, and cash flow; advise management regarding tax strategies, borrowing or investment strategies and budgeting decisions to maximize profits, and direct investment activities. These responsibilities will require approximately 24 percent of the accountant's time each day.

Additionally, a separate letter submitted by counsel, dated July 3, 2007, indicated that the petitioner had not previously employed an accountant on a full-time basis and therefore could not provide evidence that it previously required an individual with a bachelor's degree to fill such a position.

On July 19, 2007, the director denied the petition. While the director noted that the description of duties provided by the petitioner seemed to coincide with the duties of an accountant as set forth in the *Handbook*, the director found that the petitioner had not demonstrated that the level, scope, and complexity of the petitioner's business actually required an individual with a bachelor's degree to fill the proposed position. The director noted that, based on its failure to provide job postings from similar companies in the industry which required a bachelor's degree as a prerequisite for an accounting position, as well as the petitioner's lack of hiring accountants in the past, raised questions regarding the validity of the claim that a person possessing a bachelor's degree was mandated to fill the proffered position in the petitioner's food distribution company. The director concluded that the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was arbitrary, capricious, and an abuse of discretion. Specifically, counsel contends that the position is an accounting position and references an unpublished decision approving an accounting position with comparable duties. Counsel also takes issue with the director's reliance on the nature and scope of the petitioning entity when rendering the decision. No additional evidence is submitted.

To make its determination as to whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criteria include whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2008-2009 edition of the *Handbook* for its discussion of management accountants, the category of accounting most closely aligned to the duties described by the petitioner. As stated by the *Handbook*, management accountants:

[r]ecord and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management . . . . They analyze and interpret the financial information that corporate executives need in order to make sound business decisions. They also prepare financial reports for other groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, management accountants may work in various areas, including financial analysis, planning and budgeting, and cost accounting.<sup>1</sup>

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would require the beneficiary to have an understanding of accounting principles. However, degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties requiring accounting knowledge does not establish the proffered position as that of an accountant. The question is not whether the petitioner's position requires knowledge of accounting principles, which it does, but rather whether it is one that normally requires the level of accounting knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting.

The *Handbook's* discussion of the occupation of accountants clearly indicates that accounting positions may be filled by individuals holding associate degrees or certificates, or who have acquired their accounting expertise through experience:

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 or business or 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.

The *Handbook* also notes in its description of the work performed by bookkeeping, accounting and auditing clerks that:

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.<sup>2</sup>

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the Accreditation American Council for Accountancy and Taxation (ACAT), an independent accrediting and monitoring organization affiliated with the National Society of Accountants. The ACAT does not require a degree in accounting or a related

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<sup>1</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos001.htm](http://www.bls.gov/oco/ocos001.htm).  
*Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos144.htm](http://www.bls.gov/oco/ocos144.htm).

specialty to issue a credential as an Accredited Business Accountant® /Accredited Business Advisor® (ABA). Eligibility for the eight-hour comprehensive examination for the ABA credential requires only three years of "verifiable experience in accounting, taxation, financial services, or other fields requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination." Up to two of the required years of work experience may be satisfied through college credit.<sup>3</sup>

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in accounting, the AAO turns to the record for information regarding the nature of the petitioner's business operations. While the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker as an accountant, as correctly noted by the director. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent.

At the time of filing, the petitioner stated that it commenced business operations as a wholesale produce supplier in January 2006, seventeen months prior to the filing of the petition. It claimed to employ eighteen employees, and claimed that it provided fresh produce daily to supermarkets, grocery stores, and fruit stands. Finally, it claimed to have daily sales of approximately \$25,000 to \$35,000. In the director's request for evidence, the director requested that the petitioner provide evidence of the industry standard as it relates to a similar type and size company and whether those companies required the services of an accountant and whether those companies required a baccalaureate degree for the accounting position. Neither counsel nor the petitioner addressed this issue, and no evidence of similar companies requiring a degreed accountant was submitted. 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).

In addition, the record indicates that, at the time of filing, the petitioner claimed to have a gross annual income of \$4,151,286.94. In response to the request for evidence and again on appeal, counsel indicates that the petitioner has plans for further expansion and that it is the rapid and continuing growth of the company that necessitates a full-time staff accountant. The AAO acknowledges that the process of expanding the petitioner's business operations could potentially establish financial and operational complexities that would require the duties of the proffered position to be performed by a degreed accountant. Accordingly, the AAO has reviewed the record for evidence of the petitioner's growing business, as well as its financial structure and operations, to determine whether the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. However, the AAO notes two problems. First, the petitioner has submitted no documentary evidence, such as its most recent income tax return or payroll records, to corroborate its claimed gross income or staffing levels. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*,

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<sup>3</sup> Information provided by the ACAT website (<http://www.acatcredentials.org/index.html>). The *Handbook* identifies the ACAT website as one of several "Sources of Additional Information" at the end of its discussion of the occupation of accountants.

22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Second, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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 petitioner provides no documentation related to its financial operations or organization that would shed light on the complexity of the accounting work to be performed by the beneficiary, e.g., tax returns or other financial documents. Neither has it provided any evidence that would indicate how the petitioner's plans for expansion have affected its financial position. The record does not contain documented evidence of the petitioner's intentions for continued expansion such as tax returns showing complex debt repayment schedules, loan applications, or related correspondence. Moreover, although the petitioner acknowledges an upcoming merger with a smaller company, no documentation supporting this claim was submitted. Accordingly, the record offers no meaningful evidence to establish that the accounting duties to be performed by the beneficiary in relation to the petitioner's claimed operations or in relation to the petitioner's business expansion plans are sufficiently complex to require the services of a degreed accountant.

Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining this criterion include 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 the instant matter, the petitioner has not submitted evidence that responds to either prong of the criterion.

The petitioner submitted no evidence, such as job postings, to establish its degree requirement as the norm within its industry under the first prong of the criterion. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner's failure to submit information related to its financial operations or its business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from accounting employment that is performed with less than a four-year degree. As previously stated, simply going on the 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. at 158.

Therefore, the petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories,

including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant matter, counsel, in response to the director's request for evidence, asserted that the petitioner had never employed an accountant on a full-time basis. Therefore, since the petitioner has not established that it previously employed a degreed accountant in the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a bookkeeper or a junior accountant. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a bookkeeper or at most a junior accountant.

In reaching its decision, the AAO has again considered the petitioner's letter dated June 26, 2007 which provides an overview of the beneficiary's proposed duties. However, absent additional evidence, such as financial documents substantiating the petitioner's claim regarding its income, there is an inadequate factual foundation to support a finding that the proposed duties are as specialized and complex as required by the regulation. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical bookkeeper or junior accountant or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in accounting.

The totality of the record does not establish the proffered position is a specialty occupation based on its complex and unique nature as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.