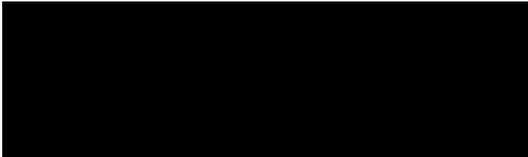


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**U.S. Citizenship
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FILE: WAC 04 197 51850 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the California 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 distributor of medical supplies, with five employees. It seeks to employ the beneficiary, who is the beneficiary of a previously-approved H-1B petition, as an accountant 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 based on his determination that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (3) Form I-290B, with counsel's brief, and additional evidence. The AAO reviewed the record in its entirety before reaching 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 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 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, 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). 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 and indicates that the position requires a baccalaureate degree in business administration, accounting or a related field. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s June 14, 2004 letter in support of the petition; and the online employment advertisements published by the petitioner. This evidence indicates that the duties of the proffered position would require the beneficiary to:

- Prepare cash flow projections, including the amount of cash expenditures and how these expenses will be applied; and prepare budgetary projections, requiring an analysis of income, expenses and capital expenditures and the preparation of sales, costing and administrative budgeting, and the analysis of standard and variable costs;
- Provide inventory control analysis, using complex accounting formulas to trim excessive overhead in the areas of nonessential storage, shelving, and shipping costs;
- Analyze and prepare financial statements, and advise the petitioner of their financial implications, including an explanation of variances between the statements and budgeted projections and the potential tax consequences, and provide recommendations as to how to rectify the discrepancies; prepare profit and loss statements and balance sheets;
- Develop and modify a computerized accounting software system to meet the petitioner’s specific needs and train personnel to work with the software;
- Research and explain new federal and state tax policies and their consequences, using new tax cuts for the petitioner’s benefit;

- Assist in IRS/state tax audits, negotiating and settling any tax liabilities, and documenting and explaining the negotiation and settlement of past/present liability accounts;
- Conduct audits of the petitioner's annual, quarterly and periodic financial statements and determine whether the statements are fairly stated in accordance with generally accepted accounting principles;
- Conduct a compliance audit of the petitioner's loans, adherence to tax law, and contractual agreements to determine whether requirements have been met;
- Conduct an operational audit to determine whether the petitioner's business activities are functioning efficiently, effectively, economically and optimally;
- Establish a system of quality control to ensure that the work being performed by the petitioner meets applicable professional standards, regulatory requirements and general standards of quality; that a particular client or potential client is financially viable; and to ensure that the petitioner's daily operations are free of conflicts of interest, and that management does not misrepresent facts or subordinate proper judgment to other employees; and
- Investigate any suspected fraudulent operations within the company and establish a guideline of prohibitive activities.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these 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; 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 his denial, the director found some of the duties described by the petitioner to reflect the employment of accountants, but determined that the petitioner did not have the type of business or the organizational complexity to require the services of a full- or part-time accountant. While, as discussed below, the AAO does not find the record to demonstrate that the petitioner would employ the beneficiary in a position requiring a degreed accountant, it has reached its conclusions on grounds other than those relied upon by the director.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity, nor operate the type of business that would require an accountant. The 2006-2007 edition of the *Handbook* indicates that accountants work throughout private industry and government, helping to ensure that the "Nation's firms are run efficiently, its public records kept accurately, and its taxes paid properly and on time." [*Handbook* at 70]. It does not indicate that accountants are employed solely by public accounting,

payroll services, and tax preparation firms; computer accounting systems, software developers or government agencies, as stated by the director. Accordingly, the petitioner's intention to employ an accountant may not be discounted based on its type of business. Neither does the fact that the petitioner does not have an accounting/bookkeeping staff establish that it would not employ the beneficiary to perform the duties of an accountant. Therefore, the AAO withdraws the director's findings in this regard.

The petitioner has stated that the proffered position is that of an accountant and has offered a description of the position that lists duties typically performed by accountants. As discussed by the 2006-2007 edition of the *Handbook*, management accountants, the category of accounting most closely aligned to the duties described by the petitioner, are individuals who:

[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. [*Handbook* at 70]

However, the similarity between the petitioner's description of the duties of the proffered position and those performed by management accountants does not establish the proffered position as a specialty occupation. The generalized duties outlined by the petitioner describe the type of work typically performed by accountants rather than the specific tasks that would be performed by the beneficiary in connection with the petitioner's medical supply business.

The AAO, as previously discussed, requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case fails to offer a meaningful description of the proffered position's responsibilities, the petitioner is unable to establish that the duties of the position are accounting duties that would require a level of accounting knowledge that is signified by at least a bachelor's degree or its equivalent in accounting. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In reaching its decision, the AAO has considered the two expert opinions submitted by counsel on appeal – one from a professor of accounting at California State University, Fullerton and the other from the head of a California accounting firm. Both statements indicate that the writers have reviewed the duties of the proffered position and find it to be that of an accountant and, therefore, to require the beneficiary to hold a baccalaureate degree in accounting, business administration or finance. They do not, however, establish the proffered position as a specialty occupation under the first criterion.

Both opinions indicate they are based on the generalized outline of accounting duties provided in the petitioner's June 14, 2004 letter, which, as previously discussed, describes the occupation of accountant rather than the day-to-day duties to be performed by the beneficiary for the petitioner's medical supply business. Accordingly, the conclusions regarding the proffered position are based on a list of responsibilities that do not offer a meaningful description of the beneficiary's duties and are of little evidentiary value in establishing a degree requirement for the proffered position. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept it or may give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The evidentiary value of the opinions is also compromised in other ways. The statement provided by the accounting firm head refers both to the accounting duties listed in the petitioner's June 14, 2004 letter and to those described by Ashrafi Catering, an entity that is not a party to this proceeding. Therefore, it is not established as an evaluation of the proffered position's duties and is discounted for this reason as well. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The authority of the California State University professor to speak to U.S. hiring practices regarding accountants is not supported by the record. While the professor bases his opinion on his years of academic experience, that experience does not demonstrate that he is knowledgeable about the requirements imposed by U.S. employers when filling accounting positions. In that his opinion does not cite any industry surveys, trade publications, or other industry data in support of his conclusions, it is insufficient to establish that the proffered position would normally impose a degree requirement on individuals seeking entry-level employment. Simply going on record without supporting documentation is not sufficient to meet 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 2006-2007 edition of the *Handbook* reports that not all accounting employment is performed by degreed accountants. Its 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. [*Handbook* at 72].

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 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 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.¹

For this reason as well, the expert opinions are insufficient to establish that employers normally impose a degree requirement on those seeking entry-level employment as an accountant. The unsubstantiated opinions do not carry the authority of the *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification or licenses in the field, to reach its conclusions regarding the U.S. employers’ practices when hiring accountants.

Finally, the AAO notes that, at the time of filing, the petitioner submitted material from the Department of Labor’s *Occupational Information Network (O*Net)* regarding the occupation of accountant, which indicates that it requires a baccalaureate degree. However, the *O*Net* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Like the *Dictionary of Occupational Titles (DOT)* that it replaced, the *O*Net* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A Specific Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. A Job Zone rating does not specify that a bachelor’s degree in a specific specialty is required. Therefore, the information provided by the *O*Net* also fails to satisfy the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that a proffered position is so complex or unique that it can be performed only by an individual with a degree. Although, on appeal, counsel does not contend that the proffered position may be established as a specialty occupation on the basis of an industry-wide degree requirement or its unique nature and complexity, the AAO will, nevertheless, consider the evidence of record as it relates to the second criterion.

The petitioner has submitted 21 Internet job announcements for accountants, each showing a degree requirement for the position advertised. Having reviewed the advertisements, the AAO finds none to satisfy the requirements of the criterion’s first prong. The announcements do not describe organizations similar to the petitioner, a medical supply business. Neither do they describe employment that might be considered parallel to the proffered position. The petitioner’s failure to provide a specific and detailed description of the proffered position’s duties precludes it from establishing the proffered position as parallel to any positions within similar organizations in its industry.

¹ 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.

To qualify the proffered position as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must demonstrate that the position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the expert opinions submitted by counsel indicate that the proffered position requires a degreed accountant. However, as previously discussed, both writers' opinions are based on the broadly-outlined accounting duties provided in the petitioner's June 14, 2004 letter in support of the Form I-129, not a listing of the duties to be performed by the beneficiary in relation to the petitioner's medical supply business. Accordingly, the conclusions offered by these opinions may not be relied upon to distinguish the proffered position from similar but non-degreed employment based on its complexity or unique nature.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer 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 the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner has submitted no information regarding prior incumbents of the proffered position and does not contend that the position may be established as a specialty occupation on the basis of its normal hiring practices. The petitioner has not established that it previously employed degreed individuals to perform the duties of the position.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As proof that the proffered position's duties are sufficiently specialized and complex to satisfy the criterion's requirements, counsel offers the expert opinions submitted on appeal.

However, as previously discussed, these opinions are undermined by their reliance on the description of accounting duties provided by the petitioner in its June 14, 2004 letter of support. As they are based on duties typically performed by accountants rather than the day-to-day tasks to be undertaken by the beneficiary on behalf of the petitioner's medical supply business, they do not satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept it or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Without a meaningful description of the proffered position's duties, the petitioner has not established them as either specialized or complex.

Therefore, the record does not establish the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The appeal will be dismissed.

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the

Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.