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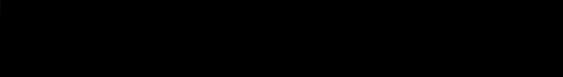
U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 085 51700 Office: CALIFORNIA SERVICE CENTER Date: **SEP 28 2006**

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a health care facilities operator. It seeks to employ the beneficiary as a controller and to continue his classification 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 on the ground that the record failed to establish that the proffered position qualifies as 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as an operator of multiple health care facilities in Santa Clara County, California, specializing in services to

developmentally disabled adults. The petitioner stated that it has fifteen employees, gross annual income of approximately \$1.4 million, and wanted to continue employing the beneficiary, who was originally hired by the company as an H-1B worker in 2002, as its part-time (20 hours/week) controller for another three years at the wage rate of \$29.93/hour. The petitioner provided the following description of the proffered position:

[The beneficiary] will continue to serve as a Controller to assist the [CEO] with financial management and direction of the organization. He will provide assistance at the corporate level with finance, accounting, administration, management, and business plan development particularly with new and expanded operations for additional facilities.

A business degree is the minimum educational requirement for the proffered position, the petitioner declares, and the beneficiary is qualified for the job by virtue of his bachelor of science in commerce from the University of Iloilo in the Philippines, granted on May 6, 1969. According to the report of an educational credentials evaluation service in Miami Beach, Florida, the beneficiary's education is equivalent to a bachelor's degree in business administration from an accredited U.S. college or university.

In the RFE the petitioner was requested to submit a more detailed description of the duties to be performed by the beneficiary, including information about the level of responsibility and types of employees supervised; an organizational chart of the company with a list of all employees and their job titles; as well as a brief description of the job duties and educational levels of the employees under the direction of the proffered position. The petitioner was also requested to submit evidence that the position of controller is common to similarly-sized companies as the petitioner; job listings showing that similar companies require a degree for the position; and that the petitioner has a history of hiring individuals with a baccalaureate or higher degree for the proffered position. In addition, the petitioner was requested to submit evidence of its business operations in the form of quarterly wage reports to the State of California (Form DE-6) for the last four quarters; the company's federal income tax return for 2003; and the company's facility license. Lastly, the petitioner was requested to submit copies of the beneficiary's recent pay statements to show that he was in valid nonimmigrant status at the time the instant H-1B extension petition was filed.

In response to the RFE the petitioner provided a more detailed description of the proffered position. It reads as follows:

As our Controller, [the beneficiary] is in charge of the company's financial activities . . . [H]is position involves traditional duties associated with financial management and those of a senior accountant, in addition to other complex financial and economic analysis, and advice on human resource and management issues. [The beneficiary] is responsible for analyzing our business and financial practices, policies, and accounting procedures. Based on his findings, he advises the company on ways of improving efficiency and productivity, while reducing costs. He is charged with establishing and implementing the company's financial and economic policies and protocols. He devises business plans, sets financial organizational goals, and evaluates the financial viability of any proposed ventures. In that respect, he studies patient and demographic statistics for various areas, assesses competition and business opportunities, and considers other variables affecting marketing of services. He also conducts regular audits of the company finances, including inventory and equipment costs, and oversees preparation of financial reports, payroll, and tax documents. Performance of these duties involves: Direction and supervision of accounting tasks; review of financial

transactions to ensure accurate transfers between books of original entry and the general ledger; review and preparation of payroll documents; audit of accounts receivable and payable; supervision and audit of purchase records with inventory stocks; preparation of monthly accounts, financial statements, and other complex economic and financial analysis.

The petitioner estimated the percentage of time required by the various duties as follows:

- 55% Reviewing, auditing and analyzing the company's practices – including human resources, cost and asset management issues – finances, and records, and on devising more cost effective strategies, and ensuring against misallocations or errors.
- 20% Devising and implementing financial and economic protocols and standards.
- 15% Preparation of financial reports, payroll, and tax related documents.
- 5% Research and analysis of economic variables and market analysis in conjunction with expansion of services.
- 5% Meetings with administrators, and miscellaneous professional tasks.

Documentation submitted by the petitioner in response to the RFE included the following:

- a summary report on treasurers, controllers, and chief financial officers from *O*NET Online*, a Department of Labor (DOL) resource on occupations;
- a payroll listing of the petitioner's employees for a six-month time period in 2003-04;
- assorted business records over a six-month time period in 2004 including general ledger postings, balance sheets, and an income statement;
- licenses issued to the petitioner's predecessor (Country Home) in the years 1993-1999 to operate three group homes for children and one adult residential facility in Gilroy, California; and
- nine checks issued by the petitioner to the beneficiary (presumably paychecks) from June 2004 to February 2005.

Other evidence requested in the RFE was not submitted by the petitioner. For example, the petitioner did not submit an organizational chart listing all employees by job title, or identify the employees subordinate to the controller and describe their duties and educational levels. Nor did the petitioner submit a copy of its 2003 federal income tax return. As for the four facility licenses submitted from the 1990s, three of them are for children's homes, which do not appear to apply to the petitioner's current operations described as health care facilities for developmentally disabled adults. Only one of the licenses from the 1990s is for an adult residential facility, but it is located in Gilroy, California. That is not the work location – Walnut Creek, California – that was identified in the DOL-certified labor condition application (LCA) filed with the petition. Thus, the record does not appear to include a copy of the facility license for the beneficiary's place of work.

In his decision the director found that while some of the duties of the proffered position reflect those performed by financial managers, including controllers, as described in the DOL's *Occupational Outlook Handbook (Handbook)*, they appeared to be incidental to the primary duties of the position, which more closely resembled those of a bookkeeping, accounting, or auditing clerk. None of those positions, as indicated in the *Handbook*, qualifies as a specialty occupation. Based on the evidence of record, the director determined that the petitioner does not have the organizational complexity, the operational scope, or the financial support staff – such as an accountant or accounting clerk(s) – to credibly utilize the beneficiary as a financial manager. The director concluded that the record failed to show that the duties of the proffered

position could not be performed by an individual with less than a baccalaureate level education. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that ample evidence has already been submitted that the proffered position meets the requirements of a specialty occupation. Counsel resubmits a copy of the *O*NET* Online report on treasurers, controllers, and financial managers, which states that a bachelor's degree is the minimum formal education required for such positions. The job description submitted by the petitioner in response to the RFE, counsel contends, comports with that of a controller and cannot be entrusted to an individual without a baccalaureate level education. In counsel's view, the director erroneously based his decision on the size of the business and ignored evidence demonstrating the petitioner's need for the services of a controller. The petitioner reiterates that the petitioner operates four health care facilities and has annual revenues in excess of \$1.3 million, which is substantial enough of a business to warrant the hiring of a part-time controller. Since controllers require a baccalaureate degree, counsel concludes, the proffered position qualifies as a specialty occupation.

To resolve the nature of the proffered position, it was proper for the director to request a more detailed job description from the petitioner showing the duties actually performed by the beneficiary. It was also proper to request evidence to establish the scale of the petitioner's business operations, its organizational structure including the job titles of its other employees, as well as the job duties and educational levels of all employees subordinate to the beneficiary to demonstrate the managerial component of the proffered position. In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the duties of the position normally require a degree in a specialty field. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

As discussed above, much of the evidence requested in the RFE has not been furnished by the petitioner, either in the response to the RFE or in support of the instant appeal. The petitioner did not submit an organizational chart listing all employees by job title, or identify employees subordinate to the controller and describe their duties and educational levels. Thus, it is impossible to place the proffered position in the company hierarchy and determine its level of responsibility or the exact scope of its duties. The petitioner did not submit a copy of its 2003 federal income tax return. Therefore, the record does not substantiate its claim to have a gross annual income of \$1.3 or 1.4 million. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)). Moreover, while the size of the business does not, in and of itself, determine the company's need for a controller, the income level and scale of operations do have a direct and substantial bearing on the scope of the duties the beneficiary would perform in the proffered position.

Furthermore, the petitioner describes the duties of the proffered position, in its response to the RFE, in generic language which provides few substantive details about the specific tasks the beneficiary performs for the petitioner's business, their level of complexity, and why they require a baccalaureate degree in a specific specialty to perform. No concrete examples have been provided of financial reports or business plans

prepared by the beneficiary. In many businesses a wide range of financial transaction and recordkeeping tasks are performed by bookkeeping, accounting, or auditing clerks, as well as junior accountants. These positions, as the *Handbook* makes clear, do not qualify as specialty occupations because they do not require baccalaureate degrees in a specific specialty. See *Handbook*, 2006-07 edition, at 72 and 435. Many accounting tasks require knowledge and application of accounting principles, but not on a baccalaureate level in accounting or a related field. In the instant petition, the job duties described by the petitioner in response to the RFE do not include sufficient details to distinguish the proffered position from that of a bookkeeping, accounting, or auditing clerk, or from a junior accountant.

In addition, the petitioner did not submit a copy of any license to operate a health care facility in Walnut Creek, California, which is the work location identified in the LCA. The four licenses in the record are for facilities located in Gilroy, California, and three of the four are for a client group – children – which conflicts with the petitioner’s claim to specialize in adult facilities for the developmentally disabled. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). No such competent evidence has been submitted by the petitioner to clarify what age group(s) it services and to show that it is licensed to operate a facility in Walnut Creek, California, for developmentally disabled adults.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish the nature of the proffered position, or that it operates a facility in Walnut Creek, California, where it claims the beneficiary would work. Since the nature of the position is unclear, the AAO cannot analyze whether the duties the beneficiary would perform require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proffered position qualifies as specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) or that the beneficiary would be coming temporarily to the United States to perform services in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(1)(B)(I).

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director’s decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.