



U.S. Citizenship
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FILE: WAC 05 161 50718 Office: CALIFORNIA SERVICE CENTER

Date: JAN 22 2007

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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 avers: it is a contract therapy company; it employs 1100 personnel; and its gross annual income is approximately \$42 million. It seeks to employ the beneficiary as a budget analyst. 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 petitioner notes that the basis of classification is new employment but that it desires to extend the beneficiary's stay as he currently holds this status. The record shows that the beneficiary is changing employers from a previously approved H-1B classification.

On October 18, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the beneficiary is currently working and has been approved for this position in the past under an H-1B classification.

The record contains: (1) the Form I-129 filed May 17, 2005 and supporting documentation; (2) the director's August 11, 2005 request for further evidence (RFE); (3) the petitioner's September 20, 2005 response to the director's RFE; (4) the director's October 18, 2005 denial decision; and (5) the Form I-290B and petitioner's letter in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

Preliminarily, the AAO notes that the beneficiary had been approved for H-1B classification from December 2, 2002 through May 15, 2005 for a different petitioner. The instant petition was filed on May 17, 2005, after the beneficiary's authorized stay had expired. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(D) if the alien in the United States seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. A request for a petition extension may be filed only if the validity of the original petition has not expired. 8 C.F.R. § 214.2(h)(14). The petition in this matter may not be approved as it was filed after the validity of the original petition had expired.

The AAO will briefly address whether the proffered position is 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.

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.

The petitioner stated on the Form I-129 that it seeks the beneficiary's services as a "budget analyst." In an August 11, 2005 RFE, the director acknowledged that the petitioner had indicated a description of the proffered position was attached to the petition, but that the record did not contain a description. The director requested a detailed job description, including the specific duties and percentage of time spent on each of the duties as well as why the services to be performed required the work of a person with a college degree.

In a September 20, 2005 response, the petitioner provided a copy of a job announcement for the position of an accounting assistant that included duties such as: assisting with Medicare reimbursement denials and tracking, contract labor tracking, payroll reporting and updating, assisting with accounts payable, invoice verifications, general accounting functions including account analysis, financial analysis, filing and other duties as assigned. The record also included a copy of a facsimile cover page dated August 24, 2005 from the beneficiary showing his position as an accounting assistant with the petitioner.

On October 18, 2005 the director denied the petition determining that the description of the proffered position reflected the duties of a financial clerk as reported in the Department of Labor's *Occupational Outlook Handbook (Handbook)* and that the occupation did not require a baccalaureate level of education in a specific specialty as a normal minimum for entry into the occupation. The director also determined that the petitioner had not provided evidence: that a bachelor's degree or its equivalent in a specific field of study is common for parallel positions in similar organizations; that the occupation involved duties that are unique or complex; that the petitioner normally required a baccalaureate degree for the proffered position; or that the nature of the

specific duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with a baccalaureate degree or higher degrees.

On appeal, the petitioner provided a new job description that includes elements that could be considered the duties of a budget analyst. For example, the petitioner indicates that the beneficiary analyzes current and past budgets, analyzes standard operating procedures for controlling costs, applies mathematical analysis to determine validity and reliability of statistics, develops recommendations to management on work methods, wage rates, and budget decisions, and develops financial reports and proposals for management's review. The petitioner also submits a position description for the occupation of budget analyst. The petitioner does not offer an explanation for the disparate description of job duties provided in response to the director's RFE and the one provided on appeal. The petitioner requests approval for the beneficiary's H-1B extension.

The petitioner's letter on appeal is not persuasive. Preliminarily, the AAO determines that a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as an H-1B specialty occupation. *See e.g. Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not offered an explanation or evidence to substantiate that the proffered position when the position was filed was that of a budget analyst. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In this matter, although the petitioner labeled the position as a budget analyst on the Form I-129, the beneficiary indicated his title in the petitioner's organization is "accounting assistant." The petitioner's job description of the duties for its position of accounting assistant does not involve duties that are normally associated with the attainment of a bachelor's degree or higher. Rather as the director determined, the job duties align more closely with that of a financial clerk or at most a junior accountant.

To determine whether a particular job qualifies as a specialty occupation, CIS does not 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. In this matter, it does not.

The *Handbook* 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.

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.

At most, the job duties described in response to the director's RFE includes some responsibilities that may be performed by accounting clerks or junior accountants, employment that does not impose a baccalaureate degree requirement in a specific discipline on those seeking entry-level employment. As a result, the petitioner has not established the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard 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)).

The record does not contain any evidence to establish this criterion. The petitioner has not provided evidence of parallel positions in similar organizations nor does the petitioner attempt to distinguish the duties of the proffered position as more complex or unique than similar employment in its industry. 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. at 165. The petitioner has not established either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Neither has the petitioner provided evidence that it previously employed degreed individuals to perform the duties of the proffered position. The petitioner has failed to provide sufficient evidence to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices. Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. Again, the petitioner's generalized iteration of the duties relates most closely to that of an accounting clerk or at most to a junior accountant. Neither position requires a

baccalaureate degree for an entry-level position. The petitioner has not provided sufficient information to establish that the duties as described are duties that correspond to a position that is so complex or unique that only an individual with a degree in a specific specialty can perform them. Accordingly, the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the record contains evidence that the beneficiary was previously approved for H-1B status on the basis of a petition filed by a different petitioner. However, prior approvals do not preclude CIS from denying an extension of the original visa. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS 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).

Beyond the decision of the director, the AAO finds that the record does not contain evidence that the beneficiary is qualified to perform the duties of a specialty occupation. Although the record contains a copy of the beneficiary's foreign degree and transcripts associated with the degree, the record does not include a credentials evaluation of the beneficiary's foreign degree. For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the director's decision will be affirmed.

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