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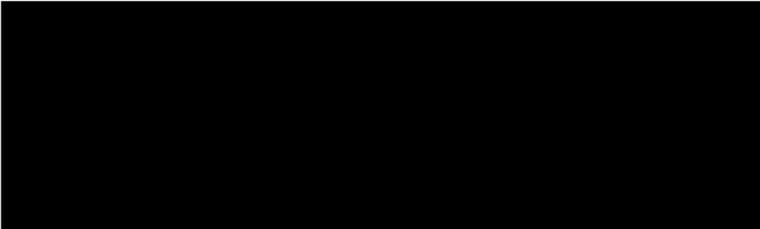
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FILE: EAC 06 136 50756 Office: VERMONT SERVICE CENTER Date: **NOV 13 2007**

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, 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 sells perfume, jewelry, and cell phones, claims to employ eight personnel, and to have a gross annual income of \$367,289. It seeks to employ the beneficiary as an accountant. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).

On July 18, 2006, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. Counsel submits a brief on appeal.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 4, 2006 and supporting documentation; (2) the director's April 17, 2006 request for additional evidence (RFE); (3) counsel's July 13, 2006 response to the director's request; (4) the director's July 18, 2006 denial letter; and (5) the Form I-290B, and 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 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 seeks the beneficiary's services as an accountant. In a March 24, 2006 letter appended to the petition, the petitioner stated:

The Beneficiary will coordinate the completion of all company and divisional financial activity and provide administrative and accounting control of financial details for the development, analysis and interpretation of statistical information.

The petitioner added that the beneficiary's responsibilities would include:

- Determining and implementing accounting policies, procedures, systems and controls required to manage the accounting functions and administration;
- Coordinating the budget preparation and projections;
- Preparing financial statements;
- Payroll;
- Sales and tax reconciliation;
- General ledger account;
- Tracking inventory and preparing depreciation schedules to apply to capital assets;
- Analyzing operating statements;
- Review[ing] cost control programs;
- Mak[ing] strategy recommendations to management;
- Analyzing financial data for accuracy and involv[ing] appropriate personnel to ensure discrepancies are resolved;
- Participating in and directing management's planning cycle – strategic planning, budgeting, actual operations reviews and provid[ing] appropriate financial information;
- Assisting other functional heads in developing, maintaining and understanding of cost and expense budgets;
- Timely preparation and submission of payroll taxes and related reports, including monthly, quarterly and annual reports; and

- Developing and maintaining a system of internal audit and checks.

The petitioner noted that the beneficiary would be responsible for maintaining accurate records of all assets, liabilities, and profit/loss transactions in accordance with generally accepted accounting principles.

In response to the director's RFE, counsel for the petitioner noted that the petitioner conducts its retail and service business at four locations via four separate outlets and that it had plans to open two additional retail outlets in Port Arthur, Texas. Counsel asserted that the petitioner needed an accountant to reconcile the inventory with sales and purchasing requirements on an increasing value basis, in order to grow its business on a well organized/reconciled basis, fully compliant with state and federal tax reporting. Counsel added that a bookkeeping position would be inadequate as the petitioner required the services of an individual who could analyze data, sales, revenues, and costs in relation to economic indicators and who would be responsible for establishing reasonable budgetary requirements and monitoring progress. Counsel contended that the petitioner's mandate for the proffered position is complex and that the petitioner wished to hire an in-house accountant to integrate that employee within the petitioner's administration.

Counsel also provided a list of the petitioner's employees including 11 sales personnel, an owner/president, a vice-president, and the proffered accounting position. Counsel noted the petitioner's number of personnel and the scheduled expansion and claimed that an accounting position was warranted. Counsel cited a decision (*Young China Daily v. Chappett*, 742 F.Supp. 522 (N.D. Cal. 1989)) for the proposition that whether a position is considered a professional position or not is unrelated to the size of the company, salary, or prior company history of maintaining the position. Counsel provided a copy of a monthly list of sales for 2005 for Louisiana and Texas that indicated the total sales for the year as \$367,289. The record also included: (1) the petitioner's first quarter Form 941, Employer's Quarterly Federal Tax Return for 2006 indicating that the petitioner compensated six employees during the time period; and (2) a list of 21 Forms W-2, issued in 2006 for the 2005 year, with salaries of less than \$2,000 for 13 employees, of less than \$3,600 for an additional four employees, and of \$9,200 for two employees.

The director determined that the petitioner would not employ the beneficiary on a full-time basis as an accountant, but would require the beneficiary to perform non-qualifying duties instead of primarily accounting duties. The director noted that the petitioner did not submit evidence of an industry standard for an accounting position for companies similar to the petitioner. The director determined that although the position of "accountant" is generally associated with a specialty occupation, the information provided in this matter in regards to the size and nature of the petitioner did not demonstrate that the position is so complex that the position should be considered a specialty occupation. The director concluded that the evidence of record did not establish that the position is a specialty occupation.

On appeal, counsel for the petitioner asserts that Citizenship and Immigration Services (CIS) should not substitute its opinion as to business necessity in place of the business ownership. Counsel references two decisions to substantiate this assertion. Counsel notes that the petitioner specified duties of the position that are consistent with the Department of Labor's *Dictionary of Occupational Titles (DOT)* description of an accountant and asserts that the bookkeeping aspect of the position is not predominant. Counsel contends that the accounting position described satisfies all of the criteria for evaluation as a specialty occupation. Counsel

claims that the director's focus on the salary of the position and erroneous conclusions regarding the petitioner's principal's rate of remuneration are an abuse of CIS discretion.

To make its determination as to whether the employment described by the petitioner 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 criterion 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 that 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 2006-2007 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

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<sup>1</sup> *Occupational Outlook Handbook*, 2006-2007 Edition, at [www.bls.gov/oco/ocos001.htm](http://www.bls.gov/oco/ocos001.htm).

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 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.<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. It is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. *See EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). 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 employed eight employees and had a gross annual income of \$367,289. In a July 13, 2006 response to the director's RFE, counsel for the petitioner noted the petitioner operated four retail outlets and had plans to open two additional outlets. The record contains a copy of a list of monthly sales revenue for 2005 showing total sales revenue of \$367,289; the petitioner's first quarter Form 941, Employer's Quarterly Federal Tax Return for 2006 indicating the petitioner compensated six employees

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<sup>2</sup> *Occupational Outlook Handbook*, 2006-2007 Edition, at [www.bls.gov/oco/ocos144.htm](http://www.bls.gov/oco/ocos144.htm).

<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.

during the time period; and a list of 21 Forms W-2, issued in 2006 for the 2005 year, with salaries of less than \$2,000 for 13 of the 21 employees compensated that year, with salaries of less than \$3,600 for an additional four employees for that year, and salaries of two employees at \$9,200.

The AAO has reviewed the record for evidence that the petitioner's business is growing, as well as evidence of its financial structure and operations, to determine whether the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. The AAO does not find any documentary evidence to establish that the petitioner is a growing business. The petitioner has not submitted any independent documentary evidence of its gross or net annual income for the year prior to filing the petition or subsequent to the filing the petition. The record does not contain any 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 to indicate whether the petitioner's retail outlets operate as separate financial entities or under a single financial structure. The record does not contain evidence such as audits or sales projections that document a pattern of growth in the petitioner's revenues or business operations. 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)). Neither has the petitioner 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, correspondence, or a business plan related to the acquisition of additional retail outlets. 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 operations or in relation to the petitioner's business expansion plans are sufficiently complex to require the services of a degreed accountant.

In addition, the petitioner has not provided an accurate depiction of its number of employees. The petitioner initially indicated it employed eight personnel. However, the petitioner has not provided substantive documentation confirming the employment of eight personnel. In addition, the petitioner's response to the director's RFE contains confusing information regarding the petitioner's personnel. Although the petitioner indicates it employed 11 personnel when the response to the RFE was filed, the petitioner does not provide adequate documentation substantiating their employment. The most that can be gleaned from the information provided is that the petitioner employs a varying number of temporary or part-time employees. Such indefinite information does not contribute to an understanding of the complexity of the petitioner's organization or the necessity for specialized accounting work to comply with state and federal payroll requirements.

The AAO acknowledges counsel's assertions regarding the petitioner's desire to employ an accountant so it would be well organized and fully compliant with state and federal tax reporting and that the position was complex and that a bookkeeping position would be inadequate. However, 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 Obaigbena*, 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 AAO observes that most companies desire to be well organized and to be fully compliant with

state and federal tax reporting requirements. Such a desire does not establish a need for an accountant with a bachelor's or higher degree in accounting.

The AAO also acknowledges counsel's reference to the *DOT*. However, the AAO does not consider the *DOT* to be 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. *DOT* 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. 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. Moreover, a petitioner may not establish a position as a specialty occupation by repeating a general description of employment of a particular occupation rather than providing specifics substantiated by the requirements of the petitioner.

The petitioner has not provided sufficient documentary evidence to establish that the proffered position is the position of a degreed accountant. Instead, the position appears more closely aligned to accounting responsibilities that may be performed by junior accountants, employment that does not impose a baccalaureate degree requirement 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 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 has not submitted any job announcements, industry letters, or other evidence that would establish a degree requirement is common to the industry for parallel position among similar organization. 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. Although counsel for the petitioner asserted the proffered position is complex, the petitioner's failure to submit financial information regarding its current business operations and expansion plans precludes it from distinguishing the proffered position from accounting employment that is performed with less than a four-year degree. Again, 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 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. The petitioner has not submitted a hiring history for the accountant position. Further, in the instant matter, counsel, has not provided evidence that the nature of its operations requires a degreed accountant to perform the duties of the position. Moreover, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. Again, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements 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. Again, the petitioner has not provided evidence that its business operations involve intricate and complex financial transactions, specialized tasks related to tax records, or any other substantiating evidence that would elevate the general duties of the position to one that requires a degreed accountant. The totality of the record does not establish that 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. The petitioner has not established 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 this proceeding 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