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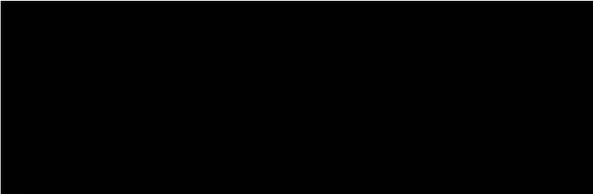
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 055 50671 Office: CALIFORNIA SERVICE CENTER Date: OCT 27 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

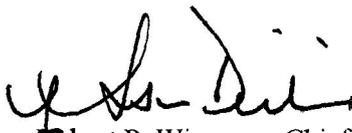
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 of the 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 an individual and family-counseling provider that seeks to extend its authorization to employ the beneficiary as a part-time accountant/auditor and budget & finance advisor. The petitioner, therefore, 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 petitioner had not established that the proffered position is a specialty occupation or that a specialty occupation is available for the beneficiary.

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

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) consistently 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 petitioner seeks the beneficiary’s services as a part-time accountant/auditor and budget & finance advisor. Evidence of the beneficiary’s duties includes: the petitioner’s October 10, 2006 letter in support of the petition and counsel’s May 23, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

Examine, analyze, and interpret accounting records for the purpose of giving advice or preparing statements; install or advise on systems of recording costs or other financial and budgetary data; establish accounting procedures and supervise the maintenance of company accounts; motivate and retain employees; prepare payroll and complete paperwork in compliance with licensing laws and reporting requirements.

In response to the RFE, counsel further described the proposed duties as follows:

Provide guidance on the financial requirements for state audit sheets, bid take-offs, and grant proposals; Analyze records of present and past operations, trends and costs, estimated and realized revenues, administrative commitments, and obligations incurred to project further revenues and expenses; interpret budgets and provide budget forecasts; maintain budgeting systems pertaining to advertising, marketing, production, and maintenance; develop and install manual and computer-based budgeting systems.

Establish accounting procedures and supervise maintenance of company accounts; oversee the billing process, manage billing capturing, and generate bills to the state, state agencies and to individual patients; keep track of time billed on patients’ accounts; analyze past and present financial operations and estimate future revenues and expenditures to prepare budget, payroll, and paperwork in compliance with State and Federal laws. Manage the petitioner’s compliance with HIPAA with regard to medical records and billing systems.

The director found that the petitioner had not submitted sufficient evidence to demonstrate that the proffered position is primarily that of an accountant. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the petitioner, which is a healthcare provider, is in need of a professional who can provide it with financial expertise. Counsel cites a publication of the American College of Medical Practice Executive (ACMPE), to state that medical practices are in need of technical and professional skills that include financial management in order to run efficiently. Counsel also states that there is no inconsistency regarding the petitioner's personnel, as the petitioner does not employ bookkeeping and accounting clerks and has never claimed to employ such individuals. Counsel states further that the scale and complexity of the petitioner's business, not its number of commercial transactions, should be the basis of establishing whether the petitioner requires the proffered position. As supporting documentation, counsel submits: a copy of the *ACMPE Guide to the Body of Knowledge for Medical Practice Management*; Texas Secretary of State website information reflecting the petitioner's entity status; and a copy of the petitioner's brochure.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first 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; 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 often considered by CIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* reports that 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The 2008-09 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." Counsel and the petitioner have stated that the proffered position is that of an accountant and have offered a general description of the position that lists duties typically performed by accountants. As discussed by the DOL, 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.

The AAO acknowledges that part of the above discussion is generally reflected in the petitioner's description of the proffered position. A petitioner, however, cannot establish employment as a specialty occupation by describing the duties of the employment in the same general terms as discussed in sources outlining occupations. Information on the petition reflects that the petitioner was established in 2001 and has a gross annual income of \$100,000. It is noted that the petitioner left blank items 12 and 14 pertaining to its current number of employees and its net annual income. In response to the RFE, counsel submitted the petitioner's federal income tax returns for 2004, 2005, and 2006, which reflect \$90,455.00, \$99,454.00, and \$120,257.00 in gross receipts or sales, \$34,000.00, \$34,000.00, and \$34,000.00 paid in compensation of officers, and \$0, \$6,479.00, and \$47,350.00 paid in salaries and wages, respectively.

A review of the *Handbook* finds 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:

Some 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 accountant positions by demonstrating their accounting skills on the job.

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

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,² the AAO turns to the record for

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.

² According to the website for Skyline College, a community college located in San Mateo, CA (www.skylinecollege.net), an associate's degree in business or accounting would involve learning the fundamentals about financial accounting principles and concepts, balance sheets, income statements, cash

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. In matters where a petitioner's business is relatively small, like that in the instant matter, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient scope and/or 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. As discussed above, the petitioner's federal income tax returns for 2004, 2005, and 2006, which reflect \$90,455.00, \$99,454.00, and \$120,257.00 in gross receipts or sales, \$34,000.00, \$34,000.00, and \$34,000.00 paid in compensation of officers, and \$0, \$6,479.00, and \$47,350.00 paid in salaries and wages, respectively. The petitioner's quarterly wage report for the fourth quarter of 2007 reflects seven employees. As the record does not contain an organizational chart, the division of duties among these employees is unclear. Counsel's statement on appeal that, contrary to the director's finding, the petitioner never claimed to employ bookkeeping and accounting clerks, is noted. However, the duties described by the petitioner's president in her October 10, 2006 letter, namely, "motivating and retaining employees" do not appear to be the complex duties normally associated with an accountant. Moreover, although counsel asserts that the petitioner serves many mental health patients, and that the scale and complexity of the petitioner's business demonstrates the need for a sophisticated financial assistance, she has not provided documentary evidence in support of her assertions. 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 record does not contain evidence, such as audits, business plans, an organizational chart, or samples of the beneficiary's accounting-related tasks completed for the petitioner, that document the petitioner's business operations as complex. In addition, although counsel asserts that the beneficiary would also oversee the petitioner's three affiliated companies, Majasa Home Health Care, Inc., Monty & Muniz Rehabilitative Services, Inc., and Capellini Homes, LLC, the record contains no evidence of any complex financial tasks associated with the beneficiary in relation to these affiliates. The petitioner has not provided documentary evidence to establish that it has a complicated financial situation and thus that its business, despite its relatively limited income and small size, has the complexity of financial operations to require that the proffered position requires a degree in accounting. Counsel asserts: "The nature of the medical practice itself and the nature of a mental health practice should be the main basis to decide whether such medical practices merit the assistance of financial professionals like the beneficiary." However, 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)). The duties of the proffered position are not established as those of a degreed accountant. Instead, they appear at most to be more closely aligned to accounting responsibilities that may be performed by junior accountants, employment that does not impose a

flow statements, the GAAP, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system. Thus, an associate's degree would provide knowledge about the GAAP and accounting techniques that serve the needs of management and facilitate decision-making.

baccalaureate degree requirement on those seeking entry-level employment. 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)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The record includes insufficient evidence from firms, individuals, or professional associations regarding an industry standard. The copy of the *ACMPE Guide to the Body of Knowledge for Medical Practice Management* submitted by counsel on appeal, is noted. Counsel states that this publication “clearly shows that Financial Management is a professional skill needed by medical practices to run efficiently.” The AAO, however, cannot assume that the services the ACMPE provides, including that of granting nationally recognized certification and fellowship designations to medical practice executives and leaders, establish the complexity of the proffered position. In addition, the record contains no evidence that the proposed duties of the proffered position are as complex as the duties described for the ACMPE-certified medical practice executive positions, such as managing some of the top-performing group practices in the nation. Again, 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).

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. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the duties of the proffered position and their performance in the specific context of the petitioner's particular business operations constitute a position so complex or unique as to necessitate at least a bachelor's degree in a specific specialty. Rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel does not address this issue on appeal. The record does not establish this criterion. Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly,

the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states, in appeal, that the beneficiary must ensure the petitioner's compliance with the American Health Insurance Portability and Accountability Act of 1996 (HIPAA). Counsel also states, "The beneficiary will be utilizing complex and advanced accounting principles to assist [the] Petitioner in examining and maintaining its financial health." The AAO, however, finds no evidence in the record to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by junior accountants. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a junior accountant. The proposed duties are described in exclusively generalized terms that are generic to accounting positions in general. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

It is noted that the beneficiary has already been approved as an H-1B nonimmigrant. This record of proceeding, however, does not contain all of the supporting evidence submitted to CIS in the prior case. In the absence of all of the corroborating evidence contained in other record of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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.