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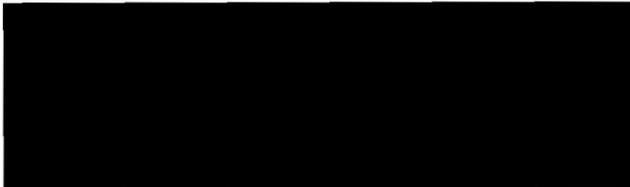
FILE: WAC 07 091 52851 Office: CALIFORNIA SERVICE CENTER Date: OCT 28 2008

IN RE: Petitioner:  
Beneficiary:



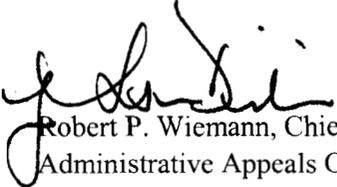
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All 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 a commercial and real estate investments business that seeks to employ the beneficiary as a part-time accountant. 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 credible offer of employment exists. The director also found that that the evidence of record is inconsistent regarding the nature of the petitioner's business and its organizational hierarchy.

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) the petitioner's prior counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

In a January 18, 2007 letter submitted in support of the petition, the petitioner described the proposed duties of the proffered accountant position as follows:

1. Apply principles of accounting to analyze financial information and to prepare financial reports. Analyze financial information by detailing assets, liabilities, and capital. Prepare balance sheets, profit and loss statement, and related reports. Present the current and projected financial position to management;
2. Analyze the past and present financial operation and estimate future revenues and expenditures to prepare the budget;
3. Analyze records of past and present operation trends and costs, estimated and realized revenues, and administrative commitments and obligations incurred to project future revenues and expenses;
4. Audit all stores managed by the company for management to assess the effectiveness of controls, accuracy of financial records, and efficiency of operations;
5. Interpret the budget to management and advise them on the effective use of resources and assumptions underlying budget forecasts;

6. Apply principles of cost accounting to provide detailed cost information not supplied by general accounting systems;
7. Determine actual import/purchase costs and prepare periodic reports comparing standard costs to actual import/purchase costs and provide management with reports comparing factors affecting prices and profitability;
8. Examine accounts and records and compute taxes owed according to prescribed rates, laws, and regulations; and
9. Ensure that the petitioner complies with periodic tax payment, information reporting, and other taxing authority requirements.

In response to the RFE, the petitioner's prior counsel provided the following job description:

The beneficiary will work 40 hours a week – 100% of his time will be spent on accounting duties. This accountant is responsible for all of petitioner's accounting including the preparation of monthly financial statements and sales reports. Specifically, the beneficiary will routinely apply accounting principles to analyze financial information when preparing the aforementioned reports, audit purchase and sales contracts, orders, and invoices to prepare reports that reflect and substantiate the transactions. He will perform all auditing for management to assess the effectiveness of controls, accuracy of financial records, and efficiency of operations. He will examine records and liaise with the accounting clerk to ensure the recording of transactions and compliance with applicable laws and regulations, and oversee the reconciliation of bank statements, preparation of payroll, and administration of personnel records and collections relating to logistical control.

The director found that the record contains insufficient evidence to demonstrate that the actual duties would require an individual with a baccalaureate degree and that the petitioner has the organizational complexity to warrant the hiring 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). The director also found the following inconsistencies/deficiencies: information on the petition reflects the petitioner's business as "Commercial & Real Estate Investments" while information on the petitioner's 2005 and 2006 income tax returns reflects the petitioner's business activity as "Retail Trade" and its product or service as "Gasoline/Groceries"; and the record contains no evidence in support of the petitioner's prior counsel's claim that a vacancy will be created, as one of the petitioner's two H-1B part-time accountants intends to move to another state.

On appeal, counsel states, in part, that the proffered position meets the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also states that the director incorrectly determined that the petitioner is not a real estate investment company, as the petitioner is "a small real estate investment company which invests in gas stations and convenience stores." Counsel reiterates the proposed duties described above and states that the beneficiary will work on a part-time basis and spend all of his time performing the duties of a

management accountant. As supporting documentation, counsel submits: business licenses for Amoco Food Mart, Texaco Food Mart, and Peachtree Collier Foodmart, all located in Georgia; job advertisements for accountant positions; and copies of the educational credentials of [REDACTED], who is described as the petitioner's previous employee.

The AAO concedes that the proffered position, as described in the record, may qualify as a specialty occupation. In this matter, the proffered position is that of a part-time accountant for the petitioning entity, which is a real estate investment business that invests in gas stations and convenience stores, with three employees (according to the petitioner's quarterly federal tax return for the first quarter of 2007), and more than \$3 million in gross receipts or sales. A review of the Department of Labor's *Occupational Outlook Handbook*, 2008-09 edition, finds that most accountant and auditor positions require at least a bachelor's degree in business, accounting, or a related field. Therefore, the petitioner may satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petition may not be approved, however, because the petitioner's organizational hierarchy remains unclear. As discussed in the director's decision, the petitioner's prior counsel asserted that the petitioner already has two part-time H-1B accountants and that the vacancy for the proffered position would be created upon the transfer of one of the petitioner's accountants, [REDACTED] to another state. The petitioner's prior counsel, however, did not submit any evidence in support of his assertion. 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 Obaiqbena*, 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 petitioner's new counsel also did not address this issue on appeal. In view of the foregoing, the petitioner has not demonstrated the availability of a specialty occupation for the beneficiary.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a bachelor's degree in accounting and business administration from an accredited college or university in the United States. The evaluation, however, is based upon the beneficiary's formal education and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved.

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).

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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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