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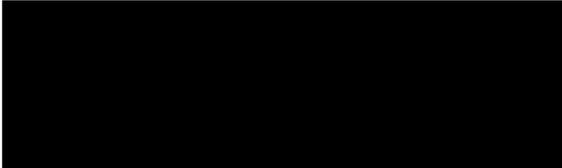
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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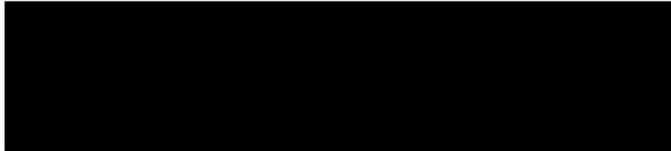


FILE: EAC 07 152 51330 Office: VERMONT SERVICE CENTER Date: **APR 29 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 is a retail trade and investment company operating a gas station, convenience store, and check cashing business. It seeks to employ the beneficiary as its finance manager. 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 because he determined that the proffered position is not a specialty occupation. On appeal, counsel states that the director erred in his findings, and submits a brief and additional evidence in support of this contention.

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and its attachments.

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.

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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner is seeking the beneficiary’s services as a finance manager. The record indicates that the beneficiary holds a bachelor of commerce degree in financial accounting and auditing. According to the job description submitted by the petitioner in its letter of support dated March 29, 2007, the beneficiary will be required to perform the following duties:

[The beneficiary will be] responsible for developing and implementing financial plans for the organization utilizing knowledge in accounting and finance. Confer with the management to determine its assets, liabilities, cash flow insurance coverage, tax status, and financial objectives. Analyze the financial status of the company and develop financial plans based on

analysis of data, and discuss financial options with the management. Prepare documents for implementation of plans selected by management. Revise plans based on modified needs of the company or changes in the investment market. Analyze current & past budgets, prepare & justify budget requests & allocate funds according to spending priorities. Analyze accounting records to determine financial resources required to implement program & submit recommendations for budget allocations.

Analyzing the operating procedures and devising the most efficient methods of improving work performance. Gathering and organizing information on problems and procedures, that were encountered in the past and present during our functions and giving advice on how to solve these problems by creating new systems or revised procedures, managing work flow for processing new items, and maintaining statistical records. Identifying the best and most cost effective resources required for buying stock for each function. Analyzing data and considering solutions or alternative methods of procedures for dealing with individual clients according to their requirements.

The director found the initial evidence insufficient, and consequently issued an RFE on June 18, 2007. The director requested additional evidence demonstrating that the position was a specialty occupation, and further requested additional details regarding the petitioner's business. In a response dated September 10, 2007, the petitioner responded to the petitioner's requests. The petitioner stated that the beneficiary would take over the check cashing business recently started by the petitioner, and indicated that in such a position, the beneficiary would be required to oversee the company's compliance with all local and state banking laws. The petitioner expanded on the description of duties assigned to the beneficiary, stating that he would also be responsible for the following tasks:

[The beneficiary] will also be brought in to handle the financial reporting of the business to ensure a maximization of efficiency. So his duties involve both check cashing and the usual duties of a financial manager. His efforts will be used to alleviate some of the stress that [REDACTED] undergoes as an overstretched owner.

On November 30, 2007, the director denied the petition. The director found that the proffered position was not a specialty occupation as it could not be determined that the duties of the proffered position were those of a financial manager. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that the proffered position was that of a finance manager, not a financial manager as the director contended in his decision. Counsel further argues that the position offered to the beneficiary is more akin to that of a financial analyst as opposed to a financial manager. In support of this contention, counsel submits summary reports for the position of financial analyst and financial manager from the Occupational Information Network (*O*Net*).

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.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. Factors often considered by USCIS when determining the above four criteria include: whether the *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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The petitioner has stated that the proffered position is that of a finance manager. The critical element in examining whether the proffered position is a specialty occupation 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. With regard to the instant petition, the record does not clearly establish that the proffered position, while it has the title of finance manager, is a specialty occupation position.

The 2006-07 edition of the Handbook does not contain a position description for "finance manager." It appears, therefore, that the director logically consulted the Handbook's description of the position of financial manager, which is described as follows:

The duties of financial managers vary with their specific titles, which include controller, treasurer or finance officer, credit manager, cash manager, and risk and insurance manager. Controllers direct the preparation of financial reports that summarize and forecast the organization's financial position, such as income statements, balance sheets, and analyses of future earnings or expenses. Controllers also are in charge of preparing special reports required by regulatory authorities. Often, controllers oversee the accounting, audit, and budget departments. Treasurers and finance officers direct the organization's financial goals, objectives, and budgets. They oversee the investment of funds, manage associated risks, supervise cash management activities, execute capital-raising strategies to support a firm's expansion, and deal with mergers and acquisitions. Credit managers oversee the firm's issuance of credit, establishing credit-rating criteria, determining credit ceilings, and monitoring the collections of past-due accounts. Managers specializing in international finance develop financial and accounting systems for the banking transactions of multinational organizations.

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In addition to carrying out the preceding general duties, all financial managers perform tasks unique to their organization or industry. For example, government financial managers must be experts on the government appropriations and budgeting processes, whereas health care financial managers must be knowledgeable about issues surrounding health care financing. Moreover, financial managers must be aware of special tax laws and regulations that affect their industry.

Financial managers play an increasingly important role in mergers and consolidations and in global expansion and related financing. These areas require extensive, specialized knowledge on the part of the financial manager to reduce risks and maximize profit. Financial managers increasingly are hired on a temporary basis to advise senior managers on these and other matters. In fact, some small firms contract out all their accounting and financial functions to companies that provide such services.

The role of the financial manager, particularly in business, is changing in response to technological advances that have significantly reduced the amount of time it takes to produce financial reports. Financial managers now perform more data analysis and use it to offer senior managers ideas on how to maximize profits. They often work on teams, acting as business advisors to top management. Financial managers need to keep abreast of the latest computer technology in order to increase the efficiency of their firm's financial operations.

The AAO concurs in part with the director's finding that the description above does not coincide with the description provided by the petitioner of the beneficiary's proffered position. Counsel takes note of these disparities on appeal, and indicates that another related Handbook classification containing some of the duties outlined by the petitioner is a financial analyst. The Handbook states the following about financial analysts:

Financial analysts, also called securities analysts and investment analysts, work for banks, insurance companies, mutual and pension funds, securities firms, and other businesses, helping these companies or their clients make investment decisions. Financial analysts read company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates in order to determine a company's value and to project its future earnings. They often meet with company officials to gain a better insight into the firm's prospects and to determine its managerial effectiveness. Usually, financial analysts study an entire industry, assessing current trends in business practices, products, and industry competition. They must keep abreast of new regulations or policies that may affect the industry, as well as monitor the economy to determine its effect on earnings.

Financial analysts use spreadsheet and statistical software packages to analyze financial data, spot trends, and develop forecasts. On the basis of their results, they write reports and make presentations, usually making recommendations to buy or sell a particular investment or security. Senior analysts may even be the ones who decide to buy or sell if they are responsible for managing the company's or client's assets. Other analysts use the data they find to measure the financial risks associated with making a particular investment decision.

The Handbook states the following with regard to academic credentials for financial manager positions:

A college education is required for financial analysts and is strongly preferred for personal financial advisors. Most companies require financial analysts to have at least a bachelor's

degree in business administration, accounting, statistics, or finance. Coursework in statistics, economics, and business is required, and knowledge of accounting policies and procedures, corporate budgeting, and financial analysis methods is recommended. A master's degree in business administration is desirable. Advanced courses in options pricing or bond valuation and knowledge of risk management also are suggested.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. In reaching this determination, 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 a finance manager or financial analyst. 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 analyst position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in a specific specialty.

Both of the classifications above describe financial analysts working in either investment or business firms, among other venues, while the actual proffered position appears to be that of a bookkeeper for a single gas station/convenience store with a check cashing business in Highspire, Pennsylvania. Specifically, at the time of filing, the petitioner claimed to employ four employees and to have a gross annual income of \$3.1 million and a net annual income of \$105,000.

A review of the proffered duties coupled with the nature of the petitioner's business indicates that the proffered position is more akin a bookkeeper than a financial manager or analyst. The *Handbook* notes in its description of the work performed by bookkeeping, accounting and auditing clerks that:

Bookkeeping, accounting, and auditing clerks are financial recordkeepers. They update and maintain accounting records, including those which calculate expenditures, receipts, accounts payable and receivable, and profit and loss. These workers have a wide range of skills from full-charge bookkeepers, who can maintain an entire company's books, to accounting clerks who handle specific tasks. All these clerks make numerous computations each day and must be comfortable using computers to calculate and record data.

In small businesses, bookkeepers and bookkeeping clerks often have responsibility for some or all the accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income). They also produce financial statements and prepare reports and summaries for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. Additionally, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

The *Handbook* indicates that the educational requirements for bookkeepers are as follows:

Education and training. Most bookkeeping, accounting, and auditing clerks are required to have a high school degree at a minimum. However, having some postsecondary education is increasingly important and an associate degree in business or accounting is required for some positions. Although a bachelor's degree is rarely required, graduates may accept bookkeeping, accounting, and auditing clerk positions to get into a particular company or to enter the accounting or finance field with the hope of eventually being promoted.

In its March 29, 2007 letter of support, the petitioner indicates that it has plans for further expansion and that it is the rapid and continuing growth of the company that necessitates a full-time finance manager. The AAO acknowledges that the process of expanding a petitioner's business operations could potentially establish financial and operational complexities that would require the duties of a finance manager as described by the *Handbook*. Accordingly, the AAO has reviewed the record for evidence of the petitioner's growing business, as well as its financial structure and operations, to determine whether the employment described by the petitioner would impose a specific degree requirement on the beneficiary. However, the AAO notes two problems. First, the petitioner has submitted no documentary evidence, such as its most recent income tax return or payroll records, to corroborate its claimed gross income or staffing levels. 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)). Second, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner provides no documentation related to its financial operations or organization that would shed light on the complexity of the financial and accounting work to be performed by the beneficiary, e.g., tax returns or other financial documents. While it submits transaction information reports demonstrating the fees it charges for cashing checks, it has not provided any evidence that would indicate how the petitioner's plans for expansion have affected its financial position. Accordingly, the record offers no meaningful evidence to establish that the financial duties to be performed by the beneficiary in relation to the petitioner's claimed operations or in relation to the petitioner's business expansion plans are sufficiently complex to require the services of a finance manager or financial analyst.

As discussed above, the proffered position is more akin to that of a bookkeeper. The record contains no evidence that the financial duties to be performed by the beneficiary in relation to the petitioner's claimed operations or in relation to the petitioner's business expansion plans are sufficiently complex to require the services of an individual with a degree in a specific specialty. Moreover, the position appears instead to be that of a bookkeeper, a position, which according to the *Handbook*, does not require a bachelor's degree or higher in a specific specialty.

Accordingly, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

With regard to parallel positions in similar convenience stores, the petitioner has failed to submit any evidence in support of this premise. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the

proffered position. 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 submitted no evidence, such as job postings, to establish its degree requirement as the norm within its industry under the first prong of the criterion. 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. The petitioner's failure to submit information related to its financial operations or its business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from accounting employment that is performed with less than a four-year degree. As previously stated, simply going on the 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 158.

Therefore, 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).

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. The petitioner filed the initial petition after owning the gasoline station/convenience store since 2004. The petitioner stated that it had four staff members, but did not identify any educational degrees for these employees. The initial petition appears to establish that the petitioner has not previously employed any in-house financial or bookkeeping personnel. Therefore, the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(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. To the extent that they are depicted in the record, the duties of the position appear generic, with the use of such terms as “prepare documents” or “analyze budgets.” While the petitioner states that its financial accounting responsibilities are complex and specialized, the primary source of the petitioner's revenues appears to be from the sale of gasoline and check cashing. The petitioner provides no explanation of why the monitoring of such sales would be viewed as either complex or specialized. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a financial manager or analyst for a gasoline/convenience store. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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