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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



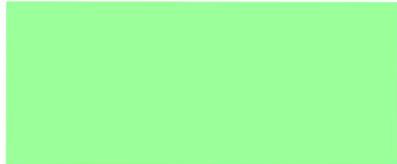
DATE: **FEB 11 2015** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR) the approval of the petition, and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office on appeal. The director's decision to revoke the approval of the petition is withdrawn. The matter will be remanded to the director for further consideration and action.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner indicated that it is a [REDACTED] company established in [REDACTED].¹ In order to employ the beneficiary in what it designates as an "Accountant" position, the petitioner seeks to classify him 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 initially approved the petition on December 13, 2012. Subsequent to the petition's approval, the United States Embassy in New Delhi, India, returned the petition to the director for review. The director reviewed the information from the Embassy and issued the petitioner a NOIR on January 21, 2014. The petitioner did not respond to the NOIR within the time allotted. On March 26, 2014, USCIS revoked the approval of the petition.

The petitioner filed an appeal contesting the director's grounds for revocation. We subsequently issued a Request for Additional and Missing Evidence (RFE), to which the petitioner responded. We will now address the merits of the petitioner's appeal.

Upon review of the entire record of proceeding, we find that the petitioner has overcome the director's grounds for revoking the approval of the petition. Beyond the director's decision, however, we have identified material discrepancies and deficiencies in the record which preclude us from reaffirming the approval of the petition. Accordingly, we will remand the matter to the director for further consideration and action.

I. FACTUAL AND PROCEDURAL HISTORY

As noted above, the petitioner indicated on the Form I-129 petition that it is a [REDACTED] company established in [REDACTED]. On the Form I-129, the petitioner listed its business address as [REDACTED]. The petitioner further indicated that it would employ the beneficiary as an accountant at the same address. The petitioner listed its gross annual income as [REDACTED].

The Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is an "Accountant," and that it corresponds to Standard Occupational Classification (SOC) code and title "13-2011.00, Accountants and Auditors" from the Occupational

¹ The petitioner did not provide a description for its type of business on the Form I-129. Although the petitioner indicated on the Form I-129 that it was established in [REDACTED] the petitioner now asserts that it was first established in [REDACTED].

Information Network (O*NET). The LCA further states that the proffered position is a Level I, entry-level, position.

In a letter dated April 6, 2012 submitted with the petition, counsel for the petitioner described the nature of the petitioner's business as having been "established for the purpose of overseeing and managing [REDACTED] franchises." Counsel stated that the petitioner provides "such services as accounting (quarterly and annual sales comparison sheets, managing finances), provide management training, conduct meetings with employees, monitor compliance for each location to [REDACTED] rules and regulations, human resources and marketing."

With regards to the proffered position, counsel asserted that the beneficiary's duties as an accountant will include the following:

- Prepare profit and loss statements for specified accounting periods;
- Prepare balance sheets, management operation reports, budgets and cash flow projections for the information of the management regarding each location;
- Prepare the information for the tax returns for each location;
- Plan tax strategies to minimize the tax liability and ensure compliance with federal and state tax laws;

In support of the petition, the petitioner submitted, *inter alia*, an evaluation of the beneficiary's academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Business Administration degree from an accredited institution of higher education in the United States.

The petitioner also submitted its business plan. In pertinent part, Part 3.1 of the business plan, "Organizational Structure," contained an organizational chart depicting the petitioner as employing, among others: an Accountant, [REDACTED] who also provides Customer Service; a Human Resources provider, [REDACTED] and a Human Resources Assistant, [REDACTED]. The same chart also depicts the petitioner as separately employing a CPA, [REDACTED] as well as an unidentified Financial Planner. Part 3.2 of the business plan, "Job Descriptions," listed several administrative positions within the organization including an "Accountant/CPA" position, but provided no actual job descriptions.

The director determined the submitted evidence to be insufficient, and issued a Request for Evidence (RFE).

In response to the RFE, counsel submitted a letter dated December 5, 2012 in which it described the petitioner as a "holding company" that "owns and operates [REDACTED] stores in Southern California and these stores generate of [sic] [REDACTED] annually." Later in the same letter, counsel stated that the petitioner "grosses over [REDACTED] annually." With respect to the proffered position, counsel stated:

The petitioner will not use the beneficiary as a book keeper because the petitioner uses a point of sale system which acts as their book keeper for each store and this system collects, organizes and reconciles the income for each store with the bank

accounts. Furthermore, the petitioner has a Human Resources person who is responsible for handling the payroll for each store and the company as well as an accounts receivable person who handles the review of the reconciliations as well as the billing.

* * *

Per the job description provided by the petitioner, the majority of the beneficiary's duties do not fall under [bookkeeping duties] as the petitioner has an accounts receivable person who handles supplier data, invoices and AR. In fact, the majority of the stated duties require the beneficiary to create financial reports and operation reports for management.

The petitioner submitted a letter dated October 26, 2012 in which it stated, for the first time, that the minimum educational requirement for the proffered position is "a bachelor's degree in accounting or closely-related field." In the same letter, the petitioner acknowledged that it currently has an "outside CPA" that assists with creating and amending the petitioner's annual budget for each of its stores. The petitioner asserted that the proffered position will "take over" the CPA's role with respect to the petitioner's budgets. The petitioner indicated that the proffered position will be responsible for preparing the petitioner's tax returns, although the CPA will continue to review these tax returns.

The petitioner submitted a separate job description for the proffered position, which described the proffered position as "responsible for highly complex accounting activities . . . [and] the completion of difficult Accounting assignments." The job description listed numerous job responsibilities relating to preparing financial reports and providing financial advice to management, such as:

- Prepare and examine financial statements;
- Analyze financial reports and records, making recommendations relative to the accounting of reserves, assets and expenditures;
- Analyze business operations, trends, costs, revenues and financial commitments to project future revenues and expenses and provide advice;
- Prepare periodic reports and break even projections for all locations;
- Consolidate results of multiple business units and provide business partners and management with actual-to-budget variance analysis and to identify causes and resolution of variances; and
- Assist identifying areas for efficiencies, establish process improvements, and assist with continuous development of policies and procedures.

The same job description also contained numerous job duties relating to preparing tax documents and providing tax advice, such as:

- Prepare information for computation of taxes and preparation of returns for each location and make sure that the taxes are paid in timely manner;
- Plan tax strategies for minimize the tax liability and ensure compliance with federal

- and state tax laws; and
- Handle all sales and use tax inquiries and audits.

The petitioner submitted a letter from [REDACTED] CPA, of [REDACTED] CPA's, opining that the duties of the proffered position "contain complex and advanced accounting duties which require a bachelor's degree in accounting or a closely-related field." The letter further concluded that the proffered position "does not fall under a bookkeeper position and is more in-line with an Accounting Manager."

The petitioner submitted another organizational chart which differs significantly from that found in the petitioner's business plan. More specifically, this organizational chart depicted an Accounting Department consisting of: (1) the beneficiary in the position of "Staff Accountant;" (2) [REDACTED] CPA; and (3) [REDACTED] AP Clerk and HR Assistant.² Notably, the beneficiary is depicted as directly overseeing [REDACTED]

The director initially approved the petition. Subsequent to the petition's approval, the United States Embassy in New Delhi, India, returned the petition to the director for review. The director reviewed the information from the Embassy and issued the petitioner a NOIR. In the NOIR the director observed that the petitioner's stated business address of [REDACTED] appeared to be a residence. The director thus questioned the petitioner's ability to employ the beneficiary in a specialty occupation at the stated address, along with the petitioner's [REDACTED] other employees. The director afforded the petitioner thirty days, plus three days for notice by mail, in which to respond to the NOIR. The petitioner did not respond to the NOIR within the time allotted. Consequently, the director revoked the approval of the petition.

The petitioner filed an appeal contesting the director's grounds for revocation. On appeal, and in response to our RFE, the petitioner asserted that it is authorized and able to conduct business at the residential address of [REDACTED]. The petitioner explained that this "residential home [is] dedicated to the operation of the business, to own and manage [REDACTED] restaurant locations." The petitioner supplemented the record with, *inter alia*, a new organizational chart that is different from the previously provided versions. This new organizational chart does not depict an Accounting Department or any accounting-related positions such as the CPA, nor does it depict the proffered position.

II. REGULATORY FRAMEWORK FOR REVOCATIONS

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

² [REDACTED] is also depicted under the Human Resources Department in the role of HR Assistant.

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
 - (5) The approval of the petition violated paragraph (h) of this section or involved gross error.
- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

III. DISCUSSION

To comply with the notice requirements of 8 C.F.R. § 214.2(h)(11)(iii), a director's decision to revoke a previously approved petition must be preceded by a NOIR which "shall contain a detailed statement of the grounds for the revocation." In the instant case, the director issued a NOIR calling into question the proffered position's eligibility as a specialty occupation. However, the only factual basis for revocation articulated in the NOIR was that the petitioner's business address was a residence. The director did not articulate any other factual basis to support the revocation.

Upon review of the record, we find that the petitioner has submitted sufficient evidence overcoming the director's sole ground for revoking the approval of the petition, i.e., that the petitioner would not be able to provide specialty occupation work for the beneficiary to perform at that residence. However, we have identified material discrepancies and deficiencies in the record which preclude us from reaffirming the approval of the petition. In particular, there are significant discrepancies and deficiencies with regards to the petitioner's descriptions of the proffered position within the context of the petitioner's organizational structure.

The petitioner has provided inconsistent descriptions and evidence regarding the proffered position and its constituent duties. For instance, the petitioner initially listed the job duties of the proffered position as including: prepare profit and loss statements for specified accounting periods; prepare balance sheets, management operation reports, budgets and cash flow projections for the information of the

management regarding each location; prepare the information for the tax returns for each location; and plan tax strategies to minimize the tax liability and ensure compliance with federal and state tax laws. In response to the director's RFE, however, the petitioner greatly expanded upon the duties and responsibilities of the proffered position to include higher-level duties such as providing financial advice to management and developing policies and procedures. The petitioner's initial description of the proffered position did not contain any such duties. At most, the petitioner's initial description indicated that the beneficiary would simply "[p]repare" various types of financial reports "for the information of the management." In sum, the petitioner's initial description appeared to have the beneficiary performing more bookkeeping work, while the second and subsequent iterations of the job have the beneficiary performing higher-level accounting work.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new, higher-level duties to the job description.

Furthermore, it is important to note that the petitioner designated the proffered position as a Level I, entry-level, position on the LCA.³ The wage levels are defined in DOL's "Prevailing Wage Determination Policy Guidance."⁴ A Level I wage rate is described as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs.

³ Wage levels should be determined only after selecting the most relevant O*NET code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation.

⁴ Prevailing wage determinations start with a Level I (entry) and progress to a wage that is commensurate with that of a Level II (qualified), Level III (experienced), or Level IV (fully competent) after considering the job requirements, experience, education, special skills/other requirements and supervisory duties. Factors to be considered when determining the prevailing wage level for a position include the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. DOL emphasizes that these guidelines should not be implemented in a mechanical fashion and that the wage level should be commensurate with the complexity of the tasks, independent judgment required, and amount of close supervision received.

The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

Thus, in designating the proffered position at a Level I wage, the petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to others within the occupation. That is, in accordance with the relevant DOL explanatory information on wage levels, this wage rate indicates that the beneficiary is only required to have a basic understanding of the occupation and carries expectations that the beneficiary perform routine tasks that require limited, if any, exercise of judgment; that he would be closely supervised; that his work would be closely monitored and reviewed for accuracy; and that he would receive specific instructions on required tasks and expected results.

In contrast to the position's Level I wage designation, the petitioner alternatively characterized the proffered position as having "highly complex" and "difficult" accounting activities. The petitioner further supported such claims with a letter from [REDACTED] CPA, opining that the duties of the proffered position "contain complex and advanced accounting duties . . . [that are] more in-line with an Accounting Manager [position]." The petitioner's claims of the "highly complex" and "advanced" nature of the duties of the proffered position are contradictory to the proffered position's Level I wage designation.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, we observe significant discrepancies and deficiencies regarding the petitioner's organizational structure. The organizational chart found in the petitioner's business plan depicted the petitioner as employing, among others: an Accountant, [REDACTED] a CPA, [REDACTED] and an unidentified Financial Planner. However, the petitioner's organizational chart submitted in response to the RFE depicted an Accounting Department consisting of: (1) the beneficiary in the position of "Staff Accountant;" (2) [REDACTED] CPA; and (3) [REDACTED] AP Clerk and HR Assistant. The petitioner did not explain the discrepancies between the two charts, such as why the second organizational chart omitted the Financial Advisor position or the employment status of the individuals previously depicted as the petitioner's Accountant and CPA (i.e., [REDACTED] and [REDACTED] respectively). Notably, the second organizational chart depicts the beneficiary as directly overseeing [REDACTED] which again is at odds with the petitioner's designation of the proffered position as a Level I, entry-level, position. Further, the

petitioner's third organizational chart submitted on appeal is also inconsistent, as it does not depict an Accounting Department, any accounting-related positions, or even the proffered position.

The petitioner has not explained and reconciled these inconsistent depictions of its organizational structure. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

Based on the differing organizational charts, it is unclear whether the petitioner employs a separate Accountant, CPA, and/or a Financial Planner, in addition to the proffered position. The lack of clarity regarding the petitioner's staffing and organizational structure precludes any meaningful understanding of the duties and role of the proffered position within the context of the petitioner's business operations. For example, we note that counsel stated in its April 6, 2012 letter that the petitioner currently provides "such services as accounting (quarterly and annual sales comparison sheets, managing finances)." However, the petitioner has not clarified who is currently providing these services, and why the petitioner would seek to employ the beneficiary to perform the same services. In addition, we note that the petitioner indicated in response to the RFE that it will continue to utilize "an outside CPA" to review tax returns that will be prepared by the beneficiary, but the second organizational chart suggests that the CPA position () is an internal position within the petitioner's Accounting department. Furthermore, the petitioner has not explained why it would need to utilize "an outside CPA" to review its internally-prepared tax returns. We further note that while Part 3.2 of the business plan was entitled "Job Descriptions," the business plan did not actually provide any job descriptions.

The petitioner has made other varying claims regarding its business operations that further undermine its overall credibility. The petitioner has not submitted any explanation for these discrepancies. For instance, the petitioner has claimed its gross annual income as () over (), and (). The petitioner has claimed that it owns and manages () restaurants. Even with respect to the petitioner's true and correct name and year of establishment, the petitioner initially claimed its name is () and that it was established in (), but then later attested in response to our RFE that its true and correct name is () and that it was established in (). Overall, the numerous discrepancies in the record cast doubt on the credibility of the petitioner's statements and evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Considering the above discrepancies and deficiencies, we cannot find that the petitioner has established the substantive nature of the work to be performed by the beneficiary. The failure to establish the substantive nature of the proffered position precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the

focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the evidence does not satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. Accordingly, the director's initial approval of the petition constituted gross error, and serves as proper grounds for revocation pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(5).

Finally, we will briefly note that even if the petitioner were able to establish that the proffered position qualifies as a specialty occupation, the petition still could not be approved due to the lack of evidence that the beneficiary is qualified to perform the duties of the proffered position.⁵ Specifically, the petitioner states that the minimum educational requirement for the proffered position is "a bachelor's degree in accounting or closely-related field." The beneficiary here, however, possesses the equivalent of a U.S. Bachelor of Business Administration degree. The petitioner has not explained and documented how a bachelor's degree in Business Administration is equivalent to "a bachelor's degree in accounting or closely-related field." For this additional reason, the director's initial approval of the petition constituted gross error, and serves as proper grounds for revocation pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(5).

IV. CONCLUSION AND ORDER

In the instant case, to properly analyze the issues of whether the proffered position qualifies as a specialty occupation, and if necessary, the beneficiary's qualifications (as well as any other issues that are material to the case), the petition will be remanded to the director for review and to contemplate the issuance of a new NOIR in accordance with the applicable statutory and regulatory provisions.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. The matter is remanded for further action in accordance with the foregoing and entry of a new decision.

⁵ In general, USCIS does not need to examine the issue of the beneficiary's qualifications where the petitioner has not provided sufficient evidence to demonstrate that the proffered position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.