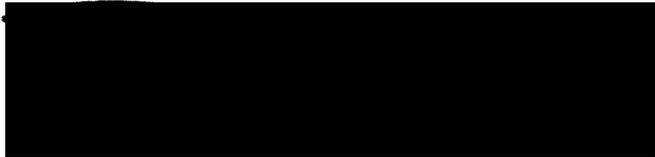




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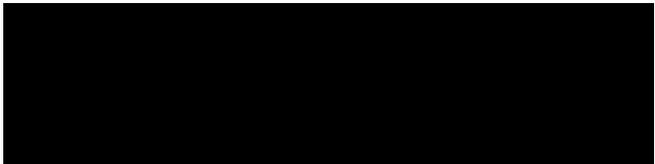
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FILE: WAC 04 085 51678 Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2005

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, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 manufacturer and wholesaler of diamonds and gemstones, with three employees. It seeks to employ the beneficiary as an accountant. The director denied the petition because he determined the proffered position met none of the criteria required for classification as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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 critical element is not the title of the position nor 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.

The petitioner seeks the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's December 15, 2003 letter of support accompanying the Form I-129; and the petitioner's February 18, 2004 response to the director's request for evidence. As indicated by the petitioner at the time of filing, the beneficiary would initially be required to a) identify areas needing to be changed based on conversations with the petitioner's staff and a review of the petitioner's transactions and procedures; and b) design an integrated accounting system, computerized where feasible. In addition to these one-time responsibilities, the on-going duties of the proffered position would require the beneficiary to:

- Implement the petitioner's new accounting system (10 percent of the beneficiary's time);
- Prepare detailed account reports, including consolidated balance sheets to reflect business assets, liabilities and capital, and profit and loss statements (25 percent of the beneficiary's time);
- Prepare annual and quarterly federal and state tax returns and provide support to outside auditors in preparing audited tax returns (25 percent of the beneficiary's time);
- Systematically compile data from financial statements and analyze income and expenses, and forecast on a five-year cycle income and expenses with the use of statistical tools including regression and variance analysis (20 percent of the beneficiary's time);
- Prepare the budget using statistical procedures such as correlation and regression analysis (10 percent of the beneficiary's time); and
- Advise management of the state of accounting and financial health of the business and also advise on the accounting computer software suitability and needs of the company (10 percent of the beneficiary's time).

In his denial, the director concluded that the above description failed to include complex or advanced accounting duties of the type performed by accountants. Moreover, he found the petitioner had failed to demonstrate sufficient organizational complexity to establish a realistic need for an in-house accountant and could rely on outsourcing for its accounting requirements, noting that the petitioner had been in business since 1997 and had not previously required an accountant.

In response, counsel contends that the proffered position is that of an accountant, as described in the DOL *Handbook*. He further asserts that the director's denial focused on the size of the petitioner's organization and ignored the nature of the petitioner's business, that the need for an accountant is "not a monopoly of big and medium size companies." He states that, since its 1997 founding, the petitioner's accounting needs have been met through expensive outside bookkeepers and certified public accountants, and that the petitioner's hiring of an in-house accountant will be a cost savings.

The AAO will first consider counsel's assertions regarding the nature of the proffered position. It turns to the 2004-2005 edition of the *Handbook*, which, at pages 68-69, identifies the four major fields of accounting: public, management, government and internal. Each field, as stated by the *Handbook* at pages 70-71, requires those seeking employment to hold at least a baccalaureate degree in accounting or a related field.

The category of accounting closest to the proffered position is that of management or private accountants who:

record and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, cost management, and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

In light of the above description of the work typically performed by accountants, the AAO, like the director, concludes that the duties of the proffered position are not those of an accountant. The decisive question for the AAO is not whether the petitioner's position requires knowledge of accounting principles but rather whether this position is one that normally requires the level of accounting knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting. In the instant case, while the beneficiary's performance of the proffered position's duties would require her to have some knowledge of accounting, the record does not establish that this knowledge would have to be on a par with that possessed by an accountant.

Although management accountants certainly record and analyze the financial information of the companies for which they work, their responsibilities extend beyond these requirements, being much broader and more complex than those outlined in the petitioner's job description. As noted by the *Handbook*, accountants routinely have responsibility for performance evaluation, cost management, and asset management, and they not only analyze financial information for the organizations employing them, but also interpret that information for these organizations' management.

The proffered position, as described by the petitioner, appears to be more closely aligned to that of a bookkeeper, as discussed by the *Handbook*, at page 437, under the occupational title of bookkeeping, accounting and auditing clerks:

Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those which tabulate

expenditures, receipts, accounts payable and receivable, and profit and loss. They have a wide range of skills and knowledge from full-charge bookkeepers who can maintain an entire company's books to accounting clerks who handle specific accounts

In small establishments, bookkeeping clerks handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers.... They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

Most of the specific duties of the proffered position relate directly to the establishment and maintenance of the petitioner's financial records and, as such, are routinely performed by bookkeeping and accounting clerks. A review of the financial analysis and reporting to be performed by the beneficiary also leads to the conclusion that such tasks are more aligned with the financial statements, reports and summaries prepared by bookkeepers for supervisors and managers than the financial analysis and interpretation performed by accountants. The AAO also notes that the *Handbook's* discussion of the job outlook for bookkeepers, at page 438, states that "full-charge bookkeepers" now perform many of the same duties as accountants. Accordingly, the AAO concludes that the duties of the proffered position are those of a full-charge bookkeeper or perhaps an intermediate position of junior accountant.

In reaching its decision, the AAO has noted the concerns counsel expresses on appeal regarding the director's finding that the petitioner lacks the organizational complexity to need an in-house accountant. The AAO does not agree with the director's comments. It does not find the record to establish that the petitioner's business is not of the type or the scale and complexity to require an accountant. There is nothing in the *Handbook* to indicate that accountants are not employed in the petitioner's industry. Further, there is nothing in the record to indicate that the duties to be performed by the beneficiary are related to the size of the petitioner's organization, i.e., to involve any tasks regarding payroll or employee benefits, etc. Instead, they appear to be tied largely to tracking, recording and reviewing the petitioner's financial operations, as well as implementing its financial control system.

The AAO now turns to the *Handbook* for its discussion of the degree requirements, if any, imposed on those seeking employment as bookkeepers or junior accountants. At page 434, the *Handbook* states the following regarding the educational requirements imposed on those who seek employment as financial clerks:

Most financial clerks are required to have at least a high school diploma. However, having completed some college is becoming increasingly important, particularly for those occupations requiring knowledge of accounting. For occupations such as bookkeepers, accounting clerks, and procurements clerks, an associate's degree in business or accounting often is required. Some financial clerks have bachelor's degrees in business, accounting, or liberal arts. Although a degree is rarely required, many graduates accept entry-level clerical positions to get into a particular company or to enter the finance or accounting field with the hope of being promoted to professional or managerial positions. Some companies have a set plan of advancement that tracks college graduates from entry-level clerical jobs into

managerial positions. Workers with bachelor's degrees are likely to start at higher salaries and advance more easily than those without degrees.

Educational requirements for junior accountants are discussed at page 71:

Many graduates of junior colleges and business and 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 positions with more responsibilities by demonstrating their accounting skills on the job.

As the *Handbook* indicates no requirement that those seeking work as a bookkeeper or junior accountant hold a baccalaureate degree or its equivalent, the AAO concludes that the proffered position cannot be established as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To satisfy the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must establish that its degree requirement is common to its industry in parallel positions among similar organizations or that its proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In response to the director's request for evidence, the petitioner referenced the degree requirement identified by the *Handbook* and the *Dictionary of Occupational Titles (DOT)* for accountants as proof of an industry-wide degree requirement for its proffered position. However, the record does not establish the proffered position as that of an accountant and, therefore, the degree requirement associated with that occupation is not relevant to these proceedings. Further, the AAO does not consider the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The Standard Vocational Preparation (SVP) rating of 8 given to the occupation of accountant by the *DOT* is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence in the record that would support such a finding. Accordingly, the petitioner cannot establish its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; 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 determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the employment histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the proffered position is newly created, the petitioner having previously relied on outside accounting assistance to meet its needs. Accordingly, the petitioner has no evidence to submit in response to the requirements and cannot establish its proffered position as a specialty occupation based on its normal hiring practices under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). While the petitioner has submitted copies of its job posting and employment advertisements for the proffered position, this documentation is insufficient to establish the petitioner's normal hiring practices. The AAO notes that the petitioner's job posting, although it indicates a baccalaureate degree is required for the proffered position, does not specify that the degree be in a field directly related to accounting, as required by statute and regulation.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In its February 18, 2004 response to the director's request for evidence, the petitioner contended that the financial planning for its business was very complex and demanding, as its business was characterized by wide fluctuations in the price of precious metals, similar to that experienced with stocks and bonds. The AAO will not, however, accept the petitioner's evaluation of the complexity of its financial operations, as it has found nothing in the record to support the petitioner's assertion regarding this aspect of its business. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See 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)). On appeal, counsel also references the effect of the fluctuation in the price of precious metals on the petitioner's business as proof of the complexity of the duties of the proffered position. Again, the AAO will not consider such statements as they are unsupported by the record. The assertions of counsel do not constitute evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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).

To determine whether the petitioner has established its proffered position as a specialty occupation under the fourth criterion, the AAO has, therefore, again reviewed record before it, including the duties of the proffered position to determine whether they reflect a higher degree of knowledge and skill than would normally be required of a full-charge bookkeeper or junior accountant, or, perhaps, represent an amalgam of jobs that require different skills and qualifications. It finds, however, no evidence in the record to indicate that the duties of the proffered position are either more specialized or more complex than those routinely performed by bookkeepers and junior accountants in the course of their employment. As a result, the AAO concludes that the petitioner has failed to establish that its proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, 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.

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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 met that burden.

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