

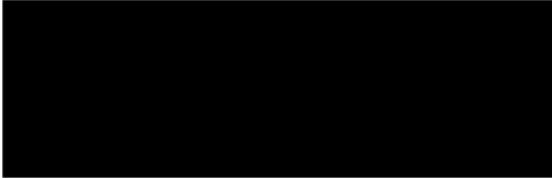
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Washington, DC 20529



U.S. Citizenship
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FILE: WAC 07 063 50541 Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2008

IN RE: Petitioner:
Beneficiary:



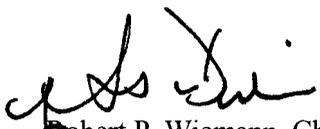
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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, California Service Center, 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 operates a home care service, claims to employ five personnel, and to have \$921,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a part-time accountant. Accordingly, the petitioner 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 did not have the organizational complexity to require the services of an accountant; thus, the evidence of record did not establish that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed December 21, 2006 and supporting documentation; (2) the director's March 23, 2007 request for evidence (RFE); (3) the petitioner's May 4, 2007 response to the director's RFE; (4) the director's May 24, 2007 denial letter; and (5) the Form I-290B, the petitioner's brief and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the 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. In a December 20, 2006 letter appended to the petition, the petitioner stated:

To further expand its operations while maintaining profitability, Home Care 1 requires the services of a part-time Accountant who will apply principles of accounting while analyzing and preparing financial reports; prepare entries to general ledger accounts and provides [sic] documentation of business transactions; analyze information regarding assets, liabilities, and capital, and prepare balance sheets, profit and loss statements, and other financial reports and implement accounting control procedures.

The petitioner indicated that in the position of accountant the beneficiary would perform the above duties.

In response to the director's RFE, the petitioner provided signed copies of its Internal Revenue Service (IRS) Forms 1120S, U.S. Income Tax Return for an S Corporation for 2005 and 2006. The IRS Form 1120S for 2005 showed \$921,157 in gross receipts, \$34,000 compensation for officers, \$0 salaries for employees, \$663,733 for independent contractors, and \$21,275 in ordinary business income. The IRS Form 1120S for

2006 showed \$1,395,144 in gross receipts, \$58,627 compensation for officers, \$0 salaries for employees, \$1,106,902 for home care services, and \$6,807 in ordinary business income. The petitioner also submitted copies of its California Form DE-6, Quarterly Wage and Withholding Report, for the fourth quarter of 2006 and the first quarter of 2007. The fourth quarter Form DE-6 for 2006 showed two employees, the two owners of the petitioner; and the first quarter Form DE-6 for 2007 showed three employees, the two owners of the petitioner and the beneficiary.

The petitioner also provided copies of three job announcements for positions including: a senior accountant for a supplier of interconnect systems and components for the aerospace industry which required a bachelor's degree in accounting/finance; a staff accountant for a telecommunications company which required two to three years accounting experience and indicated that a college degree was desirable; and a controller/senior accountant/staff accountant for an unidentified organization in the Orlando, Florida area, which indicated that a bachelor's degree in accounting was required and a master's degree was preferred for the controller/senior accountant positions. Two of the job announcements did not include information regarding the salaries for the positions advertised; one of the job announcements for the different positions of controller/senior accountant/staff accountant listed a range of salaries from \$55,000 to \$110,000 annually.

The petitioner also submitted its organizational chart showing the beneficiary in the position of accountant reporting to the vice-president and supervising a marketing director, an accounts receivable/staffing clerk, and a logistics person. The petitioner noted in its May 4, 2007 letter in response to the director's RFE that the beneficiary would only supervise the accounts receivable clerk. The petitioner also submitted an excerpt from the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on accountants and auditors.

As observed above, the director denied the petition on May 24, 2007. On appeal, the petitioner notes that the director did not ask for evidence of the petitioner's commercial transactions and detailed financial reports to demonstrate that the petitioner had the organizational complexity including commercial transactions and gross annual income to justify the need for a corporate accountant. The petitioner provides copies of its monthly financial statements, balance sheets, income statements, bank reconciliations, and payroll schedule. In addition, the petitioner submits copies of billing invoices for the use of its approximately 70 independent contractors/caregivers, the payroll schedule, and paychecks for the petitioner's caregivers for a two month period. The petitioner asserts that preparing the payroll schedule alone clearly justifies the need for a part-time accountant. The petitioner contends that it is reasonable for a company with 46 patients/clients, 70 caregivers, five employees, and an annual income of close to a million dollars to employ a part-time accountant. The petitioner clarifies its number of employees by indicating that the three individuals listed on its organizational chart as employees are independent contractors and provides copies of the IRS Forms 1099, Miscellaneous Income, issued to these three individuals. The petitioner avers that the director did not explain why a business the size of the petitioner would not require the services of a part-time accountant.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2008-2009 edition of the *Handbook* for its discussion of management accountants, the category of accounting most closely aligned to the duties described by the petitioner. As stated by the *Handbook*, management accountants:

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

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would require the beneficiary to have an understanding of accounting principles. However, degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties requiring accounting knowledge does not establish the proffered position as that of an accountant. The question is not whether the petitioner's position requires knowledge of accounting principles, which it does, but rather whether it 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.

The *Handbook's* discussion of the occupation of accountants clearly indicates that accounting positions may be filled by individuals holding associate degrees or certificates, or who have acquired their accounting expertise through experience:

Some graduates of junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.

The *Handbook* also provides a description of the work performed by bookkeeping, accounting and auditing clerks:

In small businesses, *bookkeepers and bookkeeping clerks* often have responsibility for some or all of 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 also prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

The *Handbook* reports:

Demand for full-charge bookkeepers is expected to increase, for example, because they do much of the work of accountants and perform a wider variety of financial transactions, from payroll to billing.

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the Accreditation Council for Accountancy and Taxation (ACAT), an independent accrediting and monitoring organization affiliated with the National Society of Accountants. The ACAT does not require a degree in accounting or a related specialty to issue a credential as an Accredited Business Accountant® /Accredited Business Advisor® (ABA). Eligibility for the eight-hour comprehensive examination for the ABA credential requires only three years of "verifiable experience in accounting, taxation, financial services, or other fields requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination." Up to two of the required years of work experience may be satisfied through college credit.¹

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in accounting, 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 an accountant. It is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). In matters where a petitioner's business is relatively small in number of employees or income, 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 accounting position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent.

At the time of filing, the petitioner stated that it employed five personnel and had a gross annual income of \$921,157. The petitioner provided a copy of its IRS Form 1120S for 2005 to substantiate the amount of gross income. The record also includes a copy of the petitioner's IRS Form 1120S for 2006 showing an increase in gross annual income to \$1,395,144. The record further contains financial statements, balance sheets, income statements, bank reconciliations, and a payroll schedule. On appeal, the petitioner clarified that it compensated individuals, other than the two owners and the beneficiary as independent contractors.

The AAO has reviewed the record for evidence that the petitioner's business is growing, as well as evidence of its financial structure and operations, to determine whether the accounting employment described by the petitioner would impose a degree requirement on the beneficiary. The AAO notes that the petitioner has increased its gross annual income in 2006. The record, however, does not contain information relating to the petitioner's financial operations or organization that would shed light on the complexity of the accounting

¹ Information provided by the ACAT website (<http://www.acatcredentials.org/index.html>). The *Handbook* identifies the ACAT website as one of several "Sources of Additional Information" at the end of its discussion of the occupation of accountants.

work to be performed by the beneficiary, e.g., documentation that demonstrates that the beneficiary is structuring complex debt repayment schedules, is responsible for complicated profit and loss statements, bank reconciliations, and payroll schedules. The petitioner has not provided a description and substantiating evidence of the spectrum of costs the beneficiary would be required to manage, the extent of the petitioner's financial dealings, the range of the petitioner's financial records, the specific types of data which the beneficiary would analyze, the size of the petitioner's budget, or the number of the petitioner's budget elements, or the nature of the budget/expenses variance issues and trends. The AAO acknowledges the petitioner's number of independent contractors and the number of billing invoices that must be generated; but preparing a large payroll schedule and a number of billing invoices does not demonstrate the need for the services of a degreed accountant. As observed above, graduates of junior colleges or business or correspondence schools or individuals trained as bookkeepers may handle payroll and general ledgers. The petitioner has not provided information that demonstrates the complexity of the petitioner's organization or the necessity for specialized accounting work to comply with state and federal payroll requirements. 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)). Although the petitioner may require the services of an individual who understands accounting concepts, the petitioner has not demonstrated that the proffered position requires the services of a degreed accountant.

The petitioner has not provided sufficient documentary evidence to establish that the proffered position is the position of a degreed accountant. Instead, the position appears more closely aligned to accounting responsibilities that may be performed by junior accountants, employment that does not impose a baccalaureate degree requirement on those seeking entry-level employment. As a result the petitioner has not established the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the particular position is so complex or unique that it can be performed only by an individual with a degree. 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 sufficient to comply with either prong of the criterion.

The AAO has reviewed the three job announcements submitted and does not find that any of the three announcements satisfy the requirements for establishing an industry standard. The job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business or type of business. Moreover, the record offers only an overview of the duties of the proffered position and the advertisements, likewise, provide only general information regarding the duties of the advertised positions. The duties listed in the advertisements may not be established as parallel to the actual duties of the proffered position. The record

does not contain adequate evidence demonstrating that organizations similar to the petitioner's business profile "routinely employ and recruit only degreed individuals," in an accounting discipline. The petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed accounting employment. The evidence of record fails to convey that the beneficiary's specific performance of the record's list of generalized duties would require the theoretical and practical application of highly specialized knowledge attained by at least a bachelor's degree or the equivalent in accounting or any other specific specialty. The record does not relate specific work associated with the generalized duties described by the petitioner to the petitioner's business operations and the record does not contain any documents that exemplify the nature of the proposed accounting work. Consequently, there is no evidence of complexity or uniqueness to satisfy the instant criterion, and the petitioner has not established that the proffered position can only be performed by a person with at least a bachelor's degree in accounting or a related specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. As the petitioner was established in 2005, it has not previously employed an in-house accountant; thus the petitioner has not established that it normally requires a degree or its equivalent for the proffered position. Further, in the instant matter, the petitioner has not provided evidence that the nature of its operations requires a degreed accountant to perform the duties of the position. Moreover, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. Again, the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a bookkeeper or

a junior accountant. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a bookkeeper or at most a junior accountant. Again, the petitioner has not provided evidence that its business operations involve intricate and complex financial transactions, specialized tasks related to tax records, or any other substantiating evidence that would elevate the general duties of the position to one that requires a degreed accountant. The totality of the record does not establish that 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. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.

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