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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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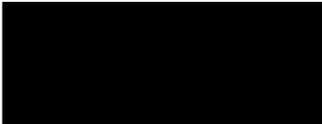
Date: OCT 07 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a business providing placement and related management services with 22 employees and a stated gross annual income of \$800,000. The petitioner seeks to employ the beneficiary as a staff accountant for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director concluded that the petitioner had failed to demonstrate that the proffered position could only be successfully performed by an individual who possessed a baccalaureate or higher degree in a specific specialty. On appeal, counsel argues that the proffered position is a specialty occupation because it required a bachelor's level degree in accounting or a related field. Counsel asserts that the Service ignored expert testimony, published sources of authority, and case law in determining that the offered position was not a specialty occupation. Counsel contends that the beneficiary will be filling a position that has always been held by individuals possessing a bachelor's degree in accounting, business, or a related area.

Counsel's statements on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a separate letter which accompanied the initial I-129 petition, the petitioner described the duties of the beneficiary in the offered position as follows:

...she will examine and analyze the accounting and financial records of the company and prepare accounting reports in accordance with generally accepted accounting principles. She will compile and review financial data regarding assets, liabilities, income, expenses, and cash flow. She will review and make recommendations for improving our system of internal financial controls, as well as introduce more effective managerial accounting measures. She will prepare balance sheets, financial and cash flow statements, and accounting summaries for presentation to our corporate accounting firm. Under the direction and advice of our CPA firm, she will assist in the preparation of accounting and tax reports including consolidated financial statements.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in an accounting or business related field. The duties of the proffered position appear to parallel those of the positions of bookkeeping, accounting, and auditing clerk, rather than those of an accountant. In its Occupational Outlook Handbook, 2002-2003 edition, at pages 21-24, the Department of Labor (DOL) describes the job of a management accountant as follows:

Management accountants - also called industrial, corporate or private accountants - record and analyze the financial information for 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 non-management groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in areas including financial analysis, planning and budgeting, and cost accounting.

The review of the description of the duties of the offered job does not reflect any activity which could be construed as involvement in an executive decision-making team. Furthermore, there is no evidence that the proffered position includes complex or advanced accounting duties such as the preparation of detailed financial reports for outside agencies or corporate stockholders, or that the position requires an individual with a knowledge of sophisticated accounting techniques normally associated with the duties of a corporate accountant. Additionally, the petitioner acknowledges that has in the past and currently retains a corporate accounting firm that could reasonably be expected to have performed and continue to perform any of the complex or advanced accounting functions or duties needed by the petitioner. Moreover, the petitioner has specified that the beneficiary will assist in the preparation of accounting and tax reports including consolidated financial statements under the direction and advice of its corporate accounting firm for presentation to that same firm.

The duties that the petitioner endeavors to have the beneficiary perform are primarily the payroll and financial transaction reporting duties, which are similar to the duties that a bookkeeping, accounting, or auditing clerk would execute in a small business establishment. In contrast to the description of an accountant, the DOL describes the positions of a bookkeeping, accounting, and auditing clerk in its Handbook at pages 390-392, as follows:

In small establishments, *bookkeeping clerks* handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, and prepare reports for supervisors and managers....

More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on accounts; and code documents,

according to company procedures. They post transactions in journals and on computer files and update these files when needed....

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents for correct entry, mathematical accuracy, and proper codes.

The duties of the proffered position relate more closely to those of the positions of bookkeeping, accounting, and auditing clerk than to those of a corporate accountant. For example, the petitioner states that the beneficiary will "will compile and review financial data regarding assets, liabilities, income, expenses, and cash flow" and "prepare balance sheets, financial and cash flow statements, and accounting summaries." Additionally, on appeal, counsel submits a revised description of the proffered position that includes duties such as:

In overseeing payroll, she will calculate verify, and input all changes in benefits, deductions, and earnings; examine payroll data for correctness of the transaction proof report (validation); ensure adequacy of bank deposits; and timely audit all materials for management.

Bookkeeping, updating payroll, auditing payroll and bank transactions, and the compilation of routine accounting reports are not duties normally associated with a corporate accountant. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Counsel cites the holdings reached in both Matter of Doultsinos, 12 I&N Dec. 153 (D.D.. 1967), and Matter of Arjani, 12 I&N Dec. 649 (Reg. Comm'r 1967), to support his argument that the position of accountant is a specialty occupation because it was professional in nature. Counsel further argues that the petitioner's size and the scope of its business activities should not be determinative factors in considering whether the duties of the offered job are professional in nature. In support of this assertion, counsel cites the holding reached in Young China Daily v. Chappell, 742 F. Supp. 522 (N.D. Cal. 1989). However, these decisions dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decisions.

Counsel's argument that the position of accountant has a specific vocational preparation (SVP) code of 8 in the DOL's Dictionary of Occupational Titles (DOT), and that such an SVP level reflects a

requirement of at least a baccalaureate degree in a specialized field for employment in the position of accountant is acknowledged. In addition, the degree requirements listed for various accounting positions contained in the 1997 Exhibit Books of Position Descriptions, Volume I, "Marketing and Sales" published by Watson Wyatt Data Services, Inc., are noted. However, as discussed above, the primary duties of the proffered position parallel those of a bookkeeping, accounting, and auditing clerk and not those of an accountant. Furthermore, a reference in the DOL's DOT, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook. The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

Counsel asserts that other organizations routinely employ individuals with accounting degrees for similar positions. Although the record contains numerous job postings for various types of accounting positions, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Accordingly, it cannot be concluded that the petitioner has demonstrated that the degree requirement is common to the industry in parallel positions among similar organizations.

Counsel contends that the beneficiary will be filling a position that has always been held by individuals possessing a bachelor's degree in accounting, business, or a related area. However, the petitioner has failed to submit any evidence, such as diplomas or academic transcripts that would tend to support such a contention. Therefore, the petitioner has failed to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the offered position.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties 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.

Counsel asserts that the Service ignored expert testimony contained in the record in determining that the offered position was not a specialty occupation. Counsel cites standards for guidance in the application of expert testimony and the response to such testimony that are set forth in the holding reached in Kuhmo Tire Co. v. Carmichael, 119 S.Ct. 1167 (1999).

The letters signed by Dr. Avner Wolf, Chairman, Department of Commerce at Baruch College of the City University and Kathryn Trudeau, CPA currently serving on the Committee Chair for Professional Development for the Virginia Society of CPA's, respectively, are noted. Dr. Wolf finds that the petitioner's "...requirement for a Bachelor's degree in Accounting, or a closely related field, justified by the complexity of the duties and the knowledge requirements." Ms. Trudeau finds that the offered job "...must be filled by a professional with no less than a four-year degree from an American accounting program." However, both Dr. Wolf and Ms. Trudeau base their conclusions on the duties of the position as described by the petitioner. Although Dr. Wolf is qualified to evaluate the educational credentials of the beneficiary, and Ms. Trudeau appears qualified to evaluate whether an accounting position is professional, neither party has provided any credentials setting forth their ability to give expert testimony regarding the question of whether the proffered position qualifies as a specialty occupation. That determination is the province of the Service as set forth within the Immigration and Nationality Act. Therefore, the Service is not inclined to accept the conclusions of either Dr. Wolf or Ms. Trudeau relating to the issue of whether the offered position is a specialty occupation.

The record also contains letters signed by two of the beneficiary's former employers Ken Sato, Executive Director for the Japan Marine Recreation Association, and Yuko Sonobe, vice president of Artnics Corporation of Tokyo, Japan, respectively. However, the subject matter of both letters pertains exclusively to the beneficiary's previous work experience and qualifications, subjects not at issue in these current proceedings. For this reason, the employment letters of Mr. Sato and Ms. Sonobe cannot be considered to be of any probative value.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the descriptions of bookkeeping, accounting, and auditing clerk, rather than an accountant. According to the DOL, the usual requirement for a bookkeeping, accounting or auditing clerk is a high school diploma or its equivalent. A higher level of training is favored but not required, and such training is available in community colleges or schools of business. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.