

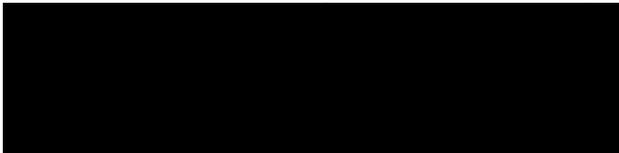
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: WAC-01-063-54354 OFFICE: CALIFORNIA SERVICE CENTER

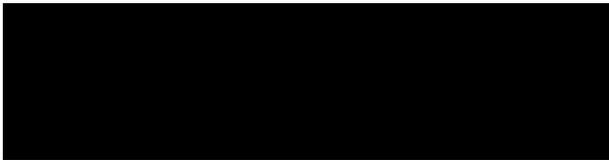
DATE: NOV 05 2003

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:



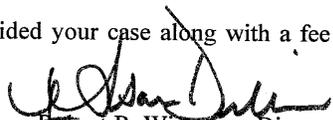
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an employment agency that employs three persons and has a gross annual income of \$300,000. It seeks to employ the beneficiary as an accountant. The director denied the petition because the position is not a specialty occupation.

On appeal, counsel submits a brief, as well as copies of Internet employment advertisements for accountant positions, which is new evidence. Counsel states, in part, that the position is a specialty occupation because: (1) a baccalaureate or higher degree or its equivalent is the normal requirement for entry into an accountant position according to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and the DOL's *Dictionary of Occupational Titles (DOT)*; (2) a degree requirement is common to the industry in parallel positions among similar organizations; and (3) the duties of an accountant position are complex.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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.

The petitioner asserts that the accountant position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title 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 CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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.¹ To interpret the

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might

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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In its initial petition, the petitioner described the job duties of the accountant position as follows:

Direct implementation of a general accounting system for keeping accounts and records of disbursements, expenses, assets and income collection into the general ledger. Design and maintain general accounting systems and procedures utilizing computer accounting software. Prepare monthly profit and loss accounting systems and procedures and balance sheets to reflect company assets, liabilities and capital. Maintain payroll records. Document business transactions and preparation [sic] of taxes to be filed with the state.

Additionally, in its supporting letter to its initial petition, the petitioner stated the job duties of the accountant position as follows:

We anticipate that [the beneficiary] will prepare the quarterly and yearly tax information, payroll statements and deductions[,] monthly profit and loss reports[,] and financial statements. She will the implementation [sic] of a general accounting system for keeping accounts and records of disbursements, expenses, tax preparation, tax payments and general ledgers. [The beneficiary] will prepare balance sheets reflecting company's assets, liabilities and capital. She will perform audits and prepare reports. She will inspect company accounting systems to determine their efficiency and protective value. She will also prepare reports of findings and recommendations for company management. She will also provide tax planning advice. This individual must be fully knowledgeable in the field of accounting and have practical experience. [The beneficiary] will set up a computerized accounting system that will retain all of the information

also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

necessary to prepare the quarterly and yearly tax information, payroll statements and deductions, monthly profit and loss reports and financial statements.

Subsequent to the filing of the petition, the director requested from the petitioner a certified labor condition application (LCA) and a detailed job description; the percentage of time to be spent on each duty; the beneficiary's level of responsibility and hours per week of work; the types of employees supervised; the minimum education, training, and experience necessary to do the job; and an explanation why the work requires an individual with a college degree or higher in the occupational field. The director also requested evidence to support the petitioner's contention that the position is a specialty occupation.

In response to this request, the petitioner's counsel provided a certified LCA and an additional description and breakdown of the position's duties and responsibilities as follows:

To clarify the job requirements outlined in [the] petitioner's letter submitted in support of the H1-B [sic] petition, the petitioner submits that the in-house accountant will prepare quarterly and yearly tax returns, payroll statements and deductions and monthly profit and loss reports and financial statements. The accountant will also direct the implementation of a general accounting system for keeping accounts and record of disbursements, expenses, tax payments, and general ledgers.

The accountant will prepare balance sheets reflecting the company's assets, liabilities and capital. The accountant will perform audits and prepare reports. She will be responsible for updating and maintaining the account receivables that are outstanding.

Record-keeping and analytical tasks will be completed on a daily basis. Quarterly and yearly reports are completed over a period of thirty days for quarterly reports, and sixty days for yearly reports. Record keeping of expenses, disbursements, tax payments and general ledgers are completed weekly and require four to eight hours of attention each week, depending on the volume of work during each week.

Account receivables are updated and reported one each month. Record keeping of account receivables require [sic] eight to ten hours each week. In total, the in-house accountant will be required to spend a

minimum of forty hours per week on the accounting duties which require attention in the company.

The director denied the petition because the description of the position was too vague and, thus, the petitioner failed to establish that the position was a specialty occupation.

On appeal, counsel submits copies of Internet employment advertisements for accountant positions. Counsel reiterates the job description she provided in response to the director's request for evidence and states, in part, that the position is a specialty occupation because: (1) a baccalaureate or higher degree or its equivalent is the normal requirement for entry into an accountant position according to the *Handbook* and *DOT*; (2) a degree requirement is common to the industry in parallel positions among similar organizations; and (3) the duties of an accountant position are complex. Additionally, counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the *DOT* (4th Ed., Rev. 1991). However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide 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 Department of Labor's *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

The petitioner is an employment agency. In its support letter attached to its initial petition filing, the petitioner stated that "[the beneficiary is] to be assigned to various clients within the Los Angeles areas who are in need of Accounting services [The beneficiary] will be on our company payroll and will be employed directly by [the petitioner]." The petitioner's business locates personnel to outsource to its clients and the record indicates that the beneficiary will be outsourced to one or more of the petitioner's clients. To date, there is insufficient evidence in the record from the petitioner's client or clients concerning the beneficiary's

proposed job duties. The record does not contain an agency service agreement between the petitioner and its client or clients, where the beneficiary will work, and the record does not contain a comprehensive description of the beneficiary's proposed duties from an authorized representative of the petitioner's client or clients. Without such evidence, the petitioner has not demonstrated that the work that the beneficiary will perform at its clients' worksites will qualify as a specialty occupation.

Even assuming, *arguendo*, that the petitioner provided ample evidence of the duties the beneficiary will perform, the proffered position does not meet the definition of a specialty occupation. The petitioner has not met any of the requirements to qualify the proffered position as a specialty occupation. The position will be analyzed as presented by the petitioner in its initial filing. The petitioner did not provide any additional details concerning the proffered position in response to the director's request for evidence. Only counsel provided additional details; however, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The proffered position is most analogous to an accounting, bookkeeping, and auditing clerk position. The petitioner asserts that the proffered position's duties include implementation of an accounting system, preparation of financial records, audits, and tax preparation. However, the AAO is not convinced that the position is an accountant position because of the nature of the petitioner's business operations. It is more likely that the position is clerical since the petitioner is an employment agency.

The *Handbook*, 2002-2003 edition, describes an accountant position, at page 21, as follows:

These services include public, management, and government accounting, as well as internal auditing. However, accountants and auditors are broadening the services they offer to include budget analysis, financial and investment planning, information technology consulting, and limited legal services. Beyond the fundamental tasks of the occupation—preparing, analyzing, and verifying financial documents in order to provide information to clients—many accountants now are required to possess a wide range of knowledge and skills.

The petitioner did not describe such expansive duties and responsibilities for the proffered position. Additionally, the

Handbook, at page 22, does not mention outsourcing as typical of the accounting profession. Instead, accountants are employed by accounting, auditing, or bookkeeping firms or are self-employed.

However, the *Handbook*, at page 390, describes the duties to be performed by an accounting, bookkeeping, and auditing clerk as follows:

Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those that 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. All of these clerks make numerous computations each day and increasingly must be comfortable using computers to calculate and record data.

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. 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 the payroll, make purchases, prepare invoices, and keep track of overdue accounts.

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Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents for correct entry, mathematical accuracy, and proper codes. They also correct or note errors for accountants or other workers to adjust.

The *Handbook* states that a growing number of accounting, bookkeeping, and auditing clerks may be found "in personnel supply firms, the result of an increase in outsourcing of this occupation." Thus, the outsourcing aspect of this occupation renders it more likely that the proffered position is an accounting, bookkeeping, and auditing clerk.

The *Handbook* refers to financial clerks for training requirements of accounting, bookkeeping, and auditing clerks. A review of the *Handbook*, at page 387, finds no requirement of a baccalaureate or

higher degree in a specific specialty for employment as an accounting, bookkeeping, or auditing clerk:

Most financial clerks are required to have at least a high school diploma. However, having some college is becoming increasingly important, particularly for those occupations requiring knowledge of accounting. For occupations such as bookkeepers, accounting clerks, and procurement 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.

The *Handbook* clearly shows that an accounting, bookkeeping, and audit clerk does not require a bachelor's degree in a specific field of study to enter into the position. Instead of specifying a specific field of study required to enter into the field, the *Handbook* delineates a multitude of educational backgrounds that could be preferred but not required by prospective employers. Additionally, high school graduates or individuals who completed a two-year post-secondary school degree may enter the occupation. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that accounting, bookkeeping, and audit clerks require a degree. The record does not contain any evidence concerning an industry professional association or expert affidavits.

On appeal, the petitioner presents five Internet advertisements as evidence that a degree requirement is common to the industry for accountant positions among employment agencies. The first

Internet advertisement is for an accountant position with a California university. A university is different than an employment agency. Additionally, while the advertisement indicates that the university requires a bachelor degree in science, it does not indicate that the university requires a bachelor degree in the specific specialty. Thus, the first Internet advertisement is not evidence that a degree requirement is common to the industry in parallel positions among similar organizations.

The second and third Internet advertisements are for accountant positions for anonymous employers, one in Indiana and one in Pleasanton, California. Thus, there is no information to determine whether the organizations in these Internet advertisements are similar to the petitioner's organization. Additionally, both Internet advertisements do not provide descriptions of the advertised positions to determine if they are similar to the petitioner's proffered position. Thus, the second and third Internet advertisements are not evidence that a degree requirement is common to the industry in parallel positions among similar organizations.

The fourth Internet advertisement is for an accountant position for a bank in Princeton, New Jersey. In addition to the organization being dissimilar to the petitioner's organization, the fourth Internet advertisement's job description is completely different than the petitioner's proffered position. The fifth Internet advertisement is for a senior accountant for a real estate developer in Newport Beach, California. In addition to the organization being dissimilar to the petitioner's organization, the fifth Internet advertisement's job description is completely different than the petitioner's proffered position. Thus, the fourth and fifth Internet advertisements are not evidence that a degree requirement is common to the industry in parallel positions among similar organizations.

To date, there is no evidence in the record to support that a degree requirement is common to the industry in parallel positions among similar organizations. Thus, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. The Form I-129 indicates that the petitioner's business was established in 1998. Presumably the petitioner employed other accountants prior to filing the instant petition. However, to date, there is no evidence in the record of proceeding concerning the petitioner's hiring practices. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support a finding 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. As noted above, the position is most likely an accounting, bookkeeping, and auditing clerk position and the *Handbook* indicates that a bachelor's degree is not required. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.