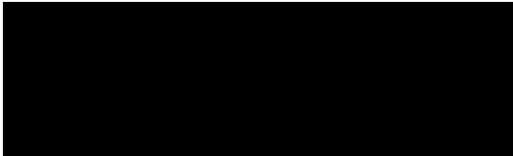


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U.S. Department of Homeland Security
Citizenship and Immigration Services

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



FILE: WAC-02-082-52514 OFFICE: CALIFORNIA SERVICE CENTER

DATE:

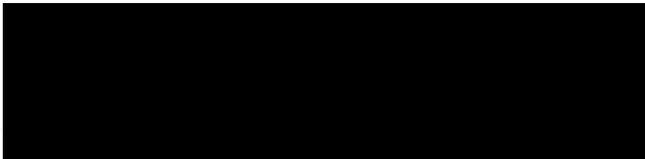
IN RE: Petitioner:
Beneficiary:



NOV 24 2003

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:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

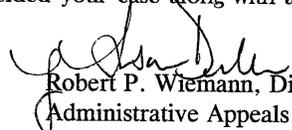
INSTRUCTIONS:

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 sustained. The petition will be approved.

The petitioner is an apparel manufacturer and distributor that employs eight persons and has a gross annual income of \$500,000. It seeks to employ the beneficiary as an accountant. The director denied the petition because he determined the position was not a specialty occupation.

On appeal, counsel submits a brief and new evidence. Counsel states, in part, the following: (1) the director mischaracterized the position as a bookkeeping position; (2) the position also encompasses aspects of a Cost Accountant; (3) the accountant position requires a baccalaureate or higher degree or its equivalent for entry into the position based on the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and *Occupational Outlook Handbook (Handbook)*; (4) the degree requirement is common in the industry among parallel positions in similar organizations because the term "similar," as defined in *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), does not require evidence that shows exact similarities; and (5) the nature of the position's duties are so specialized and complex that only an individual with a bachelor's degree could perform the duties of the position.

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

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.

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 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 explained that it was experiencing rapid growth after establishing itself in 1997 as a distributor of unique and original apparel styles through exclusive retail stores, department stores, chain and specialty stores. The petitioner set forth the following description of duties for the proposed accountant position in its initial filing: "Analyze[s] financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement." Additionally, the petitioner's support letter, submitted with the initial petition, detailed the job duties to be performed by the beneficiary as follows:

[The beneficiary] will be responsible for the overall accounting and financial duties. She will handle the preparation of our company's general ledger, monthly and yearly financial reports.

Furthermore, [the beneficiary] will monitor information systems regarding our company. She will compile and analyze financial information to prepare entries to our company's accounts. Moreover, she will detail our company assets, liabilities and capital.

Likewise, [the beneficiary] will advise and recommend to our management regarding tax strategies. She will further advise us on advantages and disadvantages of certain business decisions or transactions.

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 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.

In addition, [the beneficiary], [sic] will be responsible for the accounting and inventory of the company's supplies. She will devise a financial system that will help our company establish a more systematic and smooth inventory procedures.

Moreover, [the beneficiary] will prepare our firm's balance sheets, profit and loss statements, necessary checks, payroll, tax remittances and other reports to summarize our company's current and projected financial position. She will also meet with our management and discuss accounting matters concerning financial matters.

Likewise, [the beneficiary] will modify and coordinate implementation of our accounting and accounting control procedures. Her duties will also include monitoring our budgeting, performance evaluation, cost and assets management.

Lastly, [the beneficiary] will prepare our business letter correspondences with our existing and prospective clients regarding certain transactions, financing and billing statements.

The petitioner required a bachelor's degree in accounting and experience.

Subsequent to the filing of the petition, the director requested from the petitioner a certified labor condition application (LCA) and a detailed description of the specific duties of the proffered position, including the percentage of time to be spent on each duty, level of responsibility, types of employees supervised, and the minimum education, training, and experience necessary to perform the position's duties. Additionally the director requested an explanation why the position requires the services of a person who has a college degree or its equivalent in the occupational field and evidence the position meets one of the regulatory criteria for specialty occupations.

Counsel provided a response to this request. The petitioner did not provide a response. Counsel submitted a certified LCA and copies of Internet advertisements for accountant positions. Counsel reiterated the petitioner's description of duties for the proffered position and referenced the DOT for an accountant position and its standard vocational preparation rating. Counsel, but not the petitioner, broke down the amount of time the beneficiary would spend each week on each duty. Counsel also asserted the following:

The instant petition requires a college degree because an Accountant must have an in-depth knowledge of tax laws, math, spread sheets, ledgers, in addition to other skills that an individual normally acquires while obtaining a Bachelors [sic] degree in the field. The Accountant must know what expenses must be amortized, whether a business is better suited for the "cash method" vs. the "accrual method" of accounting, the tax implications of the Petitioner's transactions, and the depreciation in value of the Petitioner's inventory and assets, among other things

The director denied the petition because: (1) he determined the position to be a bookkeeping position, which does not require a baccalaureate or higher degree or its equivalent for entry into the position according to the *Handbook*; (2) the evidence submitted to prove that a bachelor degree is common to the industry in parallel positions among similar organizations was insufficient because the companies posting the job announcements were not in the same line of business as the petitioner nor similar in terms of size; and (3) the petitioner did not demonstrate that it needed an accountant.

On appeal, counsel submits copies of the petitioner's QRS Corporation's electronic data interchange system to track pricing of raw materials and finished goods; and copies of the petitioner's product line, sales by customer summary, and expenses by vendor summary, which are all new evidence. Counsel states the following in his brief: (1) the director mischaracterized the position as a bookkeeping position; (2) the accountant position requires a baccalaureate or higher degree or its equivalent for entry into the position based on the *DOT* and *Handbook*; (3) the degree requirement is common in the industry in similar and parallel positions because the term "similar," as defined in *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), does not require evidence that shows exact similarities; and (4) the nature of the position's duties are so specialized and complex that only an individual with a bachelor's degree could perform the duties of the position.

The petition's proffered duties will be examined as presented by the petitioner in its initial petition. Counsel's assertions concerning the petitioner's proposed position in response to the director's request for evidence and on appeal will be disregarded. 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). However, counsel's general description of the complexity of accountants' work, as well as legal discussion supporting the premise that the petitioner's position meets the regulatory

requirements for a specialty occupation, will be considered.

The position is an accountant position as described in the *Handbook*. The petitioner and counsel consistently used the same description of duties: compilation, analysis, and preparation of financial reports, ledger, balance sheets, profit and loss, and payroll; design and implementation of accounting procedures; advice and counsel for tax strategies including business transactions with tax consequences; cost/asset management; performance evaluation; and budget and information systems monitoring. Additionally, the nature of the petitioner's operations lends credibility to the premise that the position qualifies as a specialty occupation.

The petitioner's description of duties for the position reflect the duties described for accountants in the *Handbook*, 2002-2003 edition, at pages 21-22:

Accountants and auditors help to ensure that the Nation's firms are run more efficiently, its public records kept more accurately, and its taxes paid properly and on time. They perform these vital functions by offering an increasingly wide array of business and accounting services to their clients. 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.

Public accountants perform a broad range of *accounting, auditing, tax, and consulting* activities for their clients, who may be *corporations, governments, nonprofit organizations, or individuals*. . . .

Management accountants—also called industrial, corporate, or private accountants—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 non-management 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.

. . . .

Accountants also are increasingly assuming the role of a personal financial advisor. They not only provide clients with accounting and tax help, but also help them develop a personal budget, manage assets and investments, plan for retirement, and recognize and reduce exposure to risks.

Many of the emphasized terms from the previous *Handbook* quotation parallel the language used by the petitioner to describe the duties of the proffered position.

In its appeal, the petitioner presented a letter in which it stated the following:

[The petitioner], despite its lean manpower compliment of eight (8) full time employees[,] has generated substantial Sales of \$4.7 Million for the year 2000 and \$5.9 Million for the 2001 [sic]. Most of these sales were generated via "e-commerce" through the web-based facilities of QRS Corporation's electronic data interchange (EDI). 8,000 other vendors and merchandisers, including our competitors and buyers like Macy's, J.C. Penny, Sears Carson Pirie Scott and Nordstrom are subscribers to the service. This e-com site is where competition in the merchandise supply-chain occurs on "real-time" basis [sic]. And this is precisely the reason why we need an Accountant with a Degree and not high-school trained bookkeepers.

The petitioner business is a growing retail manufacturer and distributor. The *Handbook*, at page 22, states that accountants are found in private industry. It would be reasonable that a growing retail entity with annual earnings between \$4,000,000.00 and \$6,000,000.00 based on complex real-time Internet financial transactions from well-known national vendors, would desire to employ an internal accountant, to guide its business transactions, financial operations, inventory, and general accounting.

The position is not a financial record keeping or bookkeeping position. The *Handbook*, at page 390, describes these types of positions 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.

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.

Nothing in the descriptive terms of a financial record keeper or bookkeeper from the *Handbook* reflects the duties described by the petitioner for its proffered accountant position. Thus, the director erred in categorizing the position as a financial record keeper or bookkeeper.

At page 22, the *Handbook* sets forth training and educational requirements for the accountant position as follows: "Most accountant and internal auditor positions require at least a bachelor's degree in accounting or a related field." The *Handbook* illustrates that most accountant positions require a bachelor's degree in accounting or a related field. Thus, the petitioner has 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, and the petitioner's proffered position is a specialty occupation.

On appeal, counsel raises the issues of the petitioner's size and financial solvency in response to the director's statement that the petitioner failed to prove that it required an accountant for a firm of four employees. The petitioner's size and ability to pay a salary are irrelevant considerations in the context of determining whether or not a proffered position meets the definition of a specialty occupation and will not be discussed in this decision. See *Young China Daily v. Chappell*, 742 F.Supp. 552 (N.D. Calif. 1989).

Additionally, in his response to requested evidence by the director, counsel cited the *DOT* as evidence that the proffered position is a specialty occupation. 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 *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.

Additionally, counsel's assertion that the evidence provided by the petitioner was sufficient to establish that a degree requirement is common in the industry among parallel positions in similar organizations because the term "similar," as defined in *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), does not require evidence that shows exact similarities, is erroneous. *Matter of Caron* did not expound upon the meaning of "similar" as counsel suggests. The AAO affirms the part of the director's decision that the Internet advertisements submitted into evidence are insufficient. The advertisements were placed by employers such as employment staffing agencies, truck manufacturers, cosmetics retailers, restaurants, and cabinet manufacturers, none of which are similar to the petitioner's organization. No other information is provided concerning the employers such as their size or capitalization, so it is impossible to determine similarity to the petitioner in this aspect. Some of the advertisements do not specify a degree requirement. Many of the positions that do provide details concerning the duties are quite different from the petitioner's position. Thus, counsel and the petitioner did not establish the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a degree requirement is common in the industry among parallel positions in similar organizations.

The petitioner's proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A) as discussed above. 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 sustained that burden.

ORDER: The appeal is sustained. The director's decision will be withdrawn and the petition will be approved.