U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 04 061 51219 Office: CALIFORNIA SERVICE CENTER Date: DEC 0 9 2005

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a residential care facility that seeks to employ the beneficiary as an accountant. The petitioner, therefore, 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, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, both previous and newly retained counsels contend that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (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:

> [A]n 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; (5) the Form I-290B and supporting documentation; (6) previous counsel's supplemental brief, dated September 7, 2004; (7) newly-retained counsel's first supplemental brief, dated June 7, 2005; and (8) newly-retained counsel's second supplemental brief, dated September 1, 2005. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner, a residential care facility with two employees, was established in 1998 and has a gross annual income of $126,000. It proposes to hire the beneficiary as an accountant. In its December 26, 2003 letter of support, the petitioner stated that 25 percent of the beneficiary's duties would be comprised of the following cost management duties: preparing and maintaining cost records and reports for use in controlling expenditures, providing management with cost information required to review direct and indirect costs, gathering historical cost data on activities such as purchases, labor, equipment depreciation, repairs, operating expenses, etc., and ensuring that costs are allocated according to established procedures; 25 percent of the beneficiary's duties would consist of the following recording duties: preparing and managing the company's general ledger, accounts payable, accounts receivable, billing, payroll, and monthly and annual close of books for financial statements using the generally accepted accounting principles (GAAP); 30 percent of the beneficiary's duties would consist of the following financial analysis duties: preparing, coordinating, and consolidating financial statements, preparing monthly analysis and support for business operations, participating in the coordination, review, and analysis of the annual planning process, and utilizing financial and quantitative techniques and analyses to support management decision-making; 15 percent of the beneficiary's duties would consist of the following auditing duties: performing auditing tasks to ensure compliance with company policy and regulatory laws by assessing the effectiveness of controls, accuracy of financial records, and efficiency of operations as well as ensuring that internal controls are in place, conducting interviews with staff to ensure the recording of transactions and compliance with applicable laws and regulations, analyzing data obtained for evidence of deficiencies in controls, duplication of effort, extravagance, fraud, or lack of compliance with laws, government regulations, and management policies or procedures, and preparing acceptable working papers that record and summarize data on assigned auditing tasks; and five percent of the beneficiary's duties would consist of the following budgeting duties: preparing the annual budget including income statements, balance sheets, cash flow forecasts, and budgets, analyzing financial and statistical data for use in the development of all components of the annual budget and forecast, preparing, analyzing, and reporting on various issues and trends related to actual expenses as compared to the budget, and ad hoc budget reporting and modeling throughout the year as assigned or necessary.

The AAO agrees with counsel that, as a general matter, accountant positions normally qualify for classification as specialty occupations. However, the AAO disagrees with counsel's assertion that the position proposed here is that of an accountant.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence,

whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

According to the *Handbook* there are four major fields of accounting – public, management, government, and internal auditors – of which management accountant appears closest to the proposed position. The *Handbook* sets forth the following description of the duties of a management accountant:

> *Management accountants* – also called cost, managerial, 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 nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

The *Handbook* also states that, increasingly, accountants "not only provide clients with accounting and tax help, but also help them develop personal budgets, manage assets and investments, plan for retirement, and recognize and reduce exposure to risks."

By comparison, the *Handbook* describes the occupation of bookkeeping, accounting, and auditing clerks as follows:

> Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those which tabulate expenditures, receipts, accounts payable and receivable, and profit and loss. They have a wide range of skills and knowledge from full-charge bookkeepers who can maintain an entire company's books to accounting clerks who handle specific accounts. 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 payroll, make purchases, prepare invoices, and keep track of overdue accounts.
>
> In large offices and accounting departments, *accounting clerks* have more specialized tasks . . . such as accounts payable . . . or accounts receivable . . . Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts, to ensure that payments are up to date.

> 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. These workers post transactions in journals and on computer files and update the files when needed . . . .
>
> *Auditing clerks* verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are correct, mathematically accurate, and properly coded . . . .
>
> As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks are using specialized accounting software on personal computers. With manual posting to general ledgers becoming obsolete, these clerks increasingly are posting charges to accounts on computer spreadsheets and databases . . . . The widespread use of computers . . . has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing.

According to the *Handbook*, a two-year associate's degree in business or accounting is often required for bookkeeping and accounting clerk positions. A four-year bachelor's degree is not required for entry-level positions. The *Handbook* does indicate that many individuals with four-year degrees accept bookkeeping and accounting clerk positions in order to enter the field or a particular company with the goal of being promoted to professional or managerial positions. The *Handbook* also indicates that many graduates of junior colleges and business and correspondence schools can obtain junior accounting positions.

As discussed in the *Handbook*, bookkeeping, accounting, and auditing clerks produce financial statements and prepare reports and summaries for supervisors and managers, which would be used by them to make sound business decisions. Further, the *Handbook* reports that employers require most financial clerks to have at least a high school diploma, and for bookkeepers and accounting clerks, they often require an associate's degree in business or accounting.[1]

A 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.[2] To interpret the

---

[1] According to the website of Skyline College (http://www.skylinecollege.net), a community college located in San Mateo, California, an associate's degree in business or accounting would involve learning the fundamentals of financial accounting principles and concepts, balance sheets, income statements, cash flow statements, the generally accepted accounting procedures (GAAP), forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system using tools such as QuickBooks, QuickBooks Pro, or Peachtree, an integrated commercial accounting software package that is used to review, differentiate, and interpret accounting concepts and data in a multitude of business situations. Thus, an associate's degree would provide knowledge about accounting techniques that would serve the needs of management and facilitate decision-making.

[2] 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.

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.

The record in this case does not support the assertion that the duties of the proposed position require a bachelor's degree in accounting or a related specialty. While this position may include some duties that involve accounting functions, the AAO is not persuaded that they are at a level of specialization or complexity that they require the theoretical and practical application of a body of highly specialized knowledge and a baccalaureate degree or its equivalent. The scope of the proposed position lacks both the breadth and the depth of an accounting position.

As noted previously, the petitioner is a residential care facility with two employees and a gross annual income of approximately $126,000. Though the size of the company does not, in and of itself, determine a company's need for an accountant, its income level and scale of operations have a direct and substantial bearing on the scope of the duties the beneficiary would perform as an accountant. The responsibilities associated with an annual income of $126,000 differ considerably from the responsibilities associated with an annual income in the millions, or tens of millions, as well as from the responsibilities of performing accounting work for multiple clients. With a second supplemental brief, counsel submits photographs of a second facility operated by the petitioner in Poway, California. The California license issued to the facility indicates an effective date of October 18, 2004, almost ten months after the filing date of the petition. However, CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The record does not support a finding that the petitioner will employ the beneficiary in an accounting position.

Rather, the AAO concludes that the proposed position describes the duties of an experienced bookkeeping, accounting, or auditing clerk. Many of the duties of the position – such as maintaining the company's general ledger, accounts payable, accounts receivable, billing, payroll and benefits, monthly and annual close of books, gathering data regarding costs of items, preparing financial statements, income statements, balance sheets, and cash flow forecasts – accord with the *Handbook's* description of bookkeeping, accounting, and auditing clerks. As discussed in the *Handbook*, a baccalaureate or higher degree is not the normal minimum requirement for entry into bookkeeping, accounting, or auditing clerk positions, though employers often require a two-year associate's degree in business or accounting. Considering the nature of the petitioner's business, the scale of its operations, and the duties of the proposed position, the AAO concludes that the position actually combines the duties of bookkeeping, accounting, and auditing clerks. Since these positions do not require a baccalaureate degree in accounting or a related specialty, the proposed position does not meet the first criterion required for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The AAO will accord no weight to the information counsel submits from the *Dictionary of Occupational Titles (DOT)*, as 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. It provides an assessment (the S.V.P. rating) that is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it

does not specify the particular type of degree, if any, that a position would require. For the same reason, the information counsel submits from *O*Net* will be accorded no weight.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. No evidence has been presented to support the contention that the proposed position qualifies for classification as a specialty occupation under this prong.

The AAO has reviewed the job postings submitted by counsel in response to the director's request for evidence. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*) for establishing a baccalaureate degree or higher as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

No evidence has been submitted to establish that any of these postings are from organizations similar in size or scope of operations to the petitioner, a residential care facility with two employees. Simply 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)).

For example, no information was submitted regarding Childhood Development Associates, Inc., Patient First, or the Center for Performance Assessment, Accountants, Inc. Westwood One is a broadcasting company, Sun Design Remodeling Specialists, Inc. is a remodeling company, and Cal-Am Properties is a property management company. Of the unnamed companies, one is a manufacturing company and one is a law firm. One of the postings provides neither the name of the company nor the type of business in which it engages.

Thus, the AAO is presented with no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner.

Moreover, these postings do not support counsel's contention that there is an industry-wide requirement for a degree. The law firm advertising its vacancy through RemX Financial Staffing states that a bachelor's degree is "preferred." An employer preference for a bachelor's degree is not synonymous with an employer requirement, and does not rise to the "normally required" criterion imposed by the regulation. The Center for Performance Assessment also states that a college degree is "preferred." In one portion of its posting, Westwood One states that a bachelor's degree is required, but in another portion states that the requisite education level is "some college coursework completed." Sun Design Remodeling Specialists, Inc. will accept three to five years of work experience in lieu of a bachelor's degree.

Further, and as noted previously, the AAO does not accept counsel's contention that the proposed position is that of an accountant. The AAO's conclusion that this is not actually an accounting position is bolstered by the fact that counsel has submitted postings for accounting clerks and accounting assistants and labeled them as "parallel positions."

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as the duties of the proposed position are similar to those of bookkeepers, auditing clerks, and accounting clerks, which do not require a four-year degree.

Therefore, counsel has not established that its proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally 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. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion.

In order to establish eligibility under this criterion, a petitioner must demonstrate that it normally hires individuals with a bachelor's degree or its equivalent for the position. The petitioner has never before filled this position, which precludes approval under this criterion.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. As previously discussed, the AAO is not persuaded by the evidence of record, including the nature and scale of the petitioner's business operations, that the duties of the position exceed the occupational scope of an experienced bookkeeper, auditing clerk, or accounting clerk, positions which do not require specialized knowledge at a baccalaureate level. Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*), (*2*), (*3*), and (*4*), and the petition was properly denied.

Counsel's assertion that CIS lacks the expertise to assess the business needs of a petitioner is not persuasive. The AAO must analyze the duties of a proposed position in the context of a petitioner's business to determine whether the position is a specialty occupation within the meaning of the regulations. If the AAO were to take counsel's assertions in this portion of the appellate brief to their logical conclusions, CIS would be required to approve every visa petition filed by any United States employer, based simply upon assertions made in the petition.

The petitioner has not established that the proposed position qualifies for classification as a specialty occupation. Accordingly, the AAO will 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.