

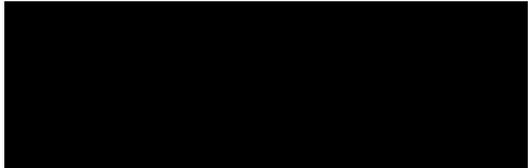


U.S. Citizenship
and Immigration
Services

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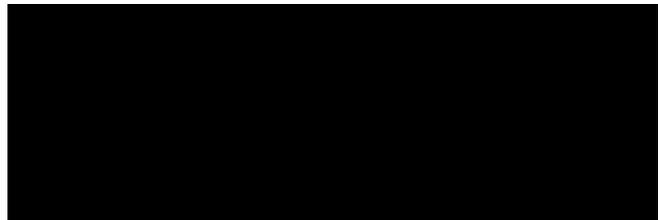
FILE: WAC 02 065 54416 Office: CALIFORNIA SERVICE CENTER Date: **JUL 21 2005**

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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition, and rejected a subsequent appeal on the ground that it was improperly filed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner imports, wholesales, and retails women's clothing. It seeks to employ the beneficiary as a part-time 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 on the ground that the proffered position is not a specialty occupation. On appeal, counsel submits a brief. The AAO observes that the appeal has been properly filed: the representative who signed the Form I-290B is eligible to file the appeal in that the person represents the law firm that submitted the original Form G-28.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a part-time accountant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail preparing yearly and quarterly tax returns, payroll statements and deductions, monthly profit and loss reports, and financial statements; directing implementation of a general accounting system; preparing balance sheets reflecting assets, liabilities, and capital; performing audits and preparing reports; updating and maintaining accounts receivables; and advising about tax planning. The petitioner stated that it requires a bachelor's degree in accounting or a related field.

The director found the submitted job announcements did not persuasively establish that the proposed position qualifies as a specialty occupation. According to the director, because no evidence showed that the petitioner has unique and specific needs for the services of an accountant, there is no *bona fide* position that qualifies as a specialty occupation.

On appeal, counsel states that the proposed position is similar to an accountant as that occupation is described in the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and the *Occupational Outlook Handbook (the Handbook)*, and that these publications reveal that an accountant is a specialty occupation. Counsel asserts that the petitioner creates, manufactures, and distributes clothing at retail outlets, and that this involves thousands of transactions resulting in millions of dollars of sales and expenses each year. Counsel states that the petitioner, therefore, requires the services of an accountant. Counsel points to and asserts that the submitted job announcements reveal that the requirement of a bachelor's degree in accounting is common throughout every industry, and that *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988) indicates that the term "similar" implies that a comparable company can have like qualities, but it need not match every aspect of a petitioner. The beneficiary's duties, counsel states, are so specialized and complex that they require a bachelor's degree in accounting. According to counsel, the director erroneously concluded that the petitioner does not have a *bona fide* position or need the services of a part-time accountant, and counsel cites to prior AAO decisions to illustrate that the Act and regulation do not support the concept of speculative employment.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a 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.

Counsel asserts that the proffered position is a specialty occupation based on the description of an accountant in the *DOT*. 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 DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and the *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 and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of an SVP rating in the *DOT*.

A review of the *Handbook* discloses that the beneficiary's duties do not rise to the level of those of an accountant. The *Handbook* shows that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. Of these, the closest category to the proposed position is the management accountant. The *Handbook* indicates:

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.

Many of the duties described in the *Handbook* do not apply to the proposed position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not prepare financial reports for nonmanagement groups such as stockholders, creditors, and tax authorities or provide budgeting, performance evaluation, and cost and asset management. The beneficiary

will not be part of an executive team. In light of this significant dissimilarity between the proposed position and the *Handbook's* description of a management accountant, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of a position requiring baccalaureate-level education. The *Handbook* also reveals, the AAO observes, that a tax preparer that is responsible for preparing the tax returns for small businesses, but does not have the background or responsibilities of an accredited or certified public accountant, does not require baccalaureate-level training. For these reasons, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proposed position.

On appeal, counsel states that the petitioner creates, manufactures, and distributes clothing at retail outlets; that this involves thousands of transactions resulting in millions of dollars of sales and expenses each year; and that the petitioner has two employees and generates \$895,000 annually. But the evidence in the record contradicts these assertions.¹ The H-1B petition and the petitioner's November 19, 2001 letter indicate that the petitioner imports, exports, and wholesales clothing, and had generated a gross annual income of \$189,459. The level of income generated by a petitioner has a direct and substantial bearing on the scope, complexity, and depth of the beneficiary's proposed duties. Responsibility for income of \$189,459 differs vastly from responsibility associated with a far larger income or for a firm that is responsible for the accounting work of many clients. Thus, the evidence in the record is insufficient to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

No evidence satisfies the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) which requires that the petitioner establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The employers in the job announcements either differ in nature from the petitioner or they are not described. Accounting Principals represents a health care company; Westaff, Inc. is in the weight loss and nutrition industry; and Manpower Professional and AOC Staffing do not identify the employers they represent. Thus, the job announcements fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence shows that the particular position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). As discussed earlier in this decision, the beneficiary's duties do not rise to the level of those of an accountant as that occupation is portrayed in the *Handbook*.

No evidence demonstrates that the petitioner normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

¹ The AAO points out that the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. Earlier in this decision we have shown why the submitted evidence fails to establish that the proposed position rises to the level of an accountant as that occupation is described in the *Handbook*. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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