U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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APR 25 2005

FILE: WAC 02 276 50510 Office: CALIFORNIA SERVICE CENTER Date:

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 of the service center 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 an adult residential board and 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company 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 applying accounting principles to analyze financial information and prepare financial reports; compiling and analyzing financial information in order to prepare entries to accounts such as general ledger accounts; documenting business transactions gathered from the two board and care facilities; analyzing financial information detailing assets, liabilities, and capital; preparing the balance sheet, profits and loss statement, and other reports to summarize the current and projected company financial position; auditing orders and vouchers and preparing reports to substantiate individual transactions prior to settlement of various accounts of the facilities; establishing, modifying, documenting, and coordinating implementation of accounting and accounting control procedures; analyzing and preparing the budget and comparing it to actual expenses and recommending the course of action regarding deviations; and directing and coordinating the activities of the other accountants and clerical workers. The petitioner stated that the proposed position requires a bachelor's degree in accounting, business administration, or a related field and two years of experience.

The director narrated the Department of Labor's (DOL) *Occupational Outlook Handbook's* (the *Handbook*) description and educational requirements of bookkeeping, accounting, and auditing clerks, occupations that do not require a baccalaureate degree. The director stated that most of the beneficiary's time will be spent performing bookkeeping/accounting clerk duties. The director found it unusual for the petitioning entity to require the full-time services of an accountant, given that the petitioner has four employees and an annual income of $61,410 (for the year 2000) and $57,947 (for the year 2001). The director stated that the evidence indicates that the proposed position's duties and responsibilities do not have the complexity or scope of responsibility that is normally required of an accountant, and that in examining whether a titled position is a specialty occupation the actual duties to be performed are determinative and not the job title. The director found the evidence did not persuasively show that the job offered could not be performed by a person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that the proposed position differs from bookkeeping, accounting, and auditing clerk positions because at least 70 percent of the beneficiary's time will be devoted to analysis rather than simply providing data. Counsel states that the proposed position is analogous to an accountant as that occupation is described in the *Dictionary of Occupational Titles (DOT)*. Counsel states that budget preparation and management are specialized and complex duties. Referring to an H-1B approval notice, counsel states that the petitioner has in the past required the services of a degreed accountant and that the petitioner's need for an accountant is reasonable. Counsel cites to the court's decision in *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) to state that an employer's size bears no rational relationship to the need for a professional. According to counsel, the petitioner's income for its two facilities is $162,739. Counsel emphasizes that the beneficiary is qualified for the proposed position.

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 notes that the record contains an approval notice for another H-1B petition. This does not indicate that the proffered position is a specialty occupation simply because CIS has approved another, similar petition in the past. This record of proceeding does not contain all of the supporting evidence submitted to the California Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the document submitted by counsel is not sufficient to enable the AAO to determine whether the other H-1B petition was approved in error.

Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied,* 485 U.S. 1008 (1988).

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)).

The petitioner's September 29, 2003 letter stated that the proposed position qualifies as a specialty occupation based on the *DOT's* information. 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 information in the *DOT*.

Furthermore, the AAO notes that an SVP rating in the *DOT* 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.

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.

The *Handbook* explains that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook,* 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, and cost 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 be part of an executive team. Nor will the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities or provide performance evaluation and cost and asset management. In light of this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of a position requiring baccalaureate-level education. Consequently, 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.

In addition, the record reflects that the petitioner employs four persons and its federal income tax returns for the year 2002 indicate gross receipts or sales of $68,880 and $93,859. Although counsel relies on a case to state that the size of the petitioning entity is not relevant in determining whether a position qualifies as a specialty occupation, the level of income generated by the petitioner has a direct and substantial bearing on the scope and depth of the beneficiary's proposed duties. Responsibility for income of only $160,000 differs vastly from responsibility associated with a far larger income or for a firm that is responsible for the accounting work of many clients. Consequently, it is very unlikely that the petitioner would require the services of a full-time accountant.

The proposed position's duties are encompassed within the description of the duties performed by bookkeeping, accounting, financial, and auditing clerks. The *Handbook* indicates:

> 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. . . . post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers. . . . handle the payroll, make purchases, prepare invoices, and keep track of overdue accounts.
>
> More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure completeness and accuracy of data on account. . . . They may also review invoices and statements to ensure that all information is accurate and complete. . . . Auditing clerks verify records of transactions posted by other workers.
>
> Financial clerks . . . record all amounts coming into or leaving an organization . . . keep track of a store's inventory. . . .
>
> 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.

The beneficiary will compile information to prepare entries to accounts; detail assets, liabilities, and capital; prepare the balance sheet, profit and loss statement, and other financial reports; and audit orders and vouchers and prepare reports to substantiate individual transactions. Similarly, bookkeeping, accounting, financial and auditing clerks total, balance, and reconcile billing vouchers; produce financial statements and prepare reports and summaries for supervisors and managers; maintain accounting records for the profit and loss statement; and handle accounts payable and accounts receivable; review invoices and statements to ensure that all information is accurate and complete; post debits and credits; and verify records of transactions posted by other workers.

The *Handbook* also states 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]

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1 The website from Skyline College, a community college located in San Mateo, California, (www.skylinecollege.net) reflects that an associate's degree in business or accounting would involve learning the fundamentals about financial accounting principles and concepts, balance sheets, income statements, cash flow statements, the GAAP, forecasting, budgeting, cost accounting, break even analysis, developing and operating a computerized accounting system using tools such as QuickBooks, QuickBooks Pro, or Peachtree, which is an integrated commercial accounting software package that is used to review, differentiate, and interpret accounting concepts and data in a multitude of business situations.

For the reasons discussed above, the evidence in the record is insufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

The petitioner cannot satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which requires that the petitioner establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The furnished job postings are deficient for a number of reasons. The employer in the job order [redacted] a media company; it therefore differs from the petitioner, an adult residential board and care facility. The duties in the postings for Fountain View, Inc, dba Carehouse Convalescent, and job orders [redacted] are similar to the proposed position, but they have no information about the employers. Consequently, the AAO cannot determine whether the employers in the postings are similar in nature, size, and scope to the petitioner. Job order [redacted] has duties that differ from the proposed position: the beneficiary will not be responsible for research grants and contracts, and endowments. Thus, the postings fail to show that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner also fails to show 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 already discussed in this decision, the *Handbook* reveals that bookkeeping, accounting, financial, and auditing clerks perform the proposed position's duties, which are occupations that do not require baccalaureate-level education in accounting.

Counsel submits an H-1B petition approval notice to show that the petitioner normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). This evidence is not convincing. 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.[2] To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed 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. Furthermore, as already discussed in this decision, the *Handbook* reveals that bookkeeping, accounting, financial, and auditing clerks perform the proposed position's duties, which are occupations that do not require baccalaureate-level education in accounting.

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[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.

The petitioner fails to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*): that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As discussed in this decision, the *Handbook* reveals that bookkeeping, accounting, financial, and auditing clerks perform the proposed position's duties, which are occupations that do not require baccalaureate-level education in accounting.

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.