

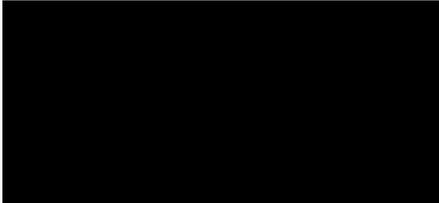
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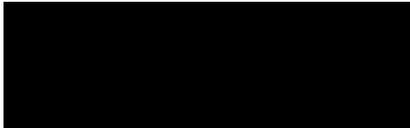
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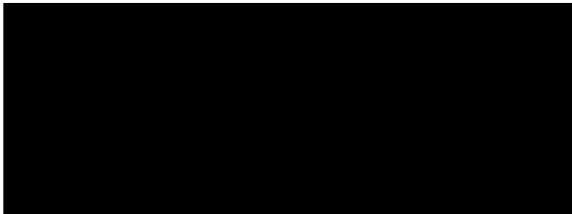
FILE: WAC 03 227 50394 Office: CALIFORNIA SERVICE CENTER Date: NOV 02 2005

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, 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 a real estate mortgage/financing company 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 on the ground that the proffered position is not a specialty occupation. On appeal, counsel states that the proposed position 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.

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 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 the general ledger and monthly and yearly financial reports; compiling and analyzing financial information, detailing assets, liabilities, and capital; advising and recommending to management tax strategies; advising on the advantages and disadvantages of business decisions or transactions; accounting and inventorying of supplies; devising a financial system that will establish inventory procedures; auditing contracts, orders, and vouchers and preparing reports to substantiate individual transactions prior to settlement; and establishing, modifying, documenting, and coordinating accounting and accounting control procedures. The petitioner requires a bachelor's degree in accounting for the proposed position.

The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reports that an accountant is usually not hired in-house. The director stated that the petitioner must demonstrate a credible need for the services of an accountant. According to the director, the petitioner failed to show that the proposed duties are normal and customary in similar organizations in the industry, which would have established a reasonable and credible offer of employment; or submit specific, credible evidence showing that it had a unique and specific need for the beneficiary's services for the period of time indicated on the H-1B petition.

On appeal, counsel states that the director failed to consider the submitted job postings from similar organizations, and misinterpreted the *Handbook's* information about accountants as the director erroneously concluded that the *Handbook* reports that companies normally outsource an accountant's services. Counsel states that the director is not in a position to determine the petitioner's employment needs, and that the concept of "speculative employment" is not appropriate here.

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 proposed 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.

In response to the request for evidence, the petitioner's January 5, 2004 letter expanded on the job duties described in the July 17, 2003 letter by stating that the beneficiary will "[c]oordinate special projects with developers from the Philippines as the availability of their inventories, recommend financing information and payment scheme." The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed qualifies as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. This job duty which was provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of proposed duties will not include this additional duty.

The AAO often turns to the *Handbook* for information about the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation.

The *Handbook* reveals that the proposed position differs from that of an accountant. The *Handbook* reports that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. Of these fields, the AAO finds that the closest category to the proposed position is the management accountant. The *Handbook* relays:

*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 is not part of a management team and will not prepare financial reports for the described nonmanagement groups; nor will the beneficiary provide budgeting and performance evaluation. In light of the disparity between the proposed position and the *Handbook's* description of a management accountant, the scope and complexity of the beneficiary's duties and responsibilities are not those of an accountant. 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.

The petitioner is a real estate mortgage financing firm with six employees. The petitioner has not submitted evidence establishing the complexity of its financial transactions. Furthermore, 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 \$781,264, which the petitioner generated in 2002, differs vastly from responsibility associated with a far larger income.

The AAO finds that the proposed position is more akin to a junior accounting position, which the *Handbook* reports is an occupation that does not require a bachelor's degree in accounting; the *Handbook* conveys:

Many graduates of junior colleges and business and correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.

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

The petitioner submits job postings to establish the first alternative prong 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 job postings and advertisements are not persuasive, however. None of the employers in the postings are similar in nature to the petitioner, a small real estate mortgage/financing company with six employees; either the job posting reflects that the employer differs in size or scope from the petitioner; or the posting is silent as to the employer's nature. BayRock Mortgage Corporation is a large, multi-state lender, whereas the petitioner is small and does not appear to be a multi-state lender; and the email address at [jobs@hopkinsgroup.com](mailto:jobs@hopkinsgroup.com) seeks an accountant for a real estate developer. The job postings do not describe the nature of EquiFirst or Loanbus. The newspaper advertisement for an accountant does not state that the employer requires a bachelor's degree in accounting; the advertisement seeking a loan officer is for a position that is unrelated to an accountant. The submitted job postings and advertisements, therefore, fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner show that its particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As discussed earlier, the AAO finds that beneficiary's duties differ from those of an

accountant as that occupation is portrayed in the *Handbook*; but are akin to the duties of a junior accountant. While the evidence of record indicates that the proposed duties require some knowledge and application of accounting principles, in the context of the income generated by the petitioner (\$781,264), the number of employees, and the dearth of evidence about the complexity of the financial transactions, the evidence does not establish the proposed duties as so complex or unique as to require a baccalaureate degree in accounting or a related field.

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner must show that it normally requires a degree or its equivalent for the position. The petitioner's January 5, 2004 letter states that it has not in the past employed an in-house accountant; but that the petitioner is part of the Barlin Group of Companies, and that all of the companies under the Barlin Group of Companies require their accountants to have a bachelor's degree in accounting.

This is not persuasive in establishing this criterion. 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 (5<sup>th</sup> 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.<sup>1</sup> 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. As discussed in this decision, the proposed position differs from an accountant and is more akin to a junior accountant, which the *Handbook* reveals is an occupation that does not require a bachelor's degree in a specific specialty.

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. The AAO has already conveyed that the proposed duties correspond to those of a junior accountant, which is an occupation that does not require a bachelor's degree in accounting. Even though the evidence of record indicates that the proposed position requires some knowledge and application of accounting principles, the evidence does not establish duties that are so specialized and complex as to be usually associated with a baccalaureate degree in accounting or a related field. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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<sup>1</sup> 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.

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.