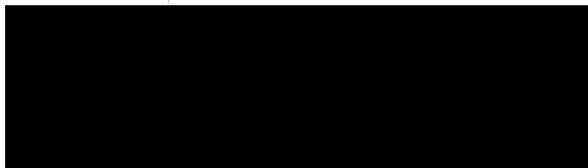


Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



Dz

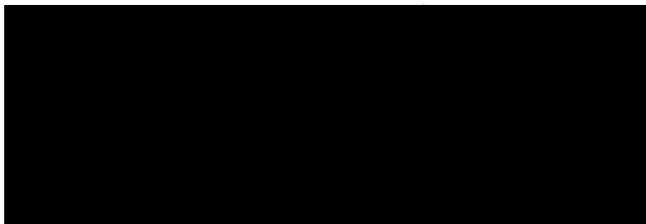
FILE: WAC 04 038 51287 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 2005**

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 the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides residential care for the elderly. It 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 submits a brief.

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's duties are as follows: analyzes operations, trends, costs, revenues, and financial commitments and obligations incurred to project future revenues and expenses; develops, maintains, and analyzes budgets, and prepares periodic reports comparing budgeted costs to actual costs; analyzes records of financial transactions to determine accuracy and completeness of entries; prepares the balance sheet, profit and loss statement, amortization and depreciation schedules, and other financial reports; reports finances to management and advises management about resource utilization, tax strategies, and assumptions underlying budget forecasts; develops, implements, modifies, and documents budgeting, cost, general property, and tax accounting systems; predicts revenues and expenditures and submits reports to management; computes taxes owed, ensures compliance with tax payments, reporting, and other tax requirements, and represents the petitioner before the taxing authority; surveys operations to ascertain accounting needs; and establishes a table of accounts and assigns entries to proper accounts. For the proposed position the petitioner requires experience and at least a bachelor's degree in accounting.

The director stated that many of the proposed duties reflect those of an accountant as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*); but that sole reliance on duties resembling those of an accountant as that occupation is described in the *Handbook* and the *Dictionary of Occupational Titles* (DOT) is misplaced. When determining whether a position qualifies as a specialty occupation, the director stated that the specific duties combined with the nature of the petitioning entity are factors that CIS considers, and that each position must be evaluated based on the nature and complexity of the actual job duties. The director stated that the beneficiary's obtaining a degree in a related area does not guarantee the position is a specialty occupation. The director discussed the *Handbook's* description of a management accountant, and stated that the petitioner does not have the organizational complexity, nor engages in the type of business operation, to require the services of a part or full-time accountant. The director states that although the title of the proposed position is accountant, the proposed duties include "quality control to ensure conformity with professional standards." If the beneficiary performs some accounting duties, but is also performing basic bookkeeping and accounting clerical duties, the director stated that the proposed position is not that of an auditor or accountant. The director discussed *Matter or Ho*, 19 I&N Dec. 582 (BIA 1988), a case concerning evidentiary matters. The director found that the beneficiary would not be used exclusively to review, analyze, and report on accounting records, and that the proposed duties more closely resembled those of bookkeeping, accounting, or auditing clerks. The director further concluded that the evidence was insufficient to show that the proposed duties could not be performed by an experienced person whose educational training fell short of a baccalaureate degree.

On appeal, counsel asserts that the proposed position is similar to the *Handbook's* description of a management accountant, and that the proposed duties have the complexity or scope normally required of an accountant. Counsel asserts that the director erred by stating that the proposed job description includes the

duty of “quality control to ensure conformity with professional standards.” According to counsel, this error suggests that the director did not carefully consider the facts of the case. Counsel states that accountants perform minimal bookkeeping duties, but that this does not transform the position of an accountant into that of a bookkeeper. Counsel asserts that the *Handbook* and the *DOT* show that an accountant is a specialty occupation. Counsel cites *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal., 1989), and states that the court’s decision indicates that a petitioner’s size and industry have no rational relationship to the need for a professional. Counsel states that the proposed position requires theoretical and practical application of accounting principles, tax law, and finance and that a bookkeeper does not have this knowledge. According to counsel, the petitioner demonstrated that it normally requires a baccalaureate degree in accounting for the proposed position as the petitioner is seeking to continue its employment relationship with the beneficiary.

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 record reflects that in a July 5, 2004 letter counsel refers to an April 23, 2004 memorandum, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, issued by Mr. William R. Yates, Associate Director for Operations, to show that CIS should approve the instant petition because CIS approved another petition that had been previously filed by the petitioner on behalf of the beneficiary.

The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). If the previous nonimmigrant petition were approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO next turns to 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. The AAO often turns to the *Handbook* for information about the nature and educational requirements of occupations.

Counsel asserts that the proposed position resembles a management accountant and that the proposed job description does not include the duty of "quality control to ensure conformity with professional standards." The AAO concurs with counsel in that the proposed job description does not include the duty of "quality control to ensure conformity with professional standards." However, the submitted evidence and the *Handbook's* information do not reflect that the proposed position is similar to an accountant. The *Handbook* describes a management accountant as follows:

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 proposed duties differ from those described in the above passage. According to the *Handbook*, accountants usually are part of executive teams. The Form I-129 reflects that the petitioner has two employees and the organizational chart shows the petitioner as having four employees: a chief executive officer (CEO), a bookkeeper, a cook, and an accountant (the beneficiary). For the quarters ending December 31, 2003 and September 30, 2003 the DE-6 Forms show only two employees: the CEO and the beneficiary; and for the quarter ending March 31, 2004 three employees are shown: the beneficiary, the CEO, and the cook. Based on this evidence, the beneficiary is not part of a management team as the petitioner has only two employees besides the beneficiary. The *Handbook* states that accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Other than representing the petitioner before the "taxing authority," the beneficiary will not prepare financial reports for

the other described nonmanagement groups. The petitioner indicates that the beneficiary will analyze and interpret financial information. 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.¹ Responsibility for income of \$268,085, which the petitioner generated in 2003, differs vastly from responsibility associated with a far larger income or for the responsibility associated with handling many accounts or employees. The evidence in the record, two licenses to operate a residential-elderly facility, suggests that the beneficiary will not handle many accounts. Considered together, the licenses for a Sherman Oaks Paradise facility and for a Sherman Oaks Paradise II facility, authorize the operation of residential-elderly facilities with a total capacity of 12 non-ambulatory household members; thus, the petitioner has, at most, a total of 12 clients. Given the context presented by the evidence, which suggests that the proposed position does not involve responsibility for a large revenue stream or many accounts, the AAO finds that the proposed duties do not have the scope, complexity, or depth of those of an accountant, which is an occupation requiring a baccalaureate degree in accounting or a related field. The *Handbook* indicates that education requirements for tax preparers is moderate term on-the-job training. The petitioner, therefore, fails 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.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that a specific degree requirement is common to the industry in parallel positions among similar organizations, the petitioner submits three job postings. This evidence is not persuasive. Two of the job postings, Maryvale Hospital Medical Center and Boston Medical Center, represent employers that differ in nature from the petitioner, a small residential-elderly care facility. Because the job posting from Emeritus Assisted Living does not describe the size and scope of this employer, the AAO cannot determine whether this employer is similar to the petitioner. As such, the job postings 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. In the context of the evidence in the record and the income generated by the petitioner (\$268,085 in 2003), the petitioner fails to depict the proposed duties as so complex or unique as to require a baccalaureate degree in accounting or a related field. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 record of proceeding reflects that the petitioner previously employed the beneficiary in the H-1B classification. However, CIS must examine the ultimate

¹ On appeal, counsel refers to *Young China Daily* to show that a petitioner's size and industry have no rational relationship to the need for a professional. The AAO finds that for an accounting position the income generated by a petitioner has a direct bearing on proposed duties, and that it is proper in light of *Young China Daily* to consider a petitioner's income when determining whether a position resembles that of an accountant.

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. As conveyed in this decision, the evidence of record fails to portray the proposed duties as requiring a baccalaureate degree in accounting or a related field.

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. In light of the submitted evidence, which the AAO has already addressed, the proposed duties do not have the specialization and complexity that would require a baccalaureate degree in accounting or a related field. Consequently, the petitioner fails to establish the last 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.

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.