

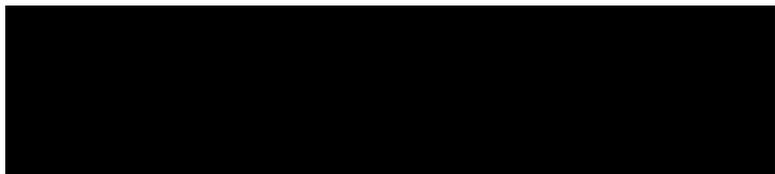
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U.S. Citizenship
and Immigration
Services



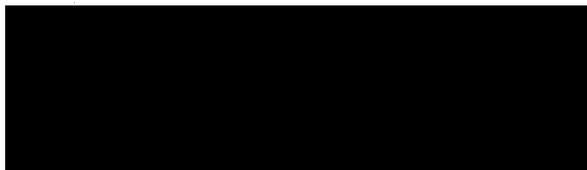
D2

FILE: WAC 03 269 50507 Office: CALIFORNIA SERVICE CENTER Date: JUN 03 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 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 restaurant 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 basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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; and (5) the Form I-290B and appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is a restaurant, established in 2002, with 12 employees and gross annual income of \$400,000.¹ It proposes to hire the beneficiary as an accountant. In counsel's submission letter, the duties of the position were set forth as follows:

- Analyze financial information of the company and work with the chief financial officer in preparing budgets, cost and asset management [sic]. Analyze company information detailing assets, liabilities, and capital and prepare balance sheet, [and] profit and loss statement. Prepare on a monthly basis income statement, balance sheet[,] and other reports to summarize current and projected company financial position. Prepare on a semi-annual basis and owner's equity statement [sic].
- Analyze operation trends, costs, revenues, financial commitments[,] and obligations incurred to project future revenues and expenses. Create subsidiary ledger for individual accounts and monitor them. Apply horizontal analysis, trend analysis, and vertical analysis to financial statements. Apply ratio analysis to financial statements in the study of the company's liquidity, profitability, and long-term solvency.
- Appraise, evaluate[,] and conduct inventory of property and equipment, record its value[,] and prepare report to management. Calculate the pricing of inventory. Apply accounting principles to inventory valuation. Compute periodic depreciation. Record property and equipment transactions.
- Develop, maintain, and analyze budgets and prepare periodic reports comparing budget costs to actual costs. Prepare periodic and cash budgets. Compute break-even points. Account for cash and short-term investments.
- Analyze the forms, records, procedures, processing methods, and reports used by the business. Develop, implement, modify[,] and coordinate implementation of sound accounting control procedures and adapt accounting and record keeping functions to current technology. Make minor or major revisions where appropriate. Integrate control measures throughout the accounting system.

The director denied the petition, finding "[t]he evidence of record is not persuasive to show that the job offered could not be performed by an experienced individual whose educational training falls short of a baccalaureate degree." As such, the director found that the petitioner had satisfied none of the four criteria set forth at § 214.2(h)(4)(iii)(A), and therefore had not established the proposed position as a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation.

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

¹ The Form I-129 states that the petitioner currently employs 12 persons. However, the organizational chart and Form DE-6, Quarterly Wage and Withholding Report, list five employees. According to the organizational chart, the servers are "not in payroll. They rely on tips only."

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 *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.

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 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 proposed position lacks crucial characteristics of a management accounting position, as described in the *Handbook*. For example, the *Handbook* indicates that management accountants are involved in strategic planning or new-product development, usually as part of an executive team, and prepare financial reports for nonmanagement groups like stockholders, creditors, regulatory agencies, and tax authorities. Such functions are not reflected in the petitioner's description of the

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.

proposed position's duties. The scope of the proposed position lacks both the breadth and the depth of a management accounting position.

As noted previously, the petitioner is a restaurant with 12 employees (of whom seven are apparently not on the company's payroll) and a gross annual income of \$400,000. 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 do have a direct and substantial bearing on the scope of the duties the beneficiary would perform in the proposed position. The responsibilities associated with an annual income of \$400,000 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.

The AAO concludes that the duties of the position as described in the petition are more closely aligned to those of experienced bookkeeping, accounting, or auditing clerks. Many of the duties – including preparing balance sheets and profit and loss statements, creating subsidiary ledgers, and conducting inventory of property and equipment and then preparing reports to management regarding the inventory – 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 is actually that of a bookkeeping, accounting, or auditing clerk. 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).

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 submitted to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.³ 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.

Therefore, the petitioner cannot establish the proposed position 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, in this case the proposed position is newly created and the petitioner has no hiring history for it. Accordingly, the proposed position does not qualify as a specialty occupation under this criterion.

³ The AAO notes that, in the RFE response, counsel specifically stated "that it would be impossible for the employer to acquire from a competitor, the information regarding the types of employees that they hire and the educational qualifications required for each position."

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 or accounting clerk, a position which does not require specialized knowledge at a baccalaureate level.

The proposed position does not qualify 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). 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.