



U.S. Citizenship
and Immigration
Services

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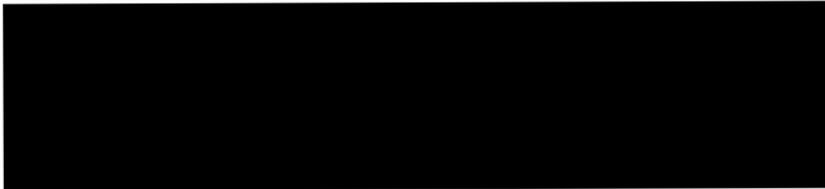
FILE: WAC 04 210 51261 Office: CALIFORNIA SERVICE CENTER Date: **JUL 14 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the California 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 wholesaler of trimmings and bridal accessories, with five employees. It seeks to extend its employment of the beneficiary as an accountant 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 based on his determination that the record failed to establish the proffered position as a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary’s services as an accountant. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s July 14, 2004 letter in support of the petition; and counsel’s December 2, 2004 response to the director’s request for evidence. As stated by the petitioner, the duties of the proffered position would require the beneficiary to:

- Prepare cash flow projections, including the amount of cash expenditures and how these expenses will be applied; and prepare budgetary projections, requiring an analysis of income, expenses and capital expenditures and the preparation of sales, costing and administrative budgeting, and the analysis of standard and variable costs;
- Engage in inventory control analysis to allow the petitioner to better ascertain inventoried items presently in stock and to better anticipate future inventories;
- Analyze and prepare financial statements, including an explanation of variances and potential tax consequences and recommendations as to how to rectify discrepancies; prepare profit and loss statements and balance sheets;
- Establish and modify a computerized accounting software system to meet the petitioner’s specific needs;
- Research and explain new federal and state tax policies and their consequences, using new tax cuts for the petitioner’s benefit;
- Assist in IRS/state tax audits, negotiating and settling any tax liabilities, and documenting and explaining the negotiation and settlement of past/present liability accounts;

- Conduct audits of the petitioner's annual, quarterly and periodic financial statements and determine whether the statements are fairly stated in accordance with generally accepted accounting principles;
- Conduct a compliance audit of the petitioner's loans, adherence to tax law, and contractual agreements to determine whether requirements have been met;
- Conduct an operational audit to determine whether the petitioner's business activities are functioning efficiently, effectively, economically and optimally; and
- Establish a system of quality control to ensure that the work being performed by the petitioner meets applicable professional standards, regulatory requirements and general standards of quality; that a particular client or potential client is financially viable; and to ensure that the petitioner's daily operations are free of conflicts of interest and that management does not misrepresent facts or subordinate proper judgment to other employees.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director found the duties described by the petitioner to reflect many of those performed by accountants, but determined that the petitioner did not have the type of business or the organizational complexity and scale to require the services of a full- or part-time accountant. While, as discussed below, the AAO does not find the record to demonstrate that the petitioner would employ the beneficiary in a position requiring a degreed accountant, it has reached its conclusions on grounds other than those relied upon by the director.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity, nor operate the type of business that would require an accountant. The 2006-2007 edition of the *Handbook* indicates that accountants work throughout private industry and government, helping to ensure that the "Nation's firms are run efficiently, its public records kept accurately, and its taxes paid properly and on time."¹ It does not indicate that the accountants are employed solely by public accounting, payroll services, and tax preparation firms; computer accounting systems, software developers, or government agencies, as stated by the director. Accordingly, the petitioner's need for an accountant may not be discounted based on its type of business. Neither does the fact that the petitioner does not employ an accounting/bookkeeping staff

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos001.htm.

establish that it would not employ the beneficiary to perform the duties of an accountant.² Therefore, the AAO withdraws the director's findings in this regard.

The petitioner has stated that the proffered position is that of an accountant and has offered a description of the position that lists the duties typically performed by accountants. As discussed by the 2006-2007 edition of the *Handbook*, management accountants, the category of accounting most closely aligned to the duties described by the petitioner, are individuals who:

[r]ecord and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management They analyze and interpret the financial information that corporate executives need in order to make sound business decisions. They also prepare financial reports for other groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, management accountants may work in various areas, including financial analysis, planning and budgeting, and cost accounting.³

However, while the above discussion is generally reflected in the petitioner's description of the duties of the proffered position, this similarity does not establish the proffered position as that of a management accountant, which imposes a degree requirement on the beneficiary. The duties described by the petitioner, although they describe accounting employment, do not indicate the specific tasks that would be performed by the beneficiary in connection with the petitioner's wholesale business, a surprising deficiency in that the beneficiary is the incumbent of the proffered position.

As previously noted, the AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no meaningful description of the proffered position's responsibilities, the petitioner is unable to establish that the duties of the position are accounting duties that would require a level of accounting knowledge that is signified by at least a bachelor's degree or its equivalent in accounting. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The deficiencies in the evidence of record are not, however, limited to the petitioner's generalized description of the duties to be performed by the beneficiary. The AAO also finds the documentation submitted by the petitioner in support of the Form I-129 to be insufficient to establish the proffered position, as described, as a specialty occupation under any of the four alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

² The AAO notes that the petitioner's organizational chart indicates that it employs a single individual to perform the duties of office manager and bookkeeper.

³ *Occupational Outlook Handbook*, 2006-2007 Edition., at www.bls.gov/oco/ocos001.htm.

At the time of filing, counsel asserted that the petitioner's recent growth and expansion has created a backlog in its ability to provide up-to-date financial information. While this assertion is somewhat unusual in that the petitioner is seeking simply to extend the beneficiary's part-time accounting employment, the AAO has, nevertheless, reviewed the record for evidence of the effects of the petitioner's expansion on its finances, as well as its financial structure and operations, to determine whether the complexity/extent of the petitioner's financial operations would impose a degree requirement on the beneficiary. However, the record contains no documentation that supports counsel's claims regarding the growth of the petitioner's business or that describes the nature and extent of the financial operations required to support its trimming and bridal accessories business. Although the petitioner has submitted copies of its 2003 tax return showing gross revenues of more than \$2.4 million, DE-6 Quarterly Wage Reports for 2003 and an organizational chart identifying its employees by title and name, this documentation offers no insight into the business or financial operations that it claims require a degreed accountant. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In that the record contains no evidence to establish the nature or scope of its business/financial operations, the petitioner has failed to demonstrate that they are of sufficient complexity to establish that the beneficiary would be employed in a position requiring a level of accounting knowledge that may only be obtained through a baccalaureate degree in accountancy.

In reaching its decision, the AAO has considered the expert opinions – the letter authored by an accounting professor at California State University, Fullerton and that provided by the head of a California accounting firm – that have been submitted by the petitioner to establish that the proffered position requires a degreed accountant. On appeal, counsel asserts that these opinions establish the proffered position as a specialty occupation under the first criterion. The AAO does not agree.

The letter from the Fullerton professor indicates that the proffered position is that of an accountant and, therefore, requires a baccalaureate degree in such areas as accounting, business administration or finance. He states that he has extensive accounting and auditing experience, and has worked with “hundreds of company Accountants representing both small and large firms.” The record does not, however, offer any evidence to support the professor's claims regarding his expertise in the field of accounting. Accordingly, it does not establish his authority to speak to the normal hiring requirements of U.S. employers filling accountancy positions. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The head of the California accounting firm also indicates that the duties of the proffered position are of an “accounting-related nature” and that a typical person performing such duties would have to obtain a bachelor's degree in accounting, business administration or finance. While the AAO acknowledges the author's expertise in the field of accounting, his opinion as to the education required to perform accounting duties is, in light of information provided by the 2006-2007 *Handbook*, insufficient to establish U.S. employers' hiring practices regarding entry-level accounting positions. The author did not cite any industry surveys, trade publications or other industry data in support of his conclusions. Going on record without supporting documentation is not sufficient to meet the burden of proof in these proceedings. *See Matter of*

Soffici, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The *Handbook* reports that not all accounting employment is performed by degreed accountants. Its discussion of the occupation of accountants clearly indicates that accounting positions may be filled by individuals holding associate degrees or certificates, or who have acquired their accounting expertise through experience:

Capable accountants and auditors may advance rapidly; those having inadequate academic preparation may be assigned routine jobs and find promotion difficult. Many graduates of junior colleges or business or 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.⁴

Further proof of the range of academic backgrounds that may prepare an individual for accounting employment is provided by the credentialing practices of the Accreditation Council for Accountancy and Taxation (ACAT), an independent accrediting and monitoring organization affiliated with the National Society of Accountants. The ACAT does not require a degree in accounting or a related specialty to issue a credential as an Accredited Business Accountant® /Accredited Business Advisor® (ABA). Eligibility for the eight-hour comprehensive examination for the ABA credential requires only three years of “verifiable experience in accounting, taxation, financial services, or other fields requiring a practical and theoretical knowledge of the subject matter covered on the ACAT Comprehensive Examination.” Up to two of the required years of work experience may be satisfied through college credit.⁵

Therefore, the expert opinion of the head of the California accounting firm does not establish the proffered position as a specialty occupation under the first criterion. While relevant to these proceedings, it does not carry the authority of the *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification or licenses in the field, to reach its conclusions regarding the U.S. employers’ practices when hiring accountants. Accordingly, neither of the expert opinions submitted by the petitioner establishes the proffered position as employment that would impose a degree requirement on the beneficiary.

The AAO also notes that the expert opinions submitted by the petitioner both state they are based on the generalized outline of accounting duties provided in the petitioner’s July 14, 2004 letter in support of the Form I-129. Accordingly, they respond to a list of responsibilities that the AAO does not find to provide a meaningful description of the proffered position. For this reason, as well, they are insufficient to establish a degree requirement for the proffered position. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information

⁴ *Ibid.*

⁵ Information provided by the ACAT website (<http://www.acatcredentials.org/index.html>). The *Handbook* identifies the ACAT website as one of several “Sources of Additional Information” at the end of its discussion of the occupation of accountants.

or is in any way questionable, the AAO is not required to accept it or may give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the petitioner has submitted more than 20 Internet job announcements for accountants, each showing a degree requirement for the position advertised. These announcements do not, however, satisfy the requirements of the criterion's first prong.

Of the announcements, none appear to come from organizations similar to the petitioner, a wholesaler of trimmings and bridal accessories. Instead, they are published by manufacturing businesses, CPA firms, a financial organization, an insurance company, a hospital, an information technology business, a polling and management consultancy firm, and other organizations that did not identify the nature of their operations. Neither do the announcements describe duties that may be considered parallel to those of the proffered position. Only two advertisements, both from unidentified employers, outline duties that are generally like those described by the petitioner. Accordingly, these materials do not establish the petitioner's degree requirement as the norm within its industry, in parallel positions among similar organizations, as required by the first prong.

The AAO also concludes that the record before it does not establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) -- the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence that would support such a finding. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion. Moreover, the petitioner's failure to provide a specific and detailed description of the proffered position's duties precludes it from establishing the proffered position as parallel to any degreed positions within similar organizations in its industry or from distinguishing it as more complex or unique than similar, but non-degreed employment. .

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine whether a proffered position may be established as a specialty occupation under the third criterion -- the employer normally requires a degree or its equivalent for the position -- the AAO usually reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner has indicated that it has not hired an accountant prior to its employment of the beneficiary, and, therefore, has no hiring history regarding the proffered position. Accordingly, the record does not establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As proof that the proffered position's duties satisfy the criterion's specialized and complex threshold, counsel, on appeal, again references the expert opinions of the Fullerton accounting professor and the head of the California accounting firm. Both individuals indicate that they have reviewed the duties of the proffered position and find them to require a degreed accountant.

The Fullerton professor states that his opinion is based on his understanding that the beneficiary would be required to provide cash flow projections; budgetary projections, including a detailed analysis of sales; costing and administrative budgeting; financial statement preparation and analysis; profit and loss statements, balance sheet preparation; the implementation of internal control procedures; and the development of a computerized accounting software system. The accounting firm head indicates that cash flow and budgetary projections must be performed by a degreed professional. He also states that the preparation of financial statements, financial analysis, the development and modification of a computerized accounting software system, tax/auditing research, consultation services and the preparation of balance sheets and profit and loss statements require a four-year degree.

However, as previously discussed, both writers indicate that their opinions are based on the petitioner's description of the proffered position's duties in its July 14, 2004 letter of support, a description that the AAO has found to better describe the general employment of accountants rather than the specific tasks to be performed by the beneficiary. Accordingly, as they are based on evidence that the AAO does not find persuasive, the AAO will not accept these opinions. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS not required to accept it or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Accordingly, the record does not establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO is aware that the petitioner has been employing the beneficiary as an H-1B worker in the proffered position, based on a previously approved petition. CIS' approval of this earlier petition does not, however, establish a basis for approving the instant Form I-129.⁶

The record does not indicate whether the director reviewed the record on which the prior decision was reached. However, if that record contained no evidence beyond that found in the instant case, then CIS would have erred in approving the previously filed petition. CIS is not bound to approve applications or petitions

⁶ In response to the director's request for evidence, counsel submitted a copy of a 2004 CIS memorandum entitled *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*. This guidance indicates that Service Center adjudicators are to give deference to previous approvals where there is no material change in underlying facts. Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *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*, HQOPRD 72/11.3 (April 23, 2004). However, prior approvals do not preclude CIS from denying an extension of the original visa 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).

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). Further, each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Moreover, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *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).

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.