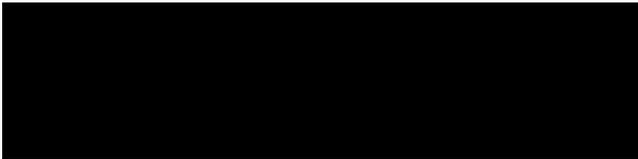


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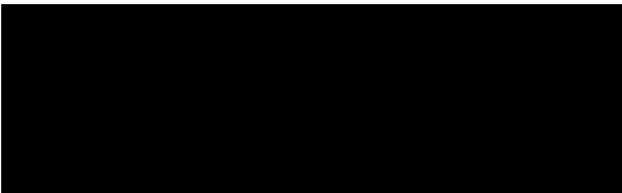
DL

FILE: WAC 03 023 51213 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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, 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 company engaged in the construction, development, ownership and management of commercial real estate, with 13 employees and \$313,401 in gross annual income. It seeks to employ 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, and new and previously submitted evidence. 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 October 15, 2002 letter in support of the petition; and the July 17, 2003 and August 5, 2003 responses submitted by the petitioner and counsel respectively in response to the director’s request for evidence. As stated by the petitioner at the time of filing and in response to the director’s request for evidence, 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;
- Analyze and prepare financial statements, and advise the petitioner of their financial implications, including an explanation of variances between the statements and budgeted projections and the potential tax consequences, and provide recommendations as to how to rectify the discrepancies; prepare profit and loss statements and balance sheets;
- Establish and modify a computerized accounting software system to meet the petitioner’s specific needs;
- Carry out depreciation and amortization calculations associated with the fixed assets component to financial statements and tax schedules and returns;
- 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;
- 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; and
- Investigate any suspected fraudulent operations within the company and establish a guideline of prohibitive activities.

The petitioner indicates that the performance of the above duties requires a baccalaureate degree in accounting, business administration, finance, commerce or a related field.

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)).

The petitioner has stated that the proffered position is that of an accountant and has offered a description of the position that lists 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. [*Handbook* at 70].

However, the similarity between the petitioner's description of the duties of the proffered position and those performed by management accountants does not establish the proffered position as a specialty occupation. The generalized duties outlined by the petitioner describe the type of work performed by accountants rather than the specific tasks that would be performed by the beneficiary in connection with the petitioner's real estate business.

A petitioner cannot establish a proffered position as a specialty occupation by listing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. While this type of generalized description is necessary when defining the range of duties that may be performed within an occupation, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties or tasks to be performed by a beneficiary in relation to its particular business interests.

The AAO, as previously discussed, 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 fails to offer a 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 petitioner has also failed to establish either that the growth of its business or the nature of its operations would require the services of a degreed accountant.

At the time of filing, counsel asserted that the petitioner's recent growth and expansion had created a backlog in its ability to provide up-to-date financial information and that once this backlog had been reduced, the beneficiary's service would no longer be needed. Although the AAO does not find the petitioner to have made this same assertion, it 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. The record, however, contains no documentation that supports counsel's claims regarding the petitioner's backlogged financial reporting or the growth of its business. The copies of the 2001 and 2002 federal tax returns submitted by the petitioner in connection with Safco Capital Corporation – which report gross incomes of \$313,401 and \$371,205 – are insufficient proof of business growth. The copies of the petitioner's DE-6 quarterly wage reports for 2003 do not report an expansion in the petitioner's workforce beyond the 13 employees claimed at

the time of filing. Further, of the 24 management properties listed by the petitioner in response to the director's request for evidence, only three were acquired since 1999. Accordingly, the AAO will discount counsel's assertions regarding the growth of the petitioner's business. 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 Obaigbena*, 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).

The AAO notes that the petitioner's involvement in a range of real estate activities has the potential to create a complex financial environment for the beneficiary. It has, therefore, also reviewed the record for evidence of the day-to-day financial activities needed to support the petitioner's real estate business, particularly those related to its development of real estate ventures, the joint operation of the two business entities owned by the petitioner – Safco Capital Corporation and Complete Building Services, Inc. – and its management of more than 20 commercial properties. However, beyond the submission of the copies of its 2001 and 2002 federal tax returns for Safco Capital Corporation and a 2002 return for Complete Building Services, Inc., the petitioner has provided no other information regarding the nature and extent of its financial operations.

In that the record contains no evidence to demonstrate the nature or scope of its financial operations beyond establishing its gross revenues, the petitioner has failed to demonstrate that its financial operations are of sufficient complexity or breadth to establish that the beneficiary would be employed in a position requiring a degreed management accountant.

The two expert opinions submitted by the petitioner at the time of filing – a December 6, 2000 letter from the president of a California job placement firm and a December 4, 2000 letter from the head of a California accounting firm head – are also insufficient to establish that the duties of the proffered position would normally impose a degree requirement on the beneficiary. Both letters indicate that the writers find that an in-house accountant, like the proffered position, carries out a wide variety of tasks including budgetary projections, cash flow projections, inventory control analysis, balance sheet preparation and analysis, profit and loss projections, inventory control analysis, balance sheet preparation and analysis, profit and loss statements and review, as well as financial statement preparation and analysis, internal control measures, and advising companies regarding a wide range of tax-related issues. The president of the placement firm states that a bachelor's degree in accounting, business administration, commerce, management, finance or any other business-oriented curriculum will meet the basic theoretical requirement to begin work in an accounting position. The head of the California accounting firm indicates that it is his experience that in-house accountants generally hold baccalaureate degrees, with concentrations in accounting, business administration, commerce, management and finance.

The AAO does not find the opinion provided by the president of the job placement agency to offer a direct opinion as to whether a degree is required for employment as an accountant. Instead, she opines on the academic fields that would prepare an individual to work as an accountant. The AAO does, however, note the opinion provided by the accounting firm head and acknowledges his expertise in the field of accounting. His opinion as to the education required to perform accounting duties is, however, insufficient to establish U.S. employers' hiring practices when filling entry-level accounting positions.

The 2006-2007 edition of 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. [*Handbook* at 72].

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.¹

Accordingly, the opinion of the head of the California accounting firm does not establish the proffered position as a specialty occupation under the first criterion. In that his opinion does not cite any industry surveys, trade publications, or other industry data in support of his conclusions, 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. Simply going on the record is not sufficient to meet the burden of proof in these proceedings. *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)).

Finally, the AAO notes that, at the time of filing and in response to the director’s request for evidence, counsel submitted material from the Department of Labor’s *Occupational Information Network (O*Net)* regarding the occupation of accountant, which indicates that it requires a baccalaureate degree. However, the *O*Net* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Like the *Dictionary of Occupational Titles* that it replaced, the *O*Net* provides 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 education and training codes assigned to occupations by the *O*Net* do not indicate a degree requirement in a specific specialty, as required for classification as a specialty occupation. Therefore,

¹ Information provided at <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.

the *O*Net* materials also fail to satisfy the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

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 40 Internet job announcements for accountants, each showing a degree requirement for the position advertised. Having reviewed the advertisements, the AAO finds none to satisfy the requirements of the criterion's first prong.

The announcements do not describe organizations similar to the petitioner, a business that is involved in the construction, development, ownership and management of a variety of commercial real estate ventures. Although some of the listings are published by property management firms and others by real estate businesses, none indicate the businesses seeking job applicants have the petitioner's range of business interests. Neither do the announcements describe employment that might be considered parallel to the proffered position. They either fail to provide a specific description of the advertised position's duties or list duties that are unlike those that have been generally outlined by the petitioner. Accordingly, the Internet listings submitted by the petitioner do not establish that its degree requirement is the norm within its industry, in parallel positions among similar organizations, as required by the first prong. 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.

To qualify the proffered position as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must demonstrate that the position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, counsel on appeal contends that two additional expert opinions submitted by the petitioner in response to the director's request for evidence – a letter from an accounting professor at California State University, Northridge and a second statement from the same California accounting firm head who authored the letter submitted at the time of filing – establish that the position may only be performed by a degreed accountant.

Both opinions indicate that the authors have reviewed the proffered position's accounting duties and find them to be those of a degreed accountant, requiring a baccalaureate degree in accounting, business administration, finance or a related field. However, the head of the accounting firm indicates that his opinion is based on his review of "the correspondence dated October 15, 2002 and July 17, 2003 by SPRING TOWERS LLC." As the instant case does not involve a Form I-129 filed by Spring Towers LLC, the AAO does not find this opinion to be relevant to the issue of whether the proffered position is that of a degreed accountant. 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, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Accordingly, the AAO will consider only the opinion of the California State professor.

In her letter, the professor states that she is a Certified Public Accountant (CPA), has extensive accounting experience, and has worked with “hundreds of company Accountants representing both small and large firms.” While the AAO acknowledges the professor’s accounting expertise, it does not find her letter to establish that the proffered position’s complexity or unique nature requires the beneficiary to hold the minimum of a baccalaureate degree in a directly-related field.

The professor’s opinion regarding the proffered position is based on the generalized outline of accounting duties provided in the petitioner’s October 15, 2002 and July 17, 2003 letters. However, as previously discussed, the description of the position provided by the petitioner in both letters describes the occupation of accountant rather than the duties to be performed by the beneficiary for the petitioner’s real estate business. Accordingly, the professor’s conclusions regarding the proffered position are based on a list of responsibilities that do not offer a meaningful description of the beneficiary’s duties. For this reason, her opinion is 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 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). As the petitioner has failed to provide a listing of the duties to be performed by the beneficiary in relation to its business, it cannot distinguish the proffered position from similar but nondegreed 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 submitted job announcements for the proffered position that indicate its degree requirement and that predate its filing of the Form I-129. Counsel, in response to the director’s request for evidence, contended that these announcements indicate the petitioner’s need for a degreed accountant. However, while the petitioner’s filing of a job announcement for the proffered position may prove its desire for a degreed accountant, it does not establish its normal hiring practices regarding the position.

In the instant case, the petitioner has not indicated that it previously employed a degreed accountant. Neither has it submitted any evidence that would establish its hiring practices in relation to the proffered position or any similarly-situated position. The petitioner’s organizational chart provided in response to the director’s request for evidence identifies some of the petitioner’s employees by name and title. Although the position of accountant is shown, the chart does not indicate that it has previously been filled. 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 Northridge 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.

However, as previously discussed, the opinion of the accounting firm head states that the duties he has reviewed are those described in two letters provided by Spring Towers LLC, an organization that is not the petitioner in the instant case. Accordingly, his opinion will be discounted. 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 is not required to accept it or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The opinion of the Northridge professor, as it is based solely on the petitioner's generalized description of the proffered position, also fails to establish the proffered position as a specialty occupation based on the specialized and complex nature of its duties. Without a meaningful description of the proffered position's duties, a petitioner cannot establish them as being of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.