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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

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FILE: WAC 08 150 51533 OFFICE: CALIFORNIA SERVICE CENTER DATE: **JAN 14 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center 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 avers on the H-1B petition that it is a general building contractor that was established in 1989 and has two employees. It seeks permission to employ the beneficiary as a research analyst and, 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, finding that the proposed position was not a specialty occupation. On appeal, the petitioner submits a letter and copies of documents already included in the record, and counsel submits a brief.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner stated in an accompany letter of support that it sought to hire the beneficiary on a part-time basis because it needed an employee who could "advise management of our finances based on statistical analysis on the building trend in the commercial versus housing sector." The petitioner set forth a list of duties that the beneficiary would be performing under the general categories of "analysis of finances (25% of the time); "forecasting" (30% of the time); and "financial management" (45% of the time). The petitioner stated that its research analyst must have a bachelor's degree in finance, accounting, business administration, statistics or a related field due to the nature of the position.

In a July 29, 2008 RFE, the director asked the petitioner to submit evidence that could establish that the position was a specialty occupation, such as a detailed position description, job postings for positions similar to the proffered one, or evidence that the petitioner has hired only degreed individuals in the past for this position.

In an August 27, 2008 response, counsel submitted a brief, and the petitioner submitted a letter and additional documents including a printout from the Department of Labor's *Occupational Outlook Handbook (Handbook)* on financial analysts and personal financial advisors, and two job advertisements that the petitioner stated were similar to the proffered position. In his brief, counsel stated that the position was similar to a financial analyst position as outlined in the *Handbook* and noted the *Handbook's* information that a bachelor's degree in finance or a related field is a minimum qualification to enter into the occupation. Counsel also stated that the petitioner was submitting job advertisements for similar positions with other companies and called the director's attention to the definition of "similar" in the American Heritage Dictionary. Counsel claimed further that the duties of the position are complex because the beneficiary would need to have knowledge of complicated math, economics, statistics and management to perform the duties that the petitioner outlined. Finally, counsel stated that the duties were sufficiently specialized and complex to require the

beneficiary to have a bachelor's degree in finance or a related field because she will be responsible for interpreting financial data, studying current problems, creating solutions, creating an effective business plan, identifying areas of opportunity within planning and forecasting duties, and preparing and delivering presentations.

On September 17, 2008 the director denied the petition. The director likened the proffered position to that of financial analyst as described in the *Handbook*, but found that the position could not qualify as a specialty occupation because the petitioner is not engaged in the type of business in which a financial analyst is typically found, and because the petitioner does not have substantial, if any, capital to invest.

On appeal, both counsel and the petitioner disagree with the director's findings. The petitioner states that despite its size and income, it requires the services of a research analyst. According to the petitioner, the beneficiary will spend her time researching and analyzing its finances and making recommendations to help its business. The petitioner claims that it has never stated that it needs the beneficiary to handle its investments. Counsel states on appeal that the beneficiary's duties resemble those of a financial analyst, a position that, according to the *Handbook*, is usually held by an individual who possess a bachelor's degree in finance or a related field. Counsel reiterates several of the arguments he made in his response to the director's RFE, in which he states that the position meets all four of the eligibility criteria under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS

regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category. To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

As the duties of the proffered position are critical to an assessment of whether the beneficiary will be working in a specialty occupation, the AAO shall repeat them here as the petitioner provided them in its initial letter of support:

Analysis of finances (25% of working hours):

- Assess financial reports and related documents to determine how well the company is performing
- Interpret financial data to management and incorporate feedback to establish financial capabilities concerning price, yield, stability, and future trends
- Conduct research on the industry for benchmarking purposes
- Evaluate pricing and financial plans
- Regularly repeat assessments

Forecasting (30% of working hours):

- Maintain and produce financial forecasts and annual budgets
- Based on assessments, create forecast reports and budget models to effectively predict results of any necessary changes to the budget
- Manipulate variable cost factors to reduce overhead
- Create budget allocation for expenditures, incomes and other financial items
- Estimate costs and profits for business strategies and decisions made by management
- Present the forecast results to management

Financial Management (45% of working hours):

- Report variances resulting in an accumulation of documentation to establish financial management procedures and requirements in addition to documenting verifiable audit trails
- Create an effective and comprehensive business plan based on the analysis of financial data to methodically calculate future earnings and expenses
- Update pricing schemes and communicate budget targets
- Make recommendations to management on better budget allocation practices
- Report potential trends in the industry and recommend on how to take advantage of the trends
- Verify financial report with actual figures
- Create income statements, assets & equity sheets, and other financial documents
- Make general business recommendations based on financial expertise to improve company performance

The AAO does not agree with the director or the petitioner that the proffered position is closely related to a financial analyst position as described in the *Handbook*. According to the *Handbook*:

Financial analysts assess the economic performance of companies and industries for firms and institutions with money to invest. Also called *securities analysts* and *investment analysts*, they work for investment banks, insurance companies, mutual and pension funds, securities firms, the business media, and other businesses, helping them make investment decisions or recommendations. Financial analysts read company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates in order to determine a company's value and to project its future earnings. They often meet with company officials to gain a better insight into the firm's prospects and to determine its managerial effectiveness.

Financial analysts can usually be divided into two basic types: those who work on the *buy side* and those who work on the *sell side*. Analysts on the buy side work for companies that have a great deal of money to invest. These companies, called institutional investors, include mutual funds, hedge funds, insurance companies, independent money managers, and charitable organizations, such as universities and hospitals, with large endowments. Buy side financial analysts work to devise investment strategies for a company's portfolio. Conversely, analysts on the sell side help securities dealers to sell their products. These companies include investment banks and securities firms. The business media also hire financial advisors that are supposed to be impartial, and as such occupy a role somewhere in the middle.

The responsibilities that the petitioner has outlined for the beneficiary do not relate to a true financial analyst position. The financial analysis and forecasting duties that the petitioner has described, as well as the financial management duties, relate more to a position that combines the occupations of an accountant and market research analyst.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The proffered position, although not a true market research analyst position, is most akin to this occupation in terms of generalized responsibilities, combined with some aspects of an accountant. While the *Handbook's* information on educational requirements for the position of market research analyst indicates that a bachelor's degree "is the minimum educational requirement for many market and survey research jobs," the AAO notes the significance of the DOL's declination to state that the bachelor's degree must be in a particular field of study. As stated previously, USCIS consistently 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. Here, the occupation of market research analyst does not qualify as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), because the incumbent could hold a bachelor's degree in any number of fields, and a baccalaureate or higher degree or its equivalent in a particular specialty is not normally the minimum requirement for entry into the position.

Similarly, in looking at the accountant occupation, the *Handbook* states that management accountants:

Record 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.

The AAO acknowledges that a management accountant's position would require the beneficiary to have an understanding of accounting principles. The AAO observes, however, that degreed accountants do not perform all types of employment that require the use of accounting principles. Thus, the performance of duties requiring accounting knowledge does not establish that the proffered position is that of a degreed accountant. The question is not whether the petitioner's position requires knowledge of accounting principles, which it does, but rather whether it is one that normally requires the level of accounting knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting.

The *Handbook's* 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. The *Handbook* reports:

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.

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

To further assist in determining whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in

¹ 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.

accounting, the AAO turns to the record for information regarding the nature of the petitioner's business operations. While the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker in an accounting occupation. It is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations, are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of financial knowledge that may be obtained only through a baccalaureate degree in accounting or its equivalent.

At the time of filing, the petitioner stated that it employed 2 persons and had a gross annual income of \$3.6 million. The record does not include any substantiating documentation related to the petitioner's financial operations or organization that would shed light on the complexity of the accounting work to be performed by the beneficiary, e.g., financial documents indicating that the petitioner's operation is inextricably entwined with that of other companies or that the petitioner's finances are highly regulated. Neither does the record indicate that the petitioner is involved in outstanding business loans or other debt or is required to deal with complex rental/lease agreements for equipment or space that might complicate its financial situation. Accordingly, the record offers no meaningful evidence to establish that the accounting duties to be performed by the beneficiary in relation to the petitioner's operations are sufficiently complex to require the services of a degreed accountant. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)). The petitioner has not demonstrated that its business has the complexity of financial operations to support the necessity for specialized accounting work. Thus, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not 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 demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree

requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS 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)).

As noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification. The petitioner also has not submitted any evidence that the industry's professional associations have made a degree a minimum requirement for entry. As evidence that businesses similar to the petitioner require a degree in a specific specialty for their positions that are parallel to the one offered here, the petitioner submitted two job postings: one is for an "Analyst II PP&C" for Honeywell; the other is for a senior financial analyst for Kaiser Permanente. Neither of these advertisements satisfies the petitioner's burden of proof for several reasons. First, neither the Honeywell Corporation nor Kaiser Permanente would be "similar" to the petitioner as operational entities. Second and most important, neither advertisement establishes that the positions being offered can only be held by someone who has a bachelor's degree or its equivalent in a specific specialty. The Honeywell advertisement allows for a "BA/BS degree in business or related field; or directly related experience in lieu of a degree." There is no requirement that the "experience in lieu of a degree" must be equivalent to a bachelor's degree in a specific specialty. The Kaiser Permanente advertisement, although requiring a bachelor's degree in finance or accounting, is not a position similar to the one being offered by the petitioner because it appears to involve more sophisticated financial and marketing analysis duties that are not a part of the petitioner's proffered position. The petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve basic financial analysis duties that are not particularly complex. The petitioner, therefore, has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires the petitioner to demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally 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. Here, the petitioner has not employed anyone in the proffered position and, therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. The

evidence in the record does not support a finding that this particular position can only be performed by someone with a bachelor's degree, or its equivalent, in finance or a related field. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

ORDER: The appeal is dismissed. The petition is denied.