

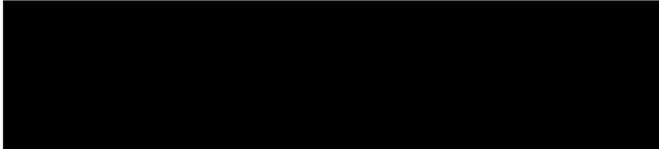
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **DEC 03 2010**

IN RE: [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)

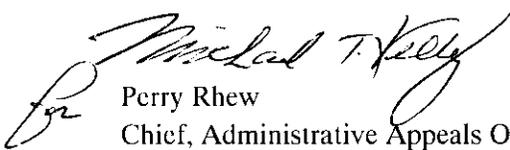
ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. 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 law firm established in 2003 that currently has no employees and a gross annual income of \$120,000. It seeks to employ the beneficiary as a full-time accountant for three years. Accordingly, the petitioner 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 determining that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's April 16, 2009 request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's June 3, 2009 denial letter; and (5) the Form I-290B with the petitioner's brief and additional evidence. The AAO reviewed the record in its entirety before issuing 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 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.

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, and determine whether the position qualifies as a specialty occupation. Cf. *Defensor v. Meissner*, 201 F. 3d 384. 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 claims to seek the beneficiary's services as an accountant. In support of the petition, the petitioner submitted a copy of its job offer letter to the beneficiary dated April 1, 2009, which outlined the duties of the proposed position. Specifically, the letter stated:

Under general direction and supervision of the Attorney, Accountant shall be responsible for and assist with:

- Generating and maintaining financial reports of Client Trust Account and General Bank Account on a monthly, quarterly and annual basis and/or as necessary;
- Analyzing annual budget and providing reports and financial recommendation to Board or to authorized requestors;
- Maintaining Assets and Liabilities reports such as account payables and receivables;
- Assisting with and providing reports and correspondence to Independent Tax Advisor with regards to filing necessary taxes[.]

Regarding the required qualifications to perform the duties of the position, the petitioner indicated that a bachelor's degree in Accounting, Commerce or Business Administration was required, as well as a minimum of one year of experience in financial operations.

In the RFE dated April 16, 2009, the director requested additional information to establish that the proffered position is in fact a specialty occupation. Specifically, the director requested details pertaining to the nature of the petitioner's business and its past hiring practices, as well as an overview of the manner in which the petitioner was able to offer the beneficiary a bona fide, full-time position as an accountant.

In a response dated May 27, 2009, the petitioner addressed the director's queries. The petitioner submitted several declarations from various individuals attesting to the need for a full time accountant in the petitioner's organization as well as other similar organizations in the industry. The petitioner also submitted copies of job postings for the position of accountant in firms claimed to be similar to the petitioner.

On June 3, 2009, the director denied the petition. While the director noted that the description of duties provided by the petitioner seemed to coincide with the duties of an accountant as set forth in the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director found that the petitioner had not demonstrated that the level, scope, and complexity of the petitioner's business actually required an individual with a bachelor's degree to fill the proposed position. The director noted that the petitioner's business was not the type of business that typically required the full-time services of an accountant, such as a public accounting firm or tax preparer. In addition, the director found that the petitioner's business operations lacked the scale and complexity that would require the services of a full-time accountant. The director concluded that the petitioner had not established the proffered position as a specialty occupation.¹

¹ The AAO here withdraws the director's statements to the effect that accounts comprise an occupational group that constitutes a specialty-occupation class. Neither the *Handbook* nor any evidence in the record of proceeding supports this proposition. In fact, the *Handbook's* chapter "Accountants and Auditors" indicates that there are positions bearing the title "accountant" whose performance requires less than the application of at least a bachelor's degree, or the equivalent, in accounting or a closely related specialty.

In this occupational context, it is incumbent on the petitioner to establish that the actual performance of the specific duties comprising its particular proffered position requires not just the use of accounting principles, but the theoretical and practical application of at least a bachelor's degree level of a highly specialized body

On appeal, the petitioner asserts that the director's denial was erroneous. Specifically, the petitioner contends that the position is in fact an accounting position, and notes that the petitioner has retained the services of [REDACTED] as an accountant for the past four years. Noting that [REDACTED] holds a degree in accounting, the petitioner contends that it therefore has established that it routinely requires a degreed individual for the proffered position. The petitioner further contends that it submitted sufficient evidence to demonstrate that other similarly-sized businesses require the full time services of an accountant. Finally, the petitioner submits an updated overview of the duties of the position which includes a breakdown of the percentage of time that will be devoted to each task by the beneficiary.

To make its determination as to whether the employment just described qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) which requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criterion include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its proposed employment, the AAO turns to the 2010-2011 online edition of the *Handbook* for its discussion of management accountants, the category of accounting most closely aligned to the generic and general duties asserted by the petitioner. As stated by the *Handbook*, management accountants:

[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.²

The AAO finds the above discussion to be generally reflected in the petitioner's description of the duties of the proffered position and agrees that the petitioner's employment would more likely than not require the beneficiary to have an understanding of accounting principles. However, as discussed in footnote 1, the question is not whether the petitioner's position requires knowledge of accounting principles, which it apparently 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.

of knowledge in accounting or a closely related specialty, as required by the statutes and regulations governing the H-1B program. As reflected in the AAO's discussion of the evidence – and particularly its generic and generalized nature - this the petitioner has failed to do.

² *Occupational Outlook Handbook*, 2010-2011 Edition, at www.bls.gov/oco/ocos001.htm.

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:

Some 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 accountant positions by demonstrating their accounting skills on the job.

Most beginning accountants and auditors may work under supervision or closely with an experienced accountant or auditor before gaining more independence and responsibility.

The *Handbook* also notes in its description of the work performed by bookkeeping, accounting and auditing clerks that:

Clerks who can carry out a wider range of bookkeeping and accounting activities will be in greater demand than specialized clerks. For example, demand for full-charge bookkeepers is expected to increase, because they can perform a wider variety of financial transactions, including payroll and billing. Certified Bookkeepers (CBs) and those with several years of accounting or bookkeeping experience who have demonstrated that they can handle a range of tasks will have the best job prospects.³

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in 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 as an accountant, as correctly noted by the director. The AAO notes that it is reasonable to assume that the size of an employer's business has or could have 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. 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 or higher in accounting or its equivalent.

At the time of filing, the petitioner stated that it commenced business operations as a law firm in 2003, had a gross annual income of \$120,000, and claimed to have no employees. A review of the record indicates that the petitioner is a law firm operated by a solo practitioner who appears to pay an accountant/bookkeeper on a contractual basis. In the director's request for evidence, the director requested that the petitioner provide evidence of the industry standard as it relates to a similar type and size company and whether those companies required the services of an accountant and whether those companies required a baccalaureate

³ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos144.htm.

degree for the accounting position. While the petitioner submitted several declarations from individuals in support of the petitioner's eligibility in this matter, no evidence of similar companies requiring a degreed accountant was submitted. Although the petitioner submits a declaration from [REDACTED] solo practitioner also based in Long Beach, California, [REDACTED] simply states that "similarly situated solo practitioners often usually hire Independent Contractors to perform law office accounting." [REDACTED] does not claim to employ a full-time accountant in his solo practice, and indicates that typically, law offices comprised of a solo practitioner typically outsource their accounting duties. While the AAO notes that [REDACTED] it would be "in the best interests" of the petitioner to have a full-time in-house accountant, this is merely the opinion of a colleague of the petitioner and is not supported by documentary evidence.

Moreover, the petitioner provides no documentation related to its financial operations or organization that would shed light on the alleged complexity of the accounting work to be performed by the beneficiary, e.g., invoices for client billings or documents pertaining to the petitioner's client trust account. While the petitioner does submit copies of its business checking account statements from January 2009 to March 2009, these statements merely show deposits and online banking transfers, and shed little light on the nature and scope of the petitioner's business. In addition, while the petitioner states that business has significantly increased since inception and that the petitioner intends to move to a larger space and increase staffing levels, no evidence to support these claims has been submitted. 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)).

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 claimed operations are sufficiently complex to require the services of a degreed accountant.

As the record of proceeding fails to establish that the proffered position as one for which a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a petitioner to prove that a degree requirement is common to the industry in parallel positions among similar organizations, or the 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 this criterion include 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 the instant matter, the petitioner's evidence fails to satisfy the requirements of either prong of the criterion.

As discussed above, the petitioner submits a declaration from [REDACTED] a solo practitioner also based on Long Beach, California, in support of the industry's degree requirement. This declaration, however, is insufficient to establish that a bachelor's degree or its equivalent is the industry standard for entry into the proffered position. Specifically, [REDACTED] states that similar solo practitioners hire accountants on a

contractual basis to perform duties such as trust account maintenance and reconciling bank accounts. However, [REDACTED] as a solo practitioner, neither indicates that he employs a full-time degreed accountant or provides evidence that other similarly-sized organizations in the industry employ full-time degreed accountants.

Moreover, while the petitioner submitted two Internet job postings for the position of accounting manager at two California law firms, the job postings provide little to no evidence with regard to the nature and scope of each of these businesses. There is nothing in the record to indicate that these two firms are run by solo practitioners with no employees. Therefore, the petitioner has failed to establish its degree requirement as the norm within its industry under the first prong of the criterion.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner's failure to submit sufficient information related to its financial operations or its claimed business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from accounting-related employment that is performed with less than a four-year degree in a specific specialty or its equivalent. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, the petitioner has failed to establish the second prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it 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 names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant matter, the petitioner asserted, in response to the director's RFE, that it had not previously hired an accountant but had retained the services of [REDACTED] as an independent contractor for the past four years. While the petitioner does submit a copy of [REDACTED] most recent Form 1099 (Miscellaneous Income), there is no evidence that the petitioner has ever employed an accountant on a full-time basis. Therefore, since the petitioner has not established that it previously employed a degreed accountant in the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁴

⁴ Further, to satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, however, finds no evidence to indicate that the beneficiary's duties would require greater knowledge or skill than that normally possessed by a bookkeeper or a junior accountant. Further, the position, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a bookkeeper or at most a junior accountant.

In reaching its decision, the AAO has again considered the petitioner's evidence submitted with the petition and submitted in response to the RFE. The petitioner throughout the record provides only a vague and generalized overview of accounting duties. Moreover, the breakdown of the percentage of time to be devoted to each stated duty on appeal sheds little light on the actual scope and complexity of the position. Absent additional evidence, such as financial documents or evidence demonstrating the proposed expansion of the petitioner's organization, there is an inadequate factual foundation to support a finding that the proposed duties are as specialized and complex as required by the regulations to qualify as a specialty occupation.

The petitioner has no employees, yet claims the services of a full-time accountant are necessary to facilitate its continued operations. However, the AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical bookkeeper or junior accountant, and finds no evidence in the record to overcome a finding that the accounting services required could continue to be met by a contractual accountant on an as-needed basis. The petitioner submits no evidence pertaining to complex accounts receivable, and the lack of an actual payroll due to the absence of employees further undermines the petitioner's claim that a full-time accountant is needed. Therefore, the AAO finds that there is no evidence that the knowledge required to perform the duties of the proffered position is usually associated with the attainment of a bachelor's or higher degree or its equivalent in accounting.

The totality of the record does not establish the proffered position is a specialty occupation based on a claimed complex and unique nature as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.