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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: VERMONT SERVICE CENTER Date: DEC 06 2010

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:

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, Vermont 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 dealer/retailer of cellular phones and related accessories. It allegedly seeks to employ the beneficiary as an accountant. 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 on three independent grounds. Specifically, the director found that the petitioner had failed to: (1) demonstrate that the proffered position was a specialty occupation; (2) comply with the terms and conditions of employment; and (3) submit evidence concerning the nature, operations, complexity and structure of its business.

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

The first 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 statutory and regulatory requirements set forth below. Since satisfying these requirements necessitates examination of the nature and scope of the petitioner's business, the AAO will also consider in this section the petitioner's failure to submit material evidence pertaining to the organizational structure of the petitioner.

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. 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.

The petitioner allegedly seeks the beneficiary's services as an accountant. In a letter of support dated January 13, 2009, the petitioner claimed that it needed an accountant who will analyze financial information and

prepare financial reports. Regarding the beneficiary's job duties, the petitioner indicated that they would include the following:

- Compile and analyze company's financial information to prepare entries to accounts.
- Maintain and reconcile accounting journals and ledgers.
- Maintain and reconcile bank statements, and tax records.
- Maintain and reconcile inventory controls and invoices.
- Prepare other various financial and tax reports as necessary.

The petitioner further indicated that the person who would fill the position would have a bachelor's degree in business administration with a concentration in accounting. The petitioner further noted that the position was not that of a certified public accountant.

In the RFE issued on March 31, 2009, the director requested additional information to establish that the proffered position was in fact a specialty occupation. Specifically, the director requested a more detailed description of the work to be done by the beneficiary during the requested validity period, as well as documentation demonstrating the petitioner's ongoing need for an accountant. Additionally, the director requested a detailed overview of the petitioner's business, including information such as the company profile, the current accounting system used by the petitioner, and its past employment practices with regard to accountants. The director also requested evidence in the form of job postings from other companies in the petitioner's industry to show that a bachelor's degree was a standard minimum requirement for the job offered.

In response to the director's RFE, counsel re-submitted the January 13, 2009 letter and highlighted the description of duties contained therein. No additional description, as requested by the director, was submitted. Additionally, the petitioner submitted copies of the beneficiary's income tax returns for 2006, 2007, and 2008, as well as copies of the petitioner's tax documents including tax returns, quarterly wage reports, and wage and tax statements.

On June 5, 2009, the director denied the petition. The director noted that the description of duties provided by the petitioner seemed to correspond with the duties of accounting clerks and bookkeepers as opposed to accountants as set forth in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director further noted 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 concluded that the petitioner had not established the proffered position as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's denial was erroneous. Specifically, counsel contends that the position is an accounting position and references the description of duties for accountants as set forth by the *Handbook* and the Foreign Labor Certification Data Center's Online Wage Library. Counsel further asserts that the director should have recognized that the duties of the proffered position "were so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree." Counsel also noted that USCIS previously approved a

petition for the beneficiary in the same position and, therefore, the prior approval affirms his contentions that the proffered position is a specialty occupation.

To make its determination as to whether the employment described above 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 be the normal minimum requirement for entry into the particular position. Factors considered by the AAO when determining this criteria include whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree.

The petitioner has repeatedly 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 employment, the AAO turns to the 2010-2011 edition of the *Handbook* for its discussion of management accountants, the category of accounting most closely aligned to the duties described 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.¹

The AAO finds that the above discussion shares some of the key words included in the petitioner's description of the proffered position, such as preparing reports and analyzing financial information. Therefore, the AAO agrees that the proffered position would require the beneficiary to have an understanding of accounting principles. However, 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 the proffered position as that of an 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:

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

¹ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos001.htm.

by their employers, can obtain junior accounting positions and advance to accountant positions by demonstrating their accounting skills on the job.

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

Demand for full-charge bookkeepers is expected to increase, because they are called upon to do much of the work of accountants, as well as perform a wider variety of financial transactions, from payroll to billing. Those with several years of accounting or bookkeeper certification will have the best job prospects.²

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 American 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.³

The AAO notes that on appeal, counsel contends that the description of accounting positions found in the *Handbook* and the FLC Data Center's Online Wage Library indicates that the profession requires a bachelor's degree and is thus a specialty occupation. The assertion is not persuasive. First, the *Handbook* only states that "[m]ost accountant and auditor positions require at least a bachelor's degree in accounting or a related field." The *Handbook* does not state that such a degree is a normal minimum entry requirement for all accountant and auditor positions. In addition, as noted above, the *Handbook* indicates that some without a bachelor's degree or even a post-secondary degree may "advance to accountant positions by demonstrating their accounting skills on the job."

Second, the AAO notes that the *O*Net* Summary Report for 13-2011.01 – Accountants, referenced in the FLC Data Center's Online Wage Library (OWL) cited by counsel, is insufficient to establish that the position qualifies as a specialty occupation normally requiring at least a bachelor's degree or its equivalent in accounting or a related field. A designation of Job Zone 4 -- Education and Training Code: 5 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor's degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is in a specialty occupation as defined in section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). More specifically, the OWL statement is a condensed version of what the *O*Net* actually states about its Job Zone 4

² *Occupational Outlook Handbook*, 2010-2011 Edition, at www.bls.gov/oco/ocos144.htm.

³ 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.

designation. See the O*Net Online Help Center, at www.online.onetcenter.org/help/online/zones, for a discussion of Job Zone 4, which explains that this Zone signifies only that most but not all of the occupations within it require a bachelor's degree. Further, the Help Center's discussion confirms that Job Zone 4 does not indicate any requirements for particular majors or academic concentrations. Therefore, despite counsel's assertions to the contrary, the OWL and O*Net information is not probative of the proffered position qualifying as a specialty occupation.

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 may not normally be 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. 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 at least a baccalaureate degree in accounting or its equivalent.

On Form I-129, the petitioner indicated that it was established in 2000. It further indicated that it employed 9 persons and had a gross annual income of \$1,730,117. In response to the RFE, the petitioner submitted copies of its corporate tax return (IRS Form 1120S) and quarterly wage reports (IRS Form 941). The petitioner's corporate tax return indicated gross sales in the amount of \$1,730,117 for 2008 as claimed. The petitioner's quarterly tax return for the most recent quarter indicated that the petitioner's employee levels ranged from 8-16 persons.

Therefore, it appears that the petitioner operates a small wireless retail store and employs approximately 9 persons. Despite the director's specific request for additional information with regard to the overall organization of the company, such as an organizational chart, an overview of its current accounting system, or evidence of its recent commercial transactions, the petitioner failed to submit such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Consequently, absent this requested material evidence, the AAO finds that the petitioner's company lacks sufficient complexity to 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.

Accordingly, 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 has not submitted evidence that responds to either prong of the criterion.

The petitioner submitted no evidence 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 information related to its operations or potential business expansion plans precludes it from establishing that the position's complexity or unique nature distinguish it from accounting employment that is performed with less than a four-year degree in a specific specialty or its equivalent. Despite claiming on appeal that the position is complex, counsel provides no evidence to corroborate this claim. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

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, counsel on appeal indicates that the beneficiary is currently employed as an accountant by the petitioner, and the prior approval establishes eligibility in this matter. This assertion is not persuasive.

The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. Moreover, the prior approval does not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The hiring history in this matter, therefore, is not sufficient to establish the 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 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 letter dated January 13, 2009 which provides an overview of the beneficiary's proposed duties. However, absent additional evidence, there is an inadequate factual foundation to support a finding that the proposed duties are as specialized and complex as required by the regulation. 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 or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in accounting. The totality of the record does not establish the proffered position is a specialty occupation based on its 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 final issue to be addressed by the AAO is whether the petitioner complied with the terms and conditions of employment.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2) requires that the petitioner submit a statement that it will comply with the terms and conditions of the LCA for the duration of the beneficiary's stay. Specifically, the director found that the petitioner made inconsistent and contradictory claims regarding its employment of and wages paid to the beneficiary.

The director noted that USCIS received evidence showing the wages paid to the beneficiary from 2007 through 2008; however, the beneficiary's salary was below the prevailing wage listed on the Form I-129 and the LCA. Specifically, the director noted that according to the prior petition under receipt number EAC0609853117, the beneficiary's stated annual wages were \$37,378. According to the quarterly wage reports submitted into the

record, the beneficiary received only \$13,090 in 2007 and \$17,251 in 2008. Based on these discrepancies, the director concluded that the petitioner had failed to comply with the terms and conditions of employment.

On appeal, counsel for the petitioner does not dispute this finding. Instead, counsel states that “even if USCIS is correct that status is not properly maintained due to the wages that were paid . . . this petition should still have been approved as a specialty occupation with provisions for the Beneficiary to go for consular processing.” It is evident, therefore, that counsel for the petitioner acknowledges the petitioner’s failure to pay to proffered wage, and makes no attempt to refute the director’s findings. The AAO, therefore, is left to conclude that the beneficiary either violated her status of her own volition or was forced to violate her status by being benched by the petitioner. Either way, the director’s concerns regarding the petitioner’s compliance with the terms and conditions of the beneficiary are justified and, as such, shall not be disturbed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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