

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

[Redacted]

D2

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: DEC 06 2010

IN RE:

Petitioner:

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:

[Redacted]

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,

Michael T. Kelly
for Perry Rhew
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 rehab services registry case management business. 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 concluding that the petitioner failed to demonstrate that the petitioner has offered a reasonable and credible offer of employment to the beneficiary in a specialty occupation.

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 RFE; (4) the director's denial letter; and (5) the Form I-290B with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue for consideration is whether the petitioner has offered a reasonable and credible offer of employment to the beneficiary in a specialty occupation.

In this matter, the petitioner states that it seeks the beneficiary's services as a full-time accountant at a salary of \$39,460 per year.

When it submitted the petition, the petitioner stated that the beneficiary would "[a]ssist the Chief Finance Officer in the supervision of the Accounting Department personnel and act in the absence of the immediate supervisor to ensure accurate processing of financial information of our company." The petitioner stated that the proffered position requires at least a bachelor of science degree in commerce or business with a major in accounting. In summary, the position duties were broken down as follows:

- Ensure the accuracy of company's books and financial reports (40% of time);
- Ensure accuracy of billing and collections (40% of time); and
- Direct day-to-day activities and operation of accounting department (20% of time).

The petitioner submitted copies of the beneficiary's foreign education documents, along with an education evaluation that states her degree is equivalent to a U.S. bachelor of science degree in accounting.

The petitioner also provided a company brochure, which indicates that the petitioner does business as A-Biz Health Systems and provides health care staffing needs. The organization chart submitted by the petitioner shows that, in addition to the proffered position, the petitioner employs a billing and collection coordinator and billing clerk who would report directly to the beneficiary. Additionally, the beneficiary would report directly to the petitioner's administrator. Contrary to the petitioner's statements, it does not appear that the petitioner has an accounting staff. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits

competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On October 20, 2008, the director requested additional information from the petitioner. In part, the director requested the following, in pertinent part: (1) documentation to establish that the proffered position is a specialty occupation; and (2) documentation regarding the petitioner's business.

In response to the RFE, the petitioner explained that the person who signed the forms both for the present petition and the [REDACTED] petition is the owner of both companies, but has discontinued the business of [REDACTED]. The petitioner further states that, despite the corporate structure change, the position and its role remain the same and, therefore, because the prior H-1B petition filed by [REDACTED] was approved, the present petition should also be approved.¹

The petitioner argued that the proffered position is that of an accountant and therefore is a specialty occupation. In support of this argument, the petitioner included copies of advertisements for two healthcare accountants as well as letters and other documents from two clients regarding their minimum requirements for an accountant/bookkeeper along with copies of service contracts.

The director denied the petition on April 30, 2009.

On appeal, counsel argues that the proffered position of accountant is a specialty occupation, but does not address the director's concerns regarding whether sufficient work to support the beneficiary in a specialty occupation is available.

The AAO affirms the director's decision that the petitioner has failed to establish that it made a reasonable and credible offer of employment for the beneficiary to work in a specialty occupation.

The U.S. Department of Labor's *Occupational Outlook Handbook's (Handbook)* (2010-11 online Edition) description of bookkeeping, accounting, and auditing clerks provides in pertinent part:

Bookkeeping, accounting, and auditing clerks are financial recordkeepers. They update and maintain accounting records, including those which calculate expenditures, receipts, accounts payable and receivable, and profit and loss. These workers have a wide range of skills from full-charge bookkeepers, who

¹ As a cautionary and instructional matter, the AAO notes that the petitioner's statements, corroborated by the financial records submitted into the record of proceeding, indicate that [REDACTED] Associates - the previous entity for which the beneficiary worked and which is the petitioner's predecessor - engaged in the legally impermissible practice of benching, that is, failing to pay the beneficiary the required wage stated in the related Form I-129 and Labor Condition Application (LCA) during periods when work was unavailable. This practice violates the wage attestations in the LCA, the governing Department of Labor regulations, and the wage obligation undertaken upon filing the Form I-129.

can maintain an entire company's books, to accounting clerks who handle specific tasks. All these clerks make numerous computations each day and must be comfortable using computers to calculate and record data.

In small businesses, bookkeepers and bookkeeping clerks often have responsibility for some or all the accounts, known as the general ledger. They record all transactions and post debits (costs) and credits (income). They also produce financial statements and prepare reports and summaries for supervisors and managers. Bookkeepers prepare bank deposits by compiling data from cashiers, verifying and balancing receipts, and sending cash, checks, or other forms of payment to the bank. Additionally, they may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts.

In large companies, accounting clerks have more specialized tasks. Their titles, such as accounts payable clerk or accounts receivable clerk, often reflect the type of accounting they do. In addition, their responsibilities vary by level of experience. Entry-level accounting clerks post details of transactions, total accounts, and compute interest charges. They also may monitor loans and accounts to ensure that payments are up to date. More advanced accounting clerks may total, balance, and reconcile billing vouchers; ensure the completeness and accuracy of data on accounts; and code documents according to company procedures.

Auditing clerks verify records of transactions posted by other workers. They check figures, postings, and documents to ensure that they are mathematically accurate, and properly coded. They also correct or note errors for accountants or other workers to fix.

As organizations continue to computerize their financial records, many bookkeeping, accounting, and auditing clerks use specialized accounting software, spreadsheets, and databases. Most clerks now enter information from receipts or bills into computers, and the information is then stored electronically. The widespread use of computers also has enabled bookkeeping, accounting, and auditing clerks to take on additional responsibilities, such as payroll, procurement, and billing. Many of these functions require these clerks to write letters and make phone calls to customers or clients.

According to the *Handbook* section on accountants and auditors:

Accountants and auditors help to ensure that firms are run efficiently, public records kept accurately, and taxes paid properly and on time. They analyze and communicate financial information for various entities such as companies, individual clients, and Federal, State, and local governments. Beyond carrying out the fundamental tasks of the occupation—providing information to clients by

preparing, analyzing, and verifying financial documents—many accountants also offer budget analysis, financial and investment planning, information technology consulting, and limited legal services.

Specific job duties vary widely among the four major fields of accounting and auditing: public accounting, management accounting, government accounting, and internal auditing.

Under the *Handbook's* description of accountants and auditors, public accountants generally have their own business or work for public accounting firms, government accountants work in the public sector, and internal auditors check for mismanagement, waste or fraud. Since these descriptions of accountants clearly do not apply to the proffered position, the focus of the AAO's analysis will be on whether the proffered position is that of a management accountant.

According to the *Handbook*:

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. *Usually, management accountants are part of executive teams involved in strategic planning or the development of new products.* They analyze and interpret the financial information that corporate executives need 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.

(Emphasis added.) Under the *Handbook's* description, it therefore appears to be unusual for small businesses to employ a full-time management accountant, since management accountants are usually part of executive teams and prepare financial reports for other entities in addition to their employer. Thus, it is incumbent upon the petitioner to demonstrate it has sufficient work in a specialty occupation to hire an accountant on a full-time basis.

Because it is not clear that the petitioner's business justified the hiring of a full-time accountant based on the initial petition, the RFE requested additional documentation in this regard. Although the petitioner stated that the beneficiary would perform day-to-day activities and operate the petitioner's accounting department, according to the organizational chart, the petitioner does not have an accounting department. Instead, at best, the petitioner has a billing department. The remaining proffered duties of ensuring accuracy of the petitioner's financial records as well as billings and collections appear to be closer to those performed by bookkeeping, accounting and auditing clerks, rather than accountants.

Moreover, as discussed above, even if the petitioner could demonstrate, which it did not do, that the beneficiary would perform some of the duties of accountants, the petitioner did not provide supporting

evidence to demonstrate that it has sufficient work in a specialty occupation for the beneficiary to perform on a full-time basis. The copies of the two contracts provided in response to the RFE do not demonstrate that the petitioner will have sufficient business to hire the beneficiary on a full-time basis in a specialty occupation. Instead, the proffered position more closely resembles the positions described under the *Handbook* section on bookkeeping, accounting, and auditing clerks and the beneficiary would, at best given the evidence that the beneficiary has been benched in the past, be employed on a part-time intermittent basis. Therefore, the AAO finds that the proffered position is not that of a full-time accountant.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one 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.

To make its determination whether the proffered position 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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria 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; whether the industry’s professional association has made a degree in a specific specialty 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 discussed above, the AAO finds that the proffered position most closely resembles that found under the *Handbook*’s section on bookkeeping, accounting, and auditing clerks. With respect to education and training requirements for bookkeeping, accounting, and auditing clerks, the *Handbook* states:

Most bookkeeping, accounting, and auditing clerks are required to have a high school degree at a minimum. However, having some postsecondary education is increasingly important and an associate degree in business or accounting is required for some positions. Although a bachelor's degree is rarely required, graduates may accept bookkeeping, accounting, and auditing clerk positions to get into a particular company or to enter the accounting or finance field with the hope of eventually being promoted.

In other words, a bachelor's degree in a specific specialty is not required.²

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. See generally *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.

As the *Handbook* indicates no degree requirement for employment as a bookkeeping, accounting or auditing clerk, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

² The AAO hereby withdraws the director's statements recognizing accountants as comprising an occupational group that categorically qualifies as a specialty occupation. That position is erroneous. Contrary to the director's statements, it is not supported by the chapter regarding accountants in the *Handbook*, which indicates that there are positions with the title "accountant" that employ accounting principles, but not at a level requiring the practical and theoretical application of a highly specialized body of accounting knowledge that is attained only by the attainment of at least a bachelor's degree, or the equivalent, in accounting or a related specialty, as required by the statutes and regulations governing the H-1B program. In this regard, the AAO also finds that, to the extent that they are described in the petition - which is in terms of generalized, generic, and abstract functions - the duties of the proffered position do not convey the need for the level of accounting knowledge requisite for a specialty occupation. For this reason also, the petition must be denied, even if the proffered position is correctly entitled "accountant."

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)).

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The two advertisements provided by the petitioner are for accounting positions. The documentation provided from the petitioner's client [REDACTED], Inc. provides a job description for an accounting supervisor, which is not comparable to the proffered position. The letter from [REDACTED] Health Agency states that it believes that its contractors must only hire personnel with four-year bachelor's degrees in a financial field and that it requires a four-year bachelor's degree in accounting, commerce or finance for its accounting and bookkeeping positions, but does not provide independent documentation to support these claims. As a result, the petitioner has not established a degree requirement in parallel positions.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. As evident from the generalized description of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than bookkeeping, accounting, or auditing clerk, or accountant, positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. The AAO does not find that sufficient evidence was provided to demonstrate that the proffered duties, as described by the petitioner in its initial support letter, reflect a higher degree of knowledge and skill than would normally be required of bookkeeping, accounting, and auditing clerks who have responsibility for the accounts and financial statements. Further, as reflected in the AAO's comments in the second footnote, the petitioner has not developed the proffered position as more specialized and complex than accounting positions not requiring knowledge usually associated with the degree or degree-equivalency required by this criterion. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, 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. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a 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 appeal will be dismissed and the petition denied. 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.