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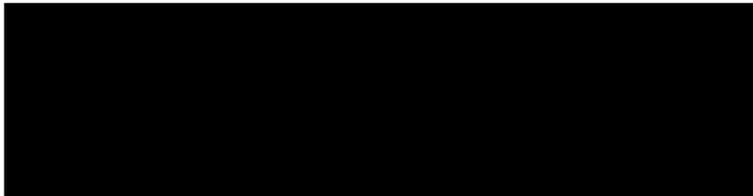
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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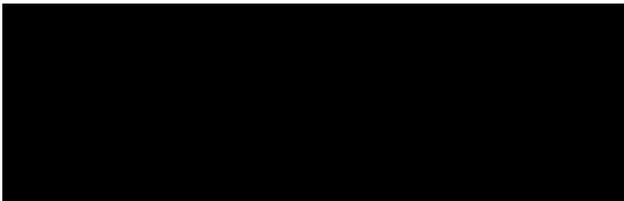
FILE: EAC 08 164 50770 Office: VERMONT SERVICE CENTER Date:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a company that owns a Dunkin Donuts and four other businesses that sell coffee and donuts with 14 full-time employees, 12 part-time employees, and a gross annual income of over \$1.8 million. It seeks to employ the beneficiary as an accountant (with IT related work) 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 establish that the proffered position is a specialty occupation and that the beneficiary is qualified to perform services 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 submission of a new petition with a statement from counsel that it does not need to respond to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation submitted by new counsel. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first consider whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

In this matter, the petitioner seeks the beneficiary’s services as an accountant (with IT related work) and submitted the H-1B petition on May 22, 2008. Evidence of the beneficiary’s duties includes: the Form I-129; and the petitioner’s May 19, 2008 support letter. The support letter indicates the proffered position would require the beneficiary to work as an accountant (with IT related work) and perform the following duties:

- Analyze financial information detailing assets, liabilities and capital, and prepare balance sheets, profit and loss statements and other reports to summarize the current and projected financial position of the companies (19.5%);
- Online ordering of raw materials of franchise stores, online payments and submission of day-to-day account reports, monthly and quarterly reports (18%);
- Analyze financial information and prepare financial reports (12.5%);
- Audit contracts and vouchers and prepare reports to substantiate individual transactions (12.5%);
- Preparation and submission of weekly, monthly and quarterly details sales report and profit and loss account (12.5%);
- Establish, modify, document and coordinate implementation of accounting and accounting control procedures (12.5%); and
- Coordinate with owners on financial matters such as banking, cash on hand, and budget as well as consolidate and prepare documents for preparation of tax returns for payroll taxes, sales taxes and income taxes (12.5%).

The petitioner provides the purpose for creating the position of accountant (with IT related work) as follows:

We have an outsider accountant, [REDACTED] for the last 10 years. It is a common practice in the industry to hire an accountant. We need full [sic] time accountant for trouble shooting and day-to-day help for financial status. We need an accountant to analyze financial information and prepare financial reports to determine or maintain a record of assets, liabilities, profit and loss, tax liability and other financial activities within the organization and for presenting our financial record, profit and loss, balance sheet etc; [sic]. We need accountant everywhere and accounting firm is inadequate to meet our needs. All financial record [sic] has to be correctly maintained.

However in time of need and urgency to get immediate response for our finances, the help from outside accounting firm is not that prompt and we suffer. Thus we decided to have full time accountant who is available and answer our problems promptly and cost efficient[ly].

At present we do not have full time accountant. The industrial practice is to employ a person with a baccalaureate degree in accounting for the position of an accountant.

Presently we do not employ any individuals in similar positions, however, we have employed accounting firm in the past, and the person render services of an accountant [sic] has minimum degree of baccalaureate in accounting or related field. We want to modernize our business and make it more efficient and more productive. Toward this end, we have decided to employ a part time accountant. However, after experiencing inordinate delays in getting accountant to troubleshoot financial problems and difficulties, we decided that it would be more

efficient to employ full-time accountant, who would be able to do all activities stated above, and troubleshoot and train our workers in accounting that would streamline and make for greater efficiency in our operations.

The petitioner submitted copies of the beneficiary's diploma and grades for a Bachelor of Commerce degree from Gujarat University, a foreign university. The grades for April 1999 are not certified – instead, the word “cancelled” is written in the certification box. Copies of certified Statements of Marks are provided for March 2000 and April 2001. These documents do not indicate how many years of education the beneficiary earned towards his degree and no credential evaluation was submitted until the appeal.

The Labor Condition Application (LCA) was submitted for an Accountant to work at the petitioner's offices in Norristown, PA at an annual salary of \$42,000.

On June 3, 2008, the director requested additional information from the petitioner. In part, the director requested the following: (1) a more detailed description of the work to be performed; (2) evidence that the proffered position is a common position required by similarly situated companies; (3) evidence that the proffered position is a specialty occupation; and, (4) additional information regarding the IT work required for the position and evidence that the beneficiary is qualified to perform the duties of the proffered position.

Previous counsel for the petitioner responded to the RFE by requesting that the petition be amended and that the job title be changed from Accountant (with IT related work) to Computer Systems Analyst. Previous counsel further states, “We understand that because [the petitioner] no longer petitions for [the beneficiary] as an accountant, a response to your RFE from June 3, 2008 is not necessary.” With this letter, previous counsel submitted a new support letter from the petitioner that states:

After recent review of our business activities, we came to a conclusion that it will be more beneficial for the company to utilize [the beneficiary]'s skills as a Computer Systems Analyst, rather than as an Accountant, at this stage in the company's growth. . . . [O]ur system of record keeping and accounting is quite obsolete, and we think that a new computerized system needs to be fully developed and in use before we bring in a full time accountant. We would like [the beneficiary] to design and develop such system.

Previous counsel also submitted new forms for the position of a computer systems analyst, including a new LCA, certified on July 14, 2008, after the date the petition was initially submitted. The revised position description stated that:

[The beneficiary] will be choosing and configuring hardware and software for this purpose and will devise ways to apply existing systems' resources to additional tasks. He will specify the inputs that the system will access, decide how the inputs will be processed, and format the output to meet our needs. Once we

approve the system, he will choose computer hardware and software to set it up. He will coordinate tests and will observe use of the system. He will diagnose problems, recommend solutions, and determine whether program requirements have been met. He will work to make the system compatible with our client's systems and will oversee its use.

The petitioner declined the opportunity provided by the RFE to provide substantive evidence demonstrating that the proffered position is a specialty occupation

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director also stated that he would not consider the documentation submitted in response to the RFE and, in making a determination about whether the proffered position constitutes a specialty occupation, would only review the evidence of record based on the documents submitted initially with the H-1B petition because the petitioner cannot change the job title and duties after the filing date and, moreover, under 8 C.F.R. § 214.2(h)(4)(i)(B)(1), before filing an H-1B petition, the petitioner must obtain a certification from the Department of Labor that it has filed an LCA in the occupational specialty in which the beneficiary will be employed.

In the denial, the director also found that "the position offered appears to be that of a bookkeeper and little or no computer system analyst duties. Since there are no defined standards for entry into most bookkeeper career[s], the position offered does not qualify as a specialty occupation and a baccalaureate or higher degree is not a normal minimum requirement for entry into bookkeepers/accounting field."

The director further found that "the evidence of record does not establish that the beneficiary is qualified to perform services in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the act."

On appeal, new counsel for the petitioner provides as follows:

Due to poor prior counsel, the Service's Request for Evidence was answered with a new LCA for a Computer Systems Analyst. The Service states that the beneficiary does not have the required combination of education and experience as a Computer Systems Analyst; however, this is not what we seek. The Service properly stated that the petitioner cannot change job title and duties after the filing date, and we do not seek a change at this time. We respectfully request consideration on the record for the specialty occupation of Accountant (with IT related work). The Beneficiary, as demonstrated by the record, is clearly qualified to hold this specialty occupation position.

Counsel asserts that the proffered position is a specialty occupation because it is that of an accountant and that the information provided by the petitioner with the submission of the petition is sufficient to establish that the proffered position is that of an accountant. Counsel further argues that

the beneficiary is qualified to perform in the duties of a specialty occupation and, for the first time on appeal, submits an education evaluation, which evaluates the beneficiary's three years of undergraduate coursework together with 14 months of additional computer education courses as equivalent to "an individual with a Bachelor of Business Administration Degree with a Computer Science minor from an accredited college or university in the United States," and states that the beneficiary is qualified to perform in the duties of a specialty occupation under *Button Depot, Inc. v. U.S. Dept. of Homeland Security*, 386 F. Supp. 2nd 1140 (C.D. Cal. 2005).

The AAO notes, and counsel agrees on appeal, that the petitioner cannot change the nature and title of the proffered position to a computer systems analyst by submitting a new or amended petition in response to the RFE. Therefore, the request by the petitioner and prior counsel to classify the proffered position as a computer systems analyst in response to the RFE will not be considered on appeal. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The analysis of this criterion therefore will primarily be based on the job description submitted with the initial petition.

However, the AAO further notes that any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Therefore, without documentation evidencing ineffective assistance of counsel as provided above, the AAO will still consider the information (or the lack of information) provided by the petitioner in response to the RFE where it is relevant to determining whether the initially proffered position of accountant (with IT related work) constitutes a specialty occupation.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, 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)).

On appeal, new counsel for the petitioner argues that the proffered position most closely resembles the position of accountant in the *Handbook*. However, the AAO agrees with the director that the proffered position most closely resembles that found under the *Handbook*'s section on bookkeeping, accounting, and auditing clerks.

The *Handbook*'s 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 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.

* * *

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.*

(Emphasis added.) In short, a number of the duties described above closely resemble those of the proffered position as described by the petitioner with the initial filing.

The RFE requested additional documentation with respect to additional details regarding the proffered position. It also stated:

The evidence submitted does not establish that the job offered qualifies as a “specialty occupation”, i.e. an employee holding at least a baccalaureate degree in a related field. While positions in the field of Accounting such as Accountant, are generally associated with specialty occupation positions, the evidence submitted describing the position itself, as it relates to your business operations, does not demonstrate the preponderance of the beneficiary’s job duties will be so complex that they could be considered professional in nature.

This additional evidence requested by the director was requested by USCIS in order to determine whether the proffered position was a specialty occupation as insufficient information was provided initially. When the petitioner declined to respond to the RFE request, it precluded the director from following a material line of inquiry with respect to whether the proffered position constitutes a specialty occupation.

Moreover, in response to the RFE, the petitioner stated, “We think that a new computerized system needs to be fully developed and in use before we bring in a full time accountant.” This means that the petitioner, by its own admission, does not have sufficient work and resources to justify the hiring of a full-time accountant. The AAO therefore concludes with the director that the proffered position is that of a bookkeeping clerk.

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.

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.

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 petitioner and counsel have not submitted any advertisements or other documentation to establish its degree requirement as an industry norm. 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 in the earlier discussion about the generalized descriptions 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 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. 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). Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO does not need to examine the issue of the beneficiary's qualifications because the petitioner has not provided sufficient documentation to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the AAO has determined that the proffered position is not that of an accountant or auditor and, therefore, the AAO need not address counsel's argument that the beneficiary qualifies for the proffered position under *Button Depot, Inc. v. U.S. Dept. of Homeland Security*, 386 F. Supp. 2nd 1140. As such, the AAO need not address the beneficiary's qualifications further. However, the AAO notes that, as the evaluation submitted is based, in part, on at least one education document that was cancelled, it is not acceptable in evidencing that the beneficiary has the equivalent of a U.S. bachelor's degree.

Moreover, beyond the decision of the director, the AAO finds that the appeal must be dismissed and the petition denied for each of the following reasons not addressed by the director.

The petition must be denied because, as discussed above, by declining to provide the evidence requested in the RFE regarding the accountant (with IT related work) position specified in the Form I-129, the petitioner denied USCIS evidence material to its proper determination of whether the proffered position qualifies as a specialty occupation. As stated at 8 C.F.R. § 103.2 (b)(14), "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition."

The petition must also be denied because, in its RFE response, the petitioner through its counsel renounced the position specified in the petition as inaccurate and attempted to amend the petition by specifying a materially different position – computer systems analyst – as the object of H-1B classification. It is noted that the petitioner's RFE response included a new Form I-129 for the newly specified position and an LCA for such position. However, the purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). As discussed earlier, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner

must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

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

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.