

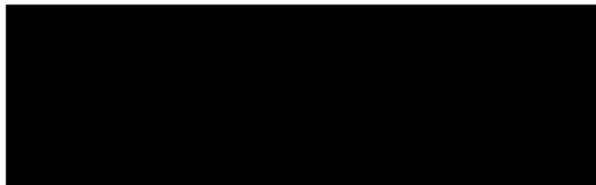
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **OCT 08 2010**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

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 \$585. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant and claims to have fifty employees. It 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 determining that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's April 28, 2009 request for additional evidence (RFE); (3) the petitioner's May 26, 2009 response to the director's request; (4) the director's June 5, 2009 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 issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. 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 seeks the beneficiary's services as an accountant. In a letter of support dated March 24, 2009, petitioner claimed that the beneficiary's job duties included the following:

- Prepare reports, which summarize and forecast business activity and financial position in areas of income, expenses and earnings and compile information from various corporate documents or personal documents – includes tax planning and tax strategies. 20% of the time will be devoted to this task;

- Prepare, examine, and analyze accounting records, financial statements, and other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards[.] 25% of the time will be devoted to this task;
- Develop, implement, modify and document recordkeeping and accounting systems, making use of current computer technology. 15% of the time will be devoted to this task;
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to protect future revenues and expenses or to provide advice. 20% of the time will be devoted to this task;
- Report to management regarding the finances of establishment. 10% of the time will be devoted to this task;
- Advise management and ensure the company complies with periodic tax payments, reporting, and other tax requirements. 10% of the time will be devoted to this task.

In the RFE issued on April 28, 2009, the director requested additional information to establish that the proffered position was in fact a specialty occupation. Specifically, 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 submitted a one-page cover letter along with copies of job postings for accountant positions, tax documents, and an employee list for the petitioner. Counsel's letter, dated May 26, 2009, briefly addressed the director's requests and discussed the evidence submitted. Counsel stated that based on the job postings provided, "it is common in the industry for similarly situated businesses to hire in-house accountants. Counsel further claimed that in the past, it used contracted accounting services such as [REDACTED]" which prepared its 2008 corporate tax return. Finally, counsel referred to a printout from the petitioner's website as evidence of the company profile.

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 found that the petitioner had not demonstrated that the level, scope, and complexity of the petitioner's business actually required an individual with a bachelor's degree to fill the proposed position. The director noted that its failure to provide job postings from similar companies in the industry which required a bachelor's degree as a prerequisite for an accounting position, as well as the petitioner's lack of hiring accountants in the past, raised questions regarding the validity of the claim that a person possessing a bachelor's degree was mandated to fill the proffered position in the petitioner's restaurant. 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*, the *Occupational Information Network O*NET Online (O*NET)*, and the *Occupational Employment Survey/Standard Occupational Classification (OES/SOC)* under Code 43-3031 in

support of this contention. Counsel further asserts that “when preparing the job description for the position in question, both the Petitioner and attorneys relied on the [REDACTED].” In conclusion, counsel challenged the director’s finding that the job postings provided were not from similar companies in the industry, noting that all postings were for restaurants. No additional documentary evidence is submitted.

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)(I) which requires that a baccalaureate or higher degree or its equivalent in a specific specialty is 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 entry requirements of particular occupations, reports the industry normally requires a degree.

The petitioner has stated that the proffered position is that of an accountant. To determine whether the duties of the proffered position support the petitioner's characterization of its 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:

record and analyze the financial information of the companies for which they work. Among their other responsibilities are budgeting, performance evaluation, cost management, and asset management They analyze and interpret the financial information that corporate executives need 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 or as an accounting position normally requiring at least a bachelor’s degree in accounting. 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:

¹ *Occupational Outlook Handbook*, 2010-2011 Edition, at www.bls.gov/oco/ocos001.htm.

Capable accountants and auditors may advance rapidly; those having inadequate academic preparation may be assigned routine jobs and find promotion difficult. Many graduates of junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to positions with more responsibilities by demonstrating their accounting skills on the job.

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 it relied on the *Handbook* and *O*Net* when compiling the description of the proffered position submitted into the record. Counsel concludes that its description of the proffered position complies with the descriptions of accounting positions as described in these sources, and therefore claims the petitioner has satisfied its burden of proof. This unsupported assertion is not persuasive. It is insufficient for the petitioner to simply conclude that the proffered position is a specialty occupation and cite generally to the *Handbook* and *O*Net* to support the assertion. In other words, the petitioner cannot adopt the generalized language of the *Handbook* and *O*Net* as its own when describing the proffered position without also specifying the actual day-to-day duties of the beneficiary. As the AAO is required to evaluate the nature of the proposed position in light of its specific duties as well as organizational complexity of the petitioner, failure to provide this information prevents a necessary and material line of

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.

inquiry. To allow otherwise would permit the petitioner to self-impose a degree requirement on any specialty occupation.⁴

To determine whether the accounting knowledge required by the proffered position rises above that which may be acquired through experience or an associate's degree in accounting, the AAO turns to the record for information regarding the nature of the petitioner's business operations. While the size of a petitioner's business is normally not a factor in determining the nature of a proffered position, both level of income and organizational structure are appropriately reviewed when a petitioner seeks to employ an H-1B worker as an accountant, as correctly noted by the director. 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 minimum level of financial knowledge that may be obtained only through a baccalaureate or higher degree in accounting or its equivalent.

On Form I-129, the petitioner indicated that it was established in 1973. It further indicated that it employed 50 persons and had a gross annual income of \$2 million. 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 \$1,596,230 for 2008. However, the petitioner's quarterly tax returns submitted for each quarter of 2008 indicated that the petitioner employed no more than 14 persons each quarter. Specifically, the employee numbers are as follows:

1 st Quarter 2008:	14 employees
2 nd Quarter 2008:	13 employees
3 rd Quarter 2008:	13 employees
4 th Quarter 2008:	11 employees

These quarterly returns contradict the petitioner's claim made on the Form I-129 under penalty of perjury that it employs 50 people. Despite submitting an employee roster, which lists 46 persons, the record is devoid of evidence to corroborate this claim. No additional documentation, such as evidence of payment to these persons as independent contractors on IRS Form 1099, was submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or

⁴ In this instance it is noted that 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. Moreover, the AAO notes that [REDACTED] - Accountants only states that most but not all of these occupations require a four-year bachelor's degree. The quote does not reference any specific specialty for the degree. Further, the provided [REDACTED] indicates that 12 percent of respondents do not even have a bachelor's degree, much less a bachelor's degree in a specific specialty. As such, even if the proffered position were determined to be an accountant position, it cannot be concluded based on the *Handbook* or *O*Net* 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.

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).

Therefore, the AAO concludes that, at the time of filing, the petitioner operated a small restaurant with one location and employed 11 persons. Consequently, 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 director's request for evidence, the director requested that the petitioner provide evidence of the industry standard as it relates to a similar type and size company and whether those companies required the services of an accountant and whether those companies required a baccalaureate degree for the accounting position. In response, counsel for the petitioner submitted four job postings for the position of accountant from the following restaurants:

The director found, and the AAO concurs, that these job postings were not from similar organizations in the petitioner's industry. As discussed above, the evidence demonstrates that the petitioner is a restaurant with one location and a staff of eleven persons. In addition, the petitioner's restaurant appears to be at most a small, single location restaurant operation. The posting for the position a professional services company providing food services, facilities management, and uniform and career apparel to various industries, is clearly distinguishable from the petitioner's restaurant. In addition, the three remaining restaurants for which job postings were submitted are full-service, national restaurants with multiple locations in different states. These companies are not organizations similar to the petitioner, and therefore the accounting positions at these companies are not parallel to the proffered position in this matter. The petitioner has failed to establish the first prong of the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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 detailed information related to its financial operations or its business dealings 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. Merely claiming that the company needs an accountant to perform complex work is insufficient. Simply going on the 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)). 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, in response to the director's request for evidence, asserted that the petitioner had never employed an accountant on a full-time basis. Therefore, since the petitioner has not established that it previously employed a degreed accountant in the proffered position, it has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 March 24, 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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