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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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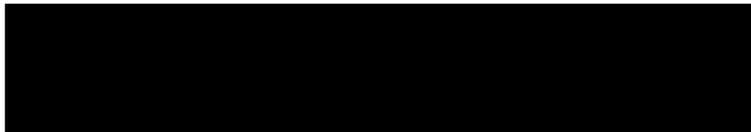


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Date: Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 131 51317

NOV 01 2011

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 \$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,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center recommended the denial of the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the decision of the director. The petition will be denied.

The petitioner is a for-profit, enterprise engaged in the fish market business. The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on April 2, 2009. At that time, the petitioner indicated that the company consisted of ten employees and had a gross annual income of approximately \$1.5 million and a net annual income of approximately \$75,000.

Seeking to continue to employ the beneficiary in what it designates as an accountant position, the petitioner filed this H-1B petition in an endeavor to continue to classify her 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, concluding that the petitioner failed to establish that the proffered position is 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 RFE; (4) the director's denial letter; (5) the Form I-290B and brief submitted by counsel along with supporting materials, which the service center adjudicated as a motion to reopen and reconsider; (6) the director's Dismissal of the Motion to Reopen and Reconsider; and (7) the Notice of Certification. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO concurs with the director that the petitioner has not established that the proffered position qualifies as a specialty occupation within the meaning of the controlling statutory and regulatory provisions. Accordingly, the decision certified to the AAO will be affirmed, and the petition will be denied.

The primary issue before the AAO is 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 Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one requiring the following:

- (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 the following:

An occupation which requires [(1)] 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 [(2)] 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 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as an accountant to “analyze financial information and prepare financial reports to determine or maintain and analyze budgets.” In a letter of support dated March 26, 2009, the petitioner states that the beneficiary will be employed to perform the following duties:

- Advise management about the compensation, employee health care benefits, design accounting and data processing systems, long-range tax plans, resource utilization, tax strategies, and the assumptions underlying budget forecasts;
- Analyze business operations, trends, costs, revenues, financial commitments, and obligations, to project future revenues and expenses;
- Appraise, evaluate, and inventory real property and equipment;
- Record information such as the description, value, and location of property;
- Compute taxes owed and prepare tax returns, ensuring compliance with payment, reporting, or other tax requirements;
- Develop, implement, modify, and document recordkeeping and accounting systems, making use of current computer technology;
- Develop, maintain, and analyze budgets, preparing periodic reports that compare budgeted costs to actual costs;
- Prepare forms and manuals for accounting and bookkeeping personnel, and direct their work activities; and,
- Prepare, examine, and analyze accounting records, financial statements, and other financial reports to assess accuracy, completeness, and conformance to reporting and procedural standards.

The petitioner also indicates “a candidate for the position of Accountant is required to possess related field and relevant professional experience, or at least a Bachelor’s Degree in Business.”

On April 14, 2009, the director requested additional information from the petitioner to demonstrate that the proffered position is a specialty occupation, including evidence that a bona fide job for an accountant exists. The director also requested evidence pertaining to the beneficiary’s qualifications and nonimmigrant status.

In response to the RFE, the petitioner provided documentation that was submitted in 2007 to the

U.S. Department of Labor (DOL) in response to an audit of an Application for Permanent Employment Certification (Form ETA 9089) for an accountant position. Counsel indicated that the documents were submitted to DOL to address the issue of why the petitioner needed a full-time, in-house accountant.

The petitioner also provided a statement indicating that the company hired the beneficiary, who is the owner's niece, in 2007 and that the company also employs three part-time, external certified public accountants. In addition, an organization chart was provided, and counsel indicated that the beneficiary supervises three employees (two clerks and a person dealing with payables) who are "involved for helping in getting the accounting information." Counsel indicated that Microsoft Excel and QuickBooks software are used to compile the accounting information.

The petitioner also provided invoices dated from 2007 to 2009 from the three certified public accountants; a payroll report (issued by [REDACTED] and additional documentation relating to the petitioning company (including tax related documents, licenses and documentation regarding commercial transactions).

The RFE response also included the beneficiary's resume, copies of her educational credentials, and a copy of her passport. On her resume, the beneficiary listed her job duties with the petitioner (since April 5, 2007) as the following:

- Directly reports to the owner;
- Maintaining accurate financial records and preparing clear and accurate reports for informational [sic];
- Reconciles general ledger and subsidiary accounts;
- Monitors grant revenues and expenditures;
- Checking the costs of the supplies and advising the owners of any possible cut down costs and expenditures.

It is important to note that the AAO finds that the above duties, as described by the beneficiary herself, are not indicative of a position whose performance would require the theoretical and practical application of at least a bachelor's degree level of knowledge in accounting or a closely related specialty. Rather, they relate generic accounting-type functions for which the particular level of accounting knowledge to be applied is not self-evident.

The director noted discrepancies in the petition and evidence and found that the petitioner failed to establish that it would comply with all of the terms and conditions as stated in the petition. The director denied the petition, finding that the petitioner had not satisfied the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualified for classification as a specialty occupation. Further, the director indicated that although the petitioner had titled the proffered position as an accountant, an analysis of the proposed job duties and evidence reflected the duties were more closely associated with the duties of a bookkeeper, as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*.

On August 31, 2009, counsel for the petitioner submitted a response to the denial. Counsel contends that the director should have approved the Form I-129 because it had previously approved similar petitions involving the same parties. Furthermore, counsel states that the director erred in determining that the position does not qualify as a specialty occupation. Counsel maintains that the duties of the proffered position fall under the section in the *Handbook on Accountants and Auditors* and that the proffered position does not fall within the category of Bookkeeping, Accounting and Audit Clerks.

Prior approvals do not preclude USCIS from denying an extension:

As a preliminary matter, the AAO will first address counsel's assertion that the H-1B petition should have been granted because it is an extension of status involving the same parties for the same or similar position. Counsel references an April 23, 2004 memorandum authored by William R. Yates, USCIS Associate Director for Operations, on the subject of extensions to support his assertion.¹

The referenced Yates memorandum does not require an approval of an extension petition when the facts of the record do not demonstrate eligibility pursuant to the statute and regulations. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decisions. 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. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they 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'r 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 eligibility for the benefit sought. *See 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

¹ Counsel refers to the memorandum from William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3, (April 23, 2004).

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 AAO further notes that, as expressly stated in its closing paragraph, the Yates memorandum is merely a guidance document that does not have the binding force of a regulation. That paragraph reads:

This memorandum is intended solely for guiding USCIS personnel in performance of their professional duties. It is not intended to be, and may not be relied upon, to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

DOL and USCIS actions related to a Form I-140 petition are not relevant to this proceeding:

Counsel also contends that the H-1B petition should be approved because an Immigrant Petition for Alien Worker (Form I-140) was approved by USCIS for an accountant position involving the petitioner and beneficiary. The Form I-140 was based upon an Application for Permanent Employment Certification (Form 9089) that was certified by DOL.²

The AAO finds no merit in counsel's contention. Counsel cites no statutory or regulatory authority, case law, or precedent decision to support it. Moreover, neither the statutory nor regulatory provisions governing USCIS adjudication of Form I-129 H-1B specialty-occupation petitions provide for the approval of an H-1B specialty-occupation petition on the grounds argued by the petitioner's counsel, or even indicate that USCIS decisions on Form I-140 adjudications are relevant to USCIS adjudications of Form I-129 H-1B specialty-occupation petitions. Further, as reflected in the excerpt below from the DOL regulation at 20 C.F.R. § 655.705(b), the administrative determination as to whether a proffered position qualifies as a specialty occupation is a matter solely within the independent purview, responsibility, and authority of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS), and thus a DOL certification is not material to a USCIS determination of the merits of a claim that a position qualifies as an H-1B specialty occupation. The regulation at 20 C.F.R. § 655.705(b) states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA [(Labor Condition Application)] attached. In doing so, the DHS determines whether the petition is supported by an LCA which

² The petitioner did not provide copies of the *certified* Form ETA 9089 and the Form I-140 petition. However, based upon the evidence that was provided, it appears there are a number of differences between the accountant position listed on the Form ETA 9089 and Form I-140 and the position listed on the H-1B petition, including the salary, specific duties, supervisory responsibilities, and education and experience requirements.

corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.

Further, as also indicated in the above excerpt, the DOL document related to H-1B petitions is a Labor Condition Application, not an Application for Permanent Employment Certification.

The proffered position is not a specialty occupation:

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).

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires that a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position.

The AAO recognizes the *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.³

Counsel claimed that the duties of the proffered position fall under the section in the *Handbook* on Accountants and Auditors and that the proffered position does not fall within the category of Bookkeeping, Accounting and Audit Clerks.

Counsel provided copies of prevailing wage determinations dated February 23, 2007 and June 21, 2007 and stated that the requirement of a four-year bachelor's degree in accounting or a related field was not found to be excessive by the State Workforce Agency (SWA) officer, who assigned the position the SOC/O*Net code and title associated with Accountants and Auditors.⁴ However, it is noted that the criteria used by a SWA officer in making a prevailing wage determination does not correspond to the statutory and regulatory requirements for establishing that a position qualifies as a specialty occupation for H-1B nonimmigrant classification. Moreover, as earlier noted in this decision's comments referencing 20 C.F.R. § 655.705(b), adjudication of H-1B petitions is the sole responsibility of USCIS, and within its sole authority. Additionally, counsel presents neither statutory nor regulatory authority, nor USCIS precedent

³ All of the AAO's references are to the 2010-2011 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

⁴ A SOC/O*Net code is assigned by an officer based upon a review of the job duties, minimum education and experience requirements, as well as any special requirements. It is noted that a review of the prevailing wage determinations submitted by the petitioner indicate that the positions are not identical to the position described in this H-1B petition, including the salary, supervisory responsibilities, and education and experience requirements. Moreover, the job duties were not listed on the prevailing wage determinations. Instead, counsel wrote "See original prevailing wage request form for job description." It is not clear which job duties were provided to the officer making the determinations.

decisions, nor federal case law for the proposition that a SWA determination is material to USCIS determinations regarding whether a particular position qualifies as a specialty occupation.

In his brief, counsel reiterated the duties listed in the petitioner's letter dated March 26, 2009 and stated that the proffered position does not involve the reconciling of daily receipts, performing bookkeeping and clerical duties or processing the payroll. Counsel further clarified that the petitioner employs cashiers and clerks who process the daily receipts and perform bookkeeping and clerical duties and that the petitioner's payroll is processed by [REDACTED] (an external service). He indicated that the beneficiary oversees the payroll service provider and submitted part of a Client Service Agreement, dated September 28, 2007, between the petitioner and [REDACTED] (It is noted that the Agreement lists someone other than the beneficiary as the contact person.) Counsel also stated that the beneficiary develops policies and guidelines for the bookkeeping personnel and analyzes the business operations of the owners and reports her findings.

Counsel stated the beneficiary also drafts all of the financial filings and prepares income tax returns for the petitioner. He indicated that the beneficiary is not authorized to sign the tax returns because she is not a certified public accountant. Counsel indicated that external certified public accountants are retained by the petitioner to review and sign the financial statements prepared by the beneficiary. As evidence, the petitioner provided one invoice issued by [REDACTED] on 6/27/2007 for services including "[r]eview financial statements prepared by the client's accountant for the calendar year 2006." No further documentation was provided. *Money Services Business* is a separate legal entity from the petitioning company. It is noted that an alien in H-1B status is only authorized to work for the petitioning company. The beneficiary is not authorized to work for other entities.

Counsel did not provide sufficient evidence that the beneficiary will perform the duties for the petitioner as described. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As already noted, the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. The two sections of the *Handbook* most relevant to this proceeding are the chapters "Bookkeeping, Accounting, and Auditing Clerks" and "Accountants and Auditors."⁵

⁵ For these chapters, see Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2010-11 Edition*, Bookkeeping, Accounting, and Auditing Clerks, on the Internet at <http://www.bls.gov/oco/ocos144.htm> (visited October 19, 2011) and Accountants and Auditors at <http://www.bls.gov/oco/ocos001.htm>. (also visited October 19, 2011).

The AAO finds that the discussions of both accountants and bookkeeping clerks in the *Handbook* encompass the petitioner's vaguely described duties, and both occupations require some understanding of accounting principles. However, the question is not whether the petitioner's position requires some knowledge of accounting principles, but rather whether it is one that normally requires the level of knowledge that is signified by at least a bachelor's degree, or its equivalent, in accounting or a closely related specialty.

Furthermore, despite the petitioner's assumption to the contrary, accountants do not comprise an occupational group that categorically requires at least a bachelor's degree, or the equivalent, in a specific specialty. The *Handbook* indicates that accountants do not constitute an occupational group that categorically requires a specialty-occupation level of education, that is, at least a U.S. bachelor's degree, or the equivalent, in a specific specialty.

The introduction to the "Training, Other Qualifications, and Advancement" section of the *Handbook's* chapter on accountants states "[m]ost accountants and auditors need at least a bachelor's degree accounting or a related field." *Id.* This does not support the view that any accountant job qualifies as a specialty occupation. "Most" is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I)), or that a particular accountant position is so specialized and complex as to require knowledge usually associated with attainment of a baccalaureate or higher degree in a specific specialty (the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).⁶ Further, the "Education and training" subsection of the aforementioned section of the *Handbook* includes the following statement:

Some graduates of junior colleges or business or correspondence schools, as well as bookkeeping and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to accountant positions by demonstrating their accounting skills on the job.

In this context, the fact that a person may be employed in a position designated as that of an accountant and may apply some accounting principles in the course of his or her job is not in itself sufficient to establish the position as one that qualifies as a specialty occupation. Thus, it is incumbent on the petitioner to provide sufficient evidence to establish that the particular position that it proffers would necessitate accounting services at a level requiring the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in accounting. To make this determination, the AAO turns to the record for information regarding the duties and the nature of the petitioner's business operations. In matters where a petitioner's business is relatively small, the AAO reviews the record for evidence that its operations are, nevertheless, of sufficient complexity to indicate that it would employ the beneficiary in an accounting position requiring a level of knowledge that may be obtained only through a baccalaureate degree or higher in accounting or its equivalent.

⁶ For instance, the first definition of "most" in *Webster's New Collegiate College Dictionary* 731 (Third Edition, Hough Mifflin Harcourt 2008) is "Greatest in number, quantity, size, or degree."

The AAO notes that the job duties of the proffered position are described in terms of general functions, which, the AAO finds, do not convey either the substantive nature of either the specific matters upon which the beneficiary would focus or the practical and theoretical level of accounting knowledge that the beneficiary would have to apply to those matters. Furthermore, the record of proceeding fails to establish that the duties to be performed by the beneficiary would require the practical and theoretical application of a highly specialized accounting knowledge attained by at least a bachelor's degree, or the equivalent, in accounting, as required by the Act and its implementing regulations regarding a position's qualification as an H-1B specialty occupation.

The *Handbook's* description of bookkeeping, accounting, and auditing clerks provides in pertinent part:

Bookkeeping, accounting, and auditing clerks are financial record keepers. 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.

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's* chapter 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, 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 analysis will be on whether the proffered position is that of a public or management accountant.

According to the *Handbook*:

Public accountants perform a broad range of accounting, auditing, tax, and consulting activities for their clients, which may be corporations, governments, nonprofit organizations, or individuals. For example, some public accountants concentrate on tax matters, such as advising companies about the tax advantages and disadvantages of certain business decisions and preparing individual income tax returns. Others offer advice in areas such as compensation or employee healthcare benefits, the design of accounting and data processing systems, and the selection of controls to safeguard assets. Still others audit clients' financial statements and inform investors and authorities that the statements have been correctly prepared and reported. These accountants are also referred to as external auditors. *Public accountants, many of whom are Certified Public Accountants (CPAs), generally have their own businesses or work for public accounting firms.*

* * *

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.

Under the *Handbook's* description, it therefore appears to be unusual for small businesses to employ a public or management accountant, since public accountants are usually CPAs with their own business or employed by accounting firms, while 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 to require the services of a person with at least a bachelor's degree in accounting or a closely related specialty, or the equivalent, to perform the duties of an accountant on a full-time basis.

The record reflects that the petitioner has used external certified public accountants for several years and intends to continue doing so in the future. The proffered job duties as described by the petitioner are generalized and generic. As such, they do not establish that their performance requires the theoretical and practical application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. While the AAO acknowledges that some of the duties described by the petitioner are similar to those under the section on accountants and auditors in the *Handbook*, it here incorporates and reiterates by reference its earlier comments in this decision regarding the lack of evidence substantiating the nature and educational level of accounting knowledge that would be required for the actual performance of the beneficiary's work. Therefore, even if viewed as falling within the general occupational subcategory of management accountant, the petitioner has failed to establish that the beneficiary's actual work in that capacity would require at least a bachelor's degree, or the equivalent, in accounting or a closely related specialty.

The AAO also finds that, to the extent the proffered position and its duties are described and documented in the record of proceeding, the proffered position more closely resembles the positions described under the *Handbook* 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 short, for the reasons discussed above, the *Handbook* does not support the contention that the proffered position qualifies as a specialty occupation.

It is further noted that the petitioner indicated in its March 26, 2009 letter of support that the duties of the position could be performed by an individual who “possesses related field and relevant professional experience, or at least a Bachelor’s Degree in Business.” To demonstrate that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

In addition to establishing that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must also demonstrate that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study. As explained above, USCIS interprets the supplemental degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) as requiring a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor’s degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). Thus, the fact that the petitioner finds an undifferentiated bachelor’s degree in business acceptable for the position is further reason for affirming the director’s decision to deny the petition.

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 that the proffered position does not belong to an occupational classification for which there is a categorical requirement for at least a bachelor’s degree in a specific specialty, and as the duties of the proffered position as described in the record of

proceeding do not indicate that the proffered position in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum requirement for entry, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO reviews the record regarding the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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. at 1102).

As reflected in the discussion above, 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. Furthermore, the petitioner has not provided any documentation to indicate that the industry's professional association has made a degree a minimum entry requirement.

Counsel claims that the duties of the position are "complex and unique to the petitioner and similarly situated employers such as [REDACTED] as well as other employers such as Wailea employ full-time Accountants, requiring [a] bachelor's degree as [the] minimum requirement." In support, the petitioner provided two affidavits and a newspaper advertisement.

Affidavits were provided by the owners of [REDACTED]. Both owners indicate that their businesses sell fish. The affidavits are almost identical and state the following: "I have hired an accountant since 2007 Based on my experience, if I would not have had an Accountant working in my company, I would have had several tax problems with the IRS. Since the high volume of commercial transactions with our customers, we need an in-house accountant for every day accounting matters in our company."

The newspaper advertisement is dated March 26, 2006 (approximately three years prior to the filing of the Form I-129) and indicates that [REDACTED] was searching for an Accounting Manager "to be responsible for the Company's financial functions related to Gold and Tennis Operations and to supervise the Accounting Department." It is noted that a review of [REDACTED] website indicates that it is part of [REDACTED]. The website states the following: "[s]panning some 1,500 acres in sunny South Maui, this luxurious resort encompasses six world-class hotels, superbly appointed condominiums and villas, exceptional private homes, five crescent beaches, an award-winning tennis club, fabulous shopping, and of course, [REDACTED] three renown golf courses."

A review of the documents provided does not demonstrate that organizations similar in size and scope to the petitioner (i.e., a for-profit, enterprise engaged in the fish market business that employs approximately 10 persons) routinely employ degreed accountants. There are too few affidavits and/or advertisements to establish an industry-wide standard. Furthermore, the affidavits and advertisement are devoid of any information regarding the size, scope, scale of operations, business efforts and expenditures of the companies, thereby rendering it impossible to conduct a legitimate comparison of business operations. Moreover, the affidavits do not include the duties and requirements for the positions. The affidavits do not indicate whether a college degree is required in a specific discipline. Additionally, it is noted that the newspaper advertisement is for a different position (Accounting Manager) for a dissimilar business (golf course), whose size and number of employees appear to far exceed the petitioner's.

The documents provided do not establish that a degree in accounting is the norm for entry into positions that are (1) parallel to the proffered position; and, (2) located in organizations similar to the petitioner. For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner shows that the particular position proffered in this petition is "so complex or unique" that it can be performed only by an individual with at least a bachelor's degree in a specialty occupation.

As noted above, counsel claims that the duties of the proffered position are "complex and unique to the petitioner and similarly situated employers such as [redacted] as well as other employers such as Wailea employ full-time Accountants, requiring [a] bachelor's degree as [the] minimum requirement." However, the petitioner failed to provide sufficiently detailed information or documentary evidence to distinguish the proffered position as more complex or unique than other accounting positions that require the application of accounting principles, but that are not at a level that requires at least a bachelor's degree, or the equivalent, in accounting or a closely related specialty. Accordingly, the petitioner failed to establish that the position is so complex or unique that it can only be performed by an individual who has attained at least a bachelor's degree, or the equivalent, in accounting or a related specialty or its equivalent. Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The third criterion entails an employer demonstrating that it normally requires a degree or its equivalent for the position. The AAO usually reviews the petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position. In the instant matter, the petitioner indicated that it had not previously hired an internal accountant. Therefore, the evidence does not establish a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, 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 the specific 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.

Counsel claims that the duties of the position are so specialized and complex that the duties can only be performed by an individual with a bachelor's degree because of tax difficulties that the petitioner encountered in 2005 and 2006. Furthermore, counsel asserts that there is further complexity to the position because the owners of the petitioning company have other businesses and that the position must take into account the financial condition of the other businesses, as well as the personal finances of the owners. Counsel claims "the duties of the [proffered] position with the Petitioner require an aptitude for mathematics and ability to analyze, compare, and interpret financial information, facts and figures quickly and accurately. The Accountant must also be able to clearly communicate the results of financial analysis etc. to management both verbally and in writing." Counsel also states that the petitioner will continue to employ certified public accountants to review and sign the petitioner's financial statements and taxes and perform accounting duties for the other businesses. To support counsel's claim, copies of related tax documents from 2005 to 2007 and a letter from a bank, dated July 2, 2007, were provided.

Simply going on record without providing adequate supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO incorporates by reference and reiterates its earlier discussion about the generalized and generic nature of the petitioner's description of the proposed duties. The petitioner has failed to establish that the duties of the proffered position are sufficiently specialized and complex that performance would require knowledge of accounting at a level associated with at least a bachelor's degree, or the equivalent, in accounting or a related specialty. Insufficient evidence was provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of bookkeeping clerks, accounting clerks, auditing clerks, tax preparers, or other types of employees, including those bearing the title "accountant," who engage in some accounting duties and employ some accounting principles, but not at a level of an accountant applying theoretical and practical knowledge of accounting that is usually associated with at least a bachelor's degree in accounting or a closely related specialty or its equivalent.

The petitioner failed to meet its burden of proof to establish that the duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion 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 any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the director's decision certified to the AAO for review will be affirmed, and the petition will be denied. Beyond the decision of the director, it is noted that the petitioner was asked to provide the dates of all of the time the beneficiary has spent in the United States in H classification on the Form I-129, as well as in response to the director's RFE. The following information was provided:



A review of the record indicates that the incorrect dates were provided to USCIS regarding the period of time that the beneficiary has been in H-1B status in the United States. The beneficiary was granted a change of status to H-1B status on January 4, 2001. A review of the beneficiary's passport indicates that she left the United States in May 2001, obtained an H-1B visa and reentered the United States shortly thereafter. The beneficiary also departed the United States in May 2003, obtained another H-1B visa and reentered the United States in July 2003.

Counsel indicated that the beneficiary reached the maximum period of authorized stay in H-1B status but was able to extend her status in one year increments (in April 2007 and in April 2008) based upon the American Competitiveness in the Twenty-First Century Act (AC21) under section 106(a). Counsel provided a Department of Labor cover letter indicating that a Form ETA 9089 was accepted for processing on September 4, 2007 and certified on October 17, 2007. Counsel also provided a USCIS receipt notice, dated January 29, 2008, for a Form I-140. The Form I-140 was approved on May 17, 2009.

Under certain circumstances, an alien's H-1B nonimmigrant status may be extended if 365 days or more have passed since the filing of a labor certification application or an immigrant petition. In the instant case, it appears that the beneficiary has been in H-1B status since January 4, 2001 and that she reached the maximum period of authorized stay in approximately May 2007 (including recapturing periods of stay when she was outside the United States). There is no evidence in this record of proceeding to indicate that the beneficiary was eligible to extend her H-1B status in April 2007 or in April 2008. Thus, we recommend that the director review the previously approved H-1B petitions and consider whether initiation of revocation action on the affected petitions is appropriate.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.