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U.S. Citizenship
and Immigration
Services

DA



FILE: WAC 04 062 52160 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:
[Redacted]

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a company with more than 130 employees. While it began as a courier service, the petitioner now has multiple business interests, including publishing a weekly Filipino-American news bulletin, providing television programming, and operating a travel business. It seeks to employ the beneficiary, previously approved for H-1B employment, as a multimedia/art director 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial; and (3) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's 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 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 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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.

The petitioner states that it is seeking the beneficiary’s services as a multimedia/art director. Evidence of the beneficiary’s duties includes: the Form I-129; and a December 26, 2003 letter of support prepared by counsel.

As described by counsel at the time of filing, the proffered position would require the beneficiary to:

- Design and formulate materials, guidelines and concepts in videography and print materials for the company;
- Review periodically programs and systems being distributed by the company on print material and video production to determine which is best suitable to specific company needs;
- Develop on a regular basis printed materials to apprise clients of latest trends and creative techniques in videography;
- Examine film and video concepts, data and ideas to determine applicability and advisability of using appropriate computer editing programs; and
- Provide technical advice to the petitioner’s management technical staff on print and video production, and pre-production, and postproduction of film and video and other multimedia problems.

To determine whether the duties just described are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement 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. Factors considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

In his denial the director concluded that the proffered position’s duties reflected the occupation of assistant producers, broadcast technicians, camera operators and video editors, as discussed in the 2002-2003 edition of the *Handbook*. On appeal, counsel contends that the director has mischaracterized the proffered position, referencing the *Handbook*’s discussion of the work performed by art directors in support of his assertions. While the AAO agrees that the duties of the proffered position do not generally describe the employment of assistant producers, broadcast technicians, camera operators or video editors, it also finds that counsel’s characterization of the proffered position as that of an art director fails to recognize that its duties include the hands-on design and development of the petitioner’s informational materials, work that is more closely aligned with the work of graphic designers. Therefore, it finds the proffered position to combine the employment of art directors with that of graphic designers.

As described at page 239 of the 2004-2005 edition of the *Handbook*, art directors:

[d]evelop design concepts and review material that is to appear in periodicals, newspapers, and other printed or digital media. They decide how best to present the information visually, so that it is eye catching, appealing, and organized. Art directors decide which photographs or artwork to use and oversee the layout design and production of the printed material

The work of graphic designers is discussed at page 242 of the *Handbook*:

Graphic designers plan, analyze and create visual solutions to communications problems. They use a variety of print, electronic, and film media and technologies to execute a design that meet clients’ communication needs Graphic designers use computer software to develop the overall layout and production design of magazines, newspapers, journals, corporate, and other publications. They also produce promotional displays and marketing brochures for products and services, design distinctive logos for products and business, and develop signs and signage systems . . . for business and government. An increasing number of graphic designers are developing material for Internet Web pages, computer interfaces, and multimedia projects

The proffered position’s final duty, which indicates that the beneficiary would be required to provide technical advice on video production and the pre-production and postproduction of film and video, appears to fall outside the employment of art directors and graphic designers. Here the work, as described, does appear to be that performed by television, video and motion picture camera operators and editors. (*Handbook* at pages 272-273).

The *Handbook* does not indicate that individuals seeking entry-level employment as camera operators, film or video editors must hold the minimum of a baccalaureate degree or its equivalent (*Handbook* at page 273). Neither does it discuss a degree requirement for employment as an art director, although many colleges and

universities offer programs leading to baccalaureate and master's degrees in fine arts (*Handbook*, at pages 240-241). However, the *Handbook* does state that a bachelor's degree is generally required for entry-level design positions, except for those in floral design and visual merchandising (*Handbook* at page 244). Accordingly, the AAO finds the petitioner to have established the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The petition may not be approved, however, as the record does not reflect that the beneficiary is eligible to perform the duties of the specialty occupation. The beneficiary received a baccalaureate degree in communication from the Ateneo de Manila University, Loyola Schools, in The Philippines, then known as the Ateneo de Manila University School of Arts and Sciences, on March 28, 1998. However, the record contains no evidence that would establish this degree as the equivalent of a U.S. baccalaureate degree required by the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). While the record contains a resume outlining the beneficiary's previous employment, there is no independent evidence of his employment history. Nor is there any evaluation of his employment experience indicating that, when combined with his education, it would provide him with the equivalent of a U.S. degree required by the proffered position. 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

The AAO notes that the record includes an approval notice that indicates the beneficiary was previously approved for H-1B status. However, the fact that CIS previously approved a petition on behalf of the beneficiary does not provide a basis for the approval of the instant petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *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).

Therefore, for reasons related in the preceding discussion, the AAO withdraws the director's decision and remands the petition to him for a decision as to whether the beneficiary qualifies to perform the duties of a specialty occupation. The director must afford the petitioner a reasonable opportunity to submit evidence relating to the beneficiary's qualifications. The director shall then issue a new decision based on the evidence of record as it relates to the statutory and regulatory requirements for H-1B nonimmigrant visa eligibility.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of May 21, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.