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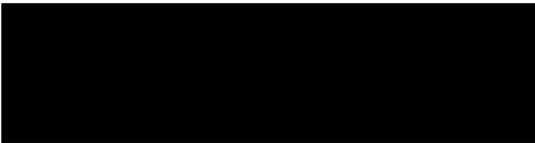
FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:

JUL 01 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:



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, Director
Administrative Appeals Office

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

The petitioner is an air charter company providing service to clients in the United States, Europe, Canada and the Caribbean. It seeks to extend its employment of the beneficiary as a pilot. The director denied the petition based on her determination that the petitioner had failed to establish its proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (4) Form I-290B, with additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

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 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.

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 pilot. Evidence of the beneficiary’s duties includes: the Form I-129 and a March 9, 2004 letter of support from the petitioner. In its letter of support, the petitioner stated that the beneficiary would continue to be responsible for “all facets of the tasks involved with the safe transportation of passengers utilizing the appropriate aircraft for the job at hand,” including:

- Piloting airplanes to transport passengers, adhering to flight plans and regulations and procedures set down by the Federal government, the State, the airport(s) and the petitioner;
- Conducting in-flight tests and evaluations, at specified altitudes, in all types of weather to determine receptivity and other characteristics of equipment and systems;
- Coordinating flight activities with ground-crew and air-traffic control, and informing crew members of flight and test procedures;
- Giving training and instruction in aircraft operations to new pilots and refresher training for experienced pilots;
- Operating radio equipment and contacting the control tower for takeoff, clearance, arrival instructions and other information;
- Planning and formulating flight activities and test schedules and preparing flight evaluation reports; and
- Studying technical manuals of airplane and equipment manufacturers and government regulations affecting flight operations to ensure that the petitioner’s training manuals adhere to legal requirements and are adapted to the type of aircraft.

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 assessing whether the proffered position of pilot normally imposes a degree requirement on those seeking employment, the AAO has relied on the DOL *Handbook's* discussion of the occupation of aircraft pilots and flight engineers. As described in the 2004-2005 edition of the *Handbook*, page 617:

Pilots are highly trained professionals who fly airplanes and helicopters to carry out a wide variety of tasks. Most are *airplane pilots, copilots, and flight engineers* who transport passengers and cargo, but 1 out of 5 pilots is a commercial pilot involved in more unusual tasks, such as dusting crops, spreading seed for reforestation, testing aircraft, flying passengers and cargo to areas not served by regular airlines

Except on small aircraft, two pilots usually make up the cockpit crew. Generally, the most experienced pilot, the *captain*, is in command and supervises all other crew members. The pilot and the copilot . . . share flying and other duties, such as communicating with air traffic controllers and monitoring the instruments. . . .

Before departure, pilots plan their flights carefully. They thoroughly check their aircraft to make sure that the engines, controls, instruments, and other systems are functioning properly They confer with flight dispatchers and aviation weather forecasters to find out about weather conditions en route and at their destination. Based on this information, they choose a route, altitude, and speed

. . . .

The number of nonflying duties that pilots have depends on the employment setting Pilots employed by . . . organizations such as charter operators or businesses have many other duties. They may load the aircraft, handle all passenger luggage to ensure a balanced load, and supervise refueling; other nonflying responsibilities include keeping records, keeping records, scheduling flights, arranging for major maintenance, and performing minor aircraft maintenance and repairwork.

Some pilots are instructors. They teach their students the principles of flight in ground-school classes and demonstrate how to operate aircraft

Regarding the qualifications for employment as a pilot, the *Handbook*, at pages 618-619, states:

All pilots who are paid to transport passengers or cargo must have a commercial pilot's license with an instrument rating issued by the FAA. Helicopter pilots must hold a

commercial pilot's certificate with a helicopter rating. To qualify for these licenses, applicants must be at least 18 years old and have at least 250 hours of flight experience. The experience required can be reduced through participation in certain flight school curricula approved by the FAA. Applicants also must pass a strict physical examination to make sure that they are in good health and have 20/20 vision with or without glasses, good hearing, and no physical handicaps that could impair their performance. They must pass a written test that includes questions on the principles of safe flight, navigation techniques, and FAA regulations, and must demonstrate their flying ability to FAA or designated examiners.

To fly during periods of low visibility, pilots must be rated by the FAA to fly by instruments. Pilots may qualify for this rating by having 105 hours of flight experience, including 40 hours of experience in flying by instruments; they also must pass a written examination on procedures and FAA regulations covering instrument flying and demonstrate to an examiner their ability to fly by instruments.

Airline pilots must fulfill additional requirements. Pilots must have an airline transport pilot's license. Applicants for this license must be at least 23 years old and have a minimum of 1,500 hours of flying experience, including night and instrument flying, and must pass FAA written and flight examinations. Usually, they also have one or more advanced ratings, such as multiengine aircraft or aircraft-type ratings, dependent upon the requirements of their particular flying jobs. Because pilots must be able to make quick decisions and accurate judgments under pressure, many airline companies reject applicants who do not pass required psychological and aptitude tests. All licenses are valid so long as a pilot can pass the periodic physical and eye examinations and tests of flying skills required by Federal Government and company regulations.

The U.S. Armed Forces have always been an important source of trained pilots for civilian jobs Persons without Armed Forces training may become pilots by attending flight schools or by taking lessons from individual FAA-certified flight instructors

Although some small airlines will hire high school graduates, most airlines require at least 2 years of college and prefer to hire college graduates. In fact, most entrants to this occupation have a college degree. Because the number of college educated applicants continues to increase, many employers are making a college degree an educational requirement.

Based on the above discussion, the AAO concludes that all of the proffered position's duties are encompassed within the occupational classification of aircraft pilots and flight engineers, and that such employment does not require those seeking entry-level employment to hold the minimum of a baccalaureate or higher degree, or its equivalent. Instead, such employment appears to require only that an applicant be appropriately licensed and certified under FAA regulations.

On appeal, counsel asserts that this conclusion misreads the discussion provided by the *Handbook*. She contends that such statements as "most airlines prefer to hire college graduates," "most entrants to this occupation have a

college degree,” and “many employers are making a college degree an educational requirement” establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO is not persuaded.

The AAO acknowledges that most employers may prefer to hire college graduates, that many may make a college degree an employment requirement, and that most individuals who become pilots have college degrees. However, these facts do not establish the proffered position as a specialty occupation. While most employers may prefer to hire individuals with degrees, employer preference is not synonymous with the “normally required” language of the first criterion. Further, the *Handbook’s* statements that many employers require college degrees and most newly-hired pilots hold degrees do not indicate that such degrees are directly related to the occupation of pilot. To qualify a position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must establish that the position requires a precise and specific course of study that relates directly and closely to the position in question. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (BIA 1988). The *Handbook’s* statements do not establish such a connection.

On appeal, counsel also submits documentation from the DOL *Online Wage Library* and the *Dictionary of Occupational Titles (DOT)*, noting that the proffered position of pilot has a Specific Vocational Preparation (SVP) rating of 8 and a JobZone rating of 5, indicating that a bachelor’s degree is required for employment. However, the AAO finds neither the *DOT*, nor the *Online Wage Library* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education and experience, and it does not specify the particular type of degree, if any, that a position would require. The JobZone rating of 5 also fails to indicate that a bachelor’s degree in a specific specialty is required.

Having reviewed counsel’s brief and the materials submitted in support of the petitioner’s Form I-129, the AAO concludes that the record does not establish that the proffered position normally imposes a degree requirement on those seeking entry-level employment. The position cannot, therefore, be qualified as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner’s industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

Although counsel contends that the petitioner’s degree requirement is common to its industry in parallel positions among similar organizations – the first prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the record contains no evidence that would support this statement. Nor does it include evidence that would support counsel’s assertion that the proffered position is so complex or unique that it

requires a degree, the second prong of the criterion. The record is equally silent regarding the petitioner's degree requirements for its other pilots and whether it imposed a degree on the proffered position prior to its hiring of the beneficiary, although counsel again asserts that the petitioner's normal hiring practices establish its position as a specialty occupation under the third criterion. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position under either the second or third criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without documentary evidence to support them, the assertions of counsel do not constitute evidence and will not satisfy the petitioner's burden of proof in these proceedings. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988).

To determine whether the proffered position may be established as a specialty occupation under the requirements of the fourth criterion – the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree – the AAO has again reviewed the description of the proffered position provided by the petitioner in its March 9, 2004 letter of support. It does not find, however, that these duties require a higher degree of knowledge and skill than would normally be expected of a pilot or that they represent an amalgam of occupations that would require the beneficiary to possess skills and qualifications beyond those of a pilot. Instead, the evidence of the record establishes that the duties of the proffered position require knowledge and skills commonly associated with the holding of FAA licensure and hands-on experience, rather than a degree in a specific academic specialty. Therefore, the proffered position does not qualify as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the instant petition seeks an extension of employment previously found by CIS to qualify as a specialty occupation. However, prior approval of a visa petition does not preclude CIS from denying an extension of the original petition based on an assessment of the record presented in support of the extension. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO is not bound by the fact that CIS has previously approved the earlier H-1B petition, even if it was filed for the same position as proffered here. If based on the same evidence as contained in the record here before the AAO, that earlier approval constituted material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). 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). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. The AAO is never bound by an erroneous decision of a service center or district director. *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).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.



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