

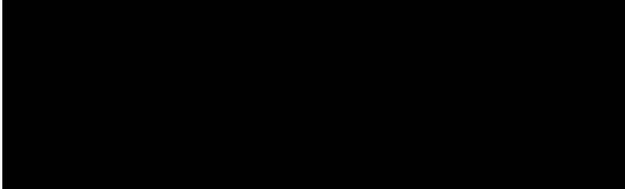


U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 157 53747 Office: VERMONT SERVICE CENTER Date: FEB 23 2006

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a graphic design firm that seeks to employ the beneficiary as a graphic designer. 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 because the petitioner did not establish that the beneficiary would be performing the duties of a specialty occupation. On appeal, counsel submits a brief.

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.

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 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) Form I-290B and supporting documentation; (6) the director's decision rejecting the appeal and treating it as a motion to reopen on the basis of late filing; and (7) the petitioner's response to

the director's decision rejecting the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a graphic designer. Evidence of the beneficiary's duties includes the I-129 petition and the petitioner's April 15, 2003 letter in support of the petition. According to this evidence, the beneficiary would perform duties that entail: studying illustrations to plan presentation of material as a prototype of a product; determining the size and arrangement of illustrative material and copy; selecting style and size of type and arranging layout based upon specifications; drawing sample of finished layout and presenting sample to client for approval; preparing notes and instructions for workers who assemble and prepare final layouts for printing; reviewing final layout and suggesting improvements as needed; and preparing illustrations or rough sketches according to instructions of client. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in graphic design.

The director found that the petitioner, a start-up company, did not establish that it had "sufficient H1B caliber work to keep the beneficiary employed on a full time basis for three years." The director also found that the petitioner failed to respond to his request for additional information regarding the structure of the petitioner's organization. The director asserted that as a one-person business, the beneficiary would be responsible for administrative and clerical duties, which are not specialty occupations. Finally, the director stated that the beneficiary could not "assume the role of Graphic Designer without having the clientele established, work contracts in place and expectations of the position defined. . . [I]n this case the need to perform duties associated with the position do not exist. Without clientele, work contracts and specific duties there is no work."

On appeal, counsel states that the Department of Labor's *Occupational Outlook Handbook (Handbook)* clearly reflects that a graphic designer is a specialty occupation, and that the AAO has previously determined that a graphic designer is a specialty occupation. Counsel states that it appears that the director's "true rationale for denying the petition primarily concentrates on the fact that the petitioner is a new company." Counsel asserts that the director inappropriately raised the concept of speculative employment, which the AAO has previously determined is not a sound basis for denying a petition. Counsel further asserts that the fact that a petitioner may be owned in whole or in part by the beneficiary does not negate that an employer-employee relationship exists.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

The AAO turns first to 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; 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 often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms

"routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The proffered position is a graphic designer. On appeal, counsel provides additional documentation regarding the petitioner's clients and work product, and the beneficiary's duties. Despite the fact that the beneficiary may also be engaged in some administrative tasks as a sole proprietor, most of the duties of the position include those of a graphic designer, which the *Handbook* indicates could not be performed without the training and education that are included in a bachelor's degree in graphic design. The petitioner has, thus, established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The regulations define a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii) as a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.

The petitioner is a limited liability corporation established under the laws of the State of New York and has engaged the beneficiary to work in her individual capacity as a graphic designer. The beneficiary established the corporation. The petitioner submitted an offer of employment to the beneficiary. Counsel has stated that a previous AAO decision supported the premise that a petitioner's sole owner can be the same person as the sole beneficiary. *Matter of X*, File No. SRC 98 101 50785, August 1999, reported in 5:2 immigration Bulletin, 89-90 (Matthew Bender Jan. 15, 2000). In that case, the AAO cited *Matter of Aphrodite*, 17 I&N Dec. 530 (Comm'r 1980), to support its position. The AAO finds in this case that the petitioner is a separate legal entity from the beneficiary, and the beneficiary would not be self-employed.

Established tenets of corporate law, as well as cases such as *Matter of Aphrodite*, state that a corporation has a separate legal identity from its owner. As such, a corporation, even if it is owned and operated by a single person, may hire that same individual and the parties will be in an employer-employee relationship, as is the case in the instant matter.

The beneficiary has the equivalent to a bachelor's degree in graphic design from a U.S. university, indicating that she is qualified for this specialty occupation.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The petition is approved.