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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 06 2006

IN RE: Petitioner: [redacted]
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:

[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.

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

DISCUSSION: The director of the 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 provides flight training. It seeks to employ the beneficiary as a certified flight instructor. The petitioner, therefore, 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 on the ground that the proffered position is not a specialty occupation. Counsel submits a timely appeal.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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; and (5) Form I-290B, counsel's letter, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a certified flight instructor. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail teaching students aeronautical knowledge in order to receive a FAA airman certificate; assuring that the training syllabus is followed and that students meet objectives and training requirements in lessons and flight courses; evaluating students' progress towards the ratings sought; keeping records of students' actions and sign-offs for at least three years; preparing schedules for students' flights and ground lessons; having responsibility for students' actions while in solo flights, including cross countries, integrity of flight planning, and alternate courses of action if a flight cannot be completed as planned; endorsing the pilot logbook when necessary safety and aeronautical knowledge has been achieved; recommending students to the FAA for practical tests after flight experience and aeronautical knowledge has been accumulated per FAA regulations; and administering biannual flight reviews for pilots and determining if more training is needed to make a pilot current.

The director found the submitted evaluation unpersuasive in establishing that the proposed position requires a baccalaureate degree in a related field. The director stated that a certified flight instructor, which is found in the flight training industry, does not typically require a degree. The director referenced the regulation at 14 C.F.R., Chapter I, Part 61, Section 61-61.183, Eligibility Requirements, and he stated that it does not indicate that a bachelor's degree is required for flight instruction certification. The director stated that CIS is not required to approve applications or petitions where eligibility has not been established, merely because of prior approvals, which may have been erroneous.

On appeal, counsel states that the record shows that a baccalaureate degree is normally the minimum educational requirement for the offered position, and she refers to the 11 job advertisements for flight instructors to show that a bachelor's degree is required by employers. Counsel references the opinion letter to show the necessity of a bachelor's degree in a relevant discipline for a certified flight instructor. According to counsel, the petitioner states that the degree requirement is increasingly common within the industry, and that a certified flight instructor progresses to a chief pilot, which also requires a degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proposed position fails to qualify as a specialty occupation.

Counsel noted that CIS approved a similar petition that had been previously filed on behalf of the beneficiary by the petitioner. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval 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. 1988). It would be absurd to suggest that

CIS 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the 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 prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

The AAO notes that the record contains the CIS memorandum relating to the prior approval of an H-1B petition.[1] The AAO notes that the memorandum from William R. Yates states that a prior approval of the petition need not be given deference if "it is determined that there is a material error with regard to the previous petition approval." The memorandum defines "material error" as the "misapplication of an objective statutory or regulatory requirement to the facts at hand." Further, the memorandum also states:

> CIS has the authority to question prior determinations. Adjudicators are not bound to approve subsequent petitions or applications seeking immigration benefits where eligibility has not been demonstrated, merely because of a prior approval which may have been erroneous. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each matter must be decided according to the evidence of record on a case-by-case basis. See 8 CFR § 103.8(d).

The AAO finds the evidence of record, which will be addressed in detail in this decision, does not reflect that the petitioner established the statutory or regulatory requirements that demonstrate that the offered position is a specialty occupation. Thus, the prior approval need not be given deference.

The AAO first turns 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 2006-2007 edition of 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

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[1] 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).

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 determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The *Handbook* discloses that the proposed duties reflect those of a flight instructor, which the *Handbook* depicts as follows:

> Some pilots are flight instructors. They teach their students in ground-school classes, in simulators, and in dual-controlled planes and helicopters. A few specially trained pilots are examiners or check pilots. They periodically fly with other pilots or pilot's license applicants to make sure that they are proficient.

The *Handbook* conveys the following about the educational requirements of pilots and flight instructors:

> 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.
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> 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 the required 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. Requirements for the instrument rating vary depending on the certification level of flight school.
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> 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 depending on

> the requirements of their particular job. 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 the FAA and company regulations.
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> The U.S. Armed Forces have always been an important source of trained pilots for civilian jobs. Military pilots gain valuable experience on jet aircraft and helicopters, and persons with this experience—because of the extensive flying time military pilots receive—usually are preferred for civilian pilot jobs. Those without Armed Forces training may become pilots by attending flight schools or by taking lessons from FAA-certified flight instructors. The FAA has certified about 600 civilian flying schools, including some colleges and universities that offer degree credit for pilot training. Until 2014 , trained pilots leaving the military are not expected to increase very much in number as the need for pilots grows in civilian aviation. As a result, FAA-certified schools will train a larger share of pilots than in the past.
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> Although some small airlines 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.
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> Depending on the type of aircraft, new airline pilots start as first officers or flight engineers. Although some airlines favor applicants who already have a flight engineer's license, they may provide flight engineer training for those who have only the commercial license. Many pilots begin with smaller regional or commuter airlines, where they obtain experience flying passengers on scheduled flights into busy airports in all weather conditions. These jobs often lead to higher paying jobs with bigger, national or major airlines.

The *Handbook* continues:

> Advancement for all pilots usually is limited to other flying jobs. Many pilots start as flight instructors, building up their flying hours while they earn money teaching. As they become more experienced, these pilots occasionally fly charter planes or perhaps get jobs with small air transportation firms, such as air-taxi companies. Some advance to flying corporate planes. A small number get flight engineer jobs with the airlines.

The *Handbook* reports that employers do not require a bachelor's degree for a pilot or a flight instructor.

Because the proposed position mirrors that of the *Handbook's* description of a flight instructor, and the *Handbook* explains that a flight instructor is not required to possess a bachelor's degree in a specific specialty, the petitioner fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*): that a baccalaureate or higher

degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which is that a specific degree requirement is common to the industry in parallel positions among similar organizations, counsel references job postings and the opinion letter from the director of the Degree Evaluation Division. The job postings are not persuasive as they do not represent companies that are similar in nature and scope to the petitioner, a small provider of flight training. Six postings represent colleges or universities. Other postings are from The City of San Angelo, Texas; a company that provides worldwide simulation and training support for the Department of Defense; and Lockheed Martin, an international corporation. Some of the job postings do not indicate a requirement of a bachelor's degree in a specific specialty; for example, the company that seeks "Certified Flyers II", Cusimano Air, Embry-Riddle Aeronautical University, Lewis University, and FIT Aviation, LLC. Thus, the postings do not establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The letter from the director of the degree evaluation division of a credentials evaluation service, A.E.S.F., Inc., which, counsel said, would show the offered position is a specialty occupation, is not persuasive. This letter states that the proposed position requires a bachelor's degree in a relevant field, and that this is the requirement of most companies, regardless of size. No evidence of record establishes the division director's credentials to render an opinion on the educational requirements of flight instructors in the industry. The division director does not cite to any industry data or trade publication to support his opinion. The AAO finds that no evidence in the record supports the director's conclusion. Further, the *Handbook* refutes the division director's assertion as it indicates that a flight instructor is not required to possess a baccalaureate degree in a specific field. Where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Thus, the lack of corroborating evidence also diminishes the weight of the division director's letter.

No evidence establishes the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*): that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The evidence of record reveals that duties of the offered position are typical of those of a flight instructor, as that occupation is depicted in the *Handbook*. No evidence in the record suggests that the proposed duties have a complexity or uniqueness that would require a baccalaureate degree in a specific discipline. The petitioner, therefore, fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

No evidence establishes the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*): that the petitioner normally requires a degree or its equivalent for the position.

To establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) the petitioner must show that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The *Handbook* reveals that the proposed duties are typical of those of a flight instructor, which is an occupation that does not

require a bachelor's degree in a specific specialty. No evidence of record indicates that the proposed duties require specialized and complex knowledge that requires the knowledge associated with the attainment of a baccalaureate degree in a specific specialty. Consequently, the petitioner fails to establish the last criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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

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