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U.S. Citizenship
and Immigration
Services

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FILE: SRC 02 244 50539 Office: TEXAS SERVICE CENTER Date: **JAN 23 2007**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center revoked the previously approved nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's revocation of the approved petition will be withdrawn and the matter will be remanded to the director for further consideration.

The petitioner is a U.S. airline that owns and operates Learjets and Gulfstream G-159 turbo prop aircraft, and provides aircraft services to military and defense contractors, with approximately 100 employees. It seeks to extend its employment of the beneficiary as an aircraft pilot in command 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 revoked the petition based on her 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 February 28, 2006 notice of intent to revoke; (3) counsel's March 30, 2006 response to the director's notice; (4) the director's June 7, 2006 notice of intent to revoke; (5) counsel's July 6, 2006 response to the director's notice; (6) the director's revocation letter; (7) counsel's August 25, 2006 letter to the director in response to the revocation; and (8) Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner has overcome the grounds for revocation specified by the director.

To establish a proffered position as a specialty occupation, a petitioner must demonstrate 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.

The director, on August 15, 2002, found the evidence of record to establish the proffered position of aircraft pilot in command as a specialty occupation. However, on June 7, 2006, she issued a notice of intent to revoke¹ under the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A)(5), stating that the approval of the petition “was erroneous as the position offered does not qualify under the ‘H’ classification.” The basis for her conclusion, she indicated, was that the record did not establish that a baccalaureate degree in a specific specialty was normally required for entry into the occupation. She gave the petitioner 30 days in which to provide evidence to rebut this finding.

On August 10, 2006, the director, noting the absence of any response from the petitioner, revoked her prior approval. She again cited the petitioner’s failure to establish that a baccalaureate degree in a specific specialty is required to perform the position’s duties.

Counsel, on appeal, contends that the director’s revocation of the approved petition was not based on the “correct regulatory test and failed to consider [his] timely response to [the] Notice of Intent to Revoke.” Based on its review of the record, the AAO also concludes that the August 10, 2006 revocation was not issued in conformance with regulatory requirements.

The record contains an August 25, 2006 letter to the director from counsel, which submits a copy of counsel’s July 6, 2006 response to the director’s notice of intent to revoke and a DHL tracking history that confirms the delivery of the July 6 response to the service center on July 7, 2006, a date that falls within the allotted response period. Counsel’s response was not, however, considered by the director prior to her revocation of the approved petition. Accordingly, the revocation does not comply with the regulation at 8 C.F.R.

¹ The director’s initial notice of intent to revoke incorrectly identified the basis for the revocation of the approved petition. Accordingly, she issued a second notice on June 7, 2006.

§ 214.2(h)(11)(iii)(B), which requires a director to consider all relevant evidence presented by a petitioner in deciding whether to revoke an approved petition.

The regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B) also specifies that a notice of intent to revoke must provide a detailed statement of the grounds for revocation. While the director's notice of intent to revoke states that to qualify as a specialty occupation a proffered position must meet the requirements of one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), she indicates that the revocation of the approved petition is based on the petitioner's failure to satisfy the requirements of the first criterion – a baccalaureate or higher degree (or its equivalent) is normally the minimum requirement for entry into the position. The director does not explain the basis for her conclusion, nor state the reasons why she also found the record to be insufficient to establish the proffered position as a specialty occupation under any of the other criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). As the June 7, 2006 notice of intent to revoke did not provide the detailed statement of the grounds for revocation required by regulation, the director erred in revoking the approved petition. For this reason as well, the director's decision will be withdrawn.

The petition may not be approved, however, as the evidence of record does not establish the proffered position as a specialty occupation. The AAO finds the evidence submitted by the petitioner to satisfy none of the alternate regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 (or its equivalent) 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 an aircraft pilot in command. Evidence of the beneficiary's duties includes: the Form I-129 and the petitioner's July 1, 2002 letter in support of the petition. At the time of filing, the petitioner indicated that the beneficiary would be required to:

- Pilot airplanes to transport passengers, mail or freight or for other commercial purposes;
- Review a ship's papers to ascertain factors such as load, weight, fuel supply, weather conditions, flight route and schedule;
- Order changes in the fuel supply, load, route or schedule to ensure the safety of the flight;
- Pilot airplanes to destinations, adhering to flight plans, and the regulations and procedures of the federal government, company, and airports; and
- Log information, such as time in flight, altitude flown and fuel consumed.

The petitioner states that the proffered position requires knowledge, training and experience that either exceeds or is the equivalent of a baccalaureate degree in aeronautical science/engineering.

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)).

The duties of the proffered position establish it as that of an aircraft pilot, employment discussed by the 2006-2007 edition of the *Handbook* under the occupational title of aircraft pilots and flight engineers. With regard to the preparation required for employment as a pilot, the *Handbook* reports the following:

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 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 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 [the] flight school.

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

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. [*Handbook*, page 630].

Based on the above discussion, the AAO concludes that the proffered position of aircraft pilot would not impose a degree requirement on the beneficiary. While the *Handbook* reports that employers seeking aircraft pilots prefer to hire college graduates and that many are making a college degree a job requirement, employers' preference for degreed job candidates is not synonymous with the normally required language of the first criterion. Employer preference indicates only that employers find degrees desirable. It is, therefore, insufficient to establish that a baccalaureate or its equivalent is normally the minimum requirement for entry into the particular position. Moreover, the *Handbook* does not indicate that employers seeking degreed pilots require these pilots to hold degrees in fields that are directly related to their employment, as required for classification as a specialty occupation. In that the *Handbook* does not indicate that a baccalaureate or higher degree in a specific specialty is the normal requirement for entry-level employment as an aircraft pilot, the AAO finds that the position does not qualify 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.

In reaching this conclusion, the AAO has considered the materials submitted by the petitioner from the Department of Labor's *Dictionary of Occupational Titles (DOT)* and the *Online Wage Library*. The petitioner contends that the Specific Vocational Preparation (SVP) codes assigned to the occupation of chief pilot and commercial airline pilot establish that the performance of these positions requires the minimum of a baccalaureate degree or its equivalent. However, the AAO finds neither the *DOT*, nor the *Online Wage Library* to be persuasive sources 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 Job Zone rating of 4 given to the position of commercial pilot by the *Online Wage Library* does not indicate that a bachelor's degree in a specific specialty is required.

The AAO has also reviewed the record material published by the Air Line Pilots Association; the Federal Aviation Administration (FAA) regulations governing the issuance of airline transport pilot certificates and ratings; a 1999 FAA advisory circular on certification for pilots, and flight and ground instructors; and a 1998 FAA publication entitled "Airline Transport Pilot and Aircraft Type Rating, Practical Test Standards for Airplane." While this evidence establishes that aircraft pilots undergo significant training for FAA licensure, it does not indicate that such licensure requires a baccalaureate or higher degree in a directly related field, as required for classification as a specialty occupation.

The AAO also notes the petitioner's contention that the training required to perform the duties of an aircraft pilot in command is at least the equivalent of a bachelor's degree in aeronautical science/engineering. However, a petitioner may establish a proffered position as a specialty occupation on the basis of educational equivalency only when a specific degree does not exist in the occupational field. *Tapis Int'l v. INS*, 94 F. Supp. 2d (D. Mass. 2000). As the petitioner indicates that the duties of the proffered position may be performed by someone with a degree in aeronautical science/engineering, the AAO will not consider whether the training required for FAA certification as an airline transport pilot is equivalent to or exceeds a bachelor's degree in an academic field directly related to the proffered employment. Moreover, the petitioner has submitted no documentation to support its claim regarding the degree equivalency provided by fulfilling FAA certification requirements. Going on record without supporting documentation is not sufficient to meet 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)).

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either that a specific degree requirement is common to the industry in parallel positions among similar organizations, or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In the instant case, the petitioner has submitted no evidence, e.g., letters from other airlines operating similar businesses, statements from industry associations or expert opinions, to establish its degree requirement as the norm within its industry. Neither has it submitted documentary evidence to support its assertions regarding the complexity of the proffered position. Going on record without supporting documentation is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*. Accordingly, the record does not establish the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. Again, however, the petitioner has submitted no evidence to demonstrate that it normally requires the minimum of a baccalaureate degree when filling the proffered position. Therefore, the petitioner has not established the proffered position as a specialty occupation based on its normal hiring practices.²

² The AAO notes that the Form ETA 750, Application for Alien Employment Certification, underlying the Form I-140, Immigrant Visa Petition (SRC 04 193 52174) filed by the petitioner on behalf of the beneficiary does not indicate that the petitioner finds the duties of an aircraft pilot in command to require the minimum of a baccalaureate degree in a directly-related field. Instead, it states that the beneficiary must hold an FAA Airline Transport Pilot Certificate and have at least 5,000 flight hours in G-159 turbo prop aircraft. The instant record does not establish that a transport pilot certificate and 5,000 flight hours are the equivalent of a baccalaureate degree in aeronautical science. The petitioner has not attempted to establish such equivalency. Further, as discussed above with regard to *Tapis Int'l v. INS*, the petitioner may not establish the position as a

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to establish that the nature of its position's 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. Therefore, to establish the proffered position as a specialty occupation, the petitioner must distinguish the duties to be performed by the beneficiary from those typically performed by aircraft pilots, employment that the *Handbook* indicates does not normally impose a degree requirement.

The duties of the proffered position, as described by the petitioner, are those routinely performed by aircraft pilots. While the AAO has reviewed the record to determine whether the petitioner's support of the U.S. Navy Aegis program, USAR/ANG front line weapons systems and NATO would impose additional requirements on the beneficiary, it has found no indication that the petitioner's defense contracts have any relation to the duties of the proffered position. Accordingly, the record offers no evidence, beyond counsel's assertions, that the proffered position may be established as a specialty occupation under the fourth criterion's specialized and complex threshold. Without supporting documentation, the assertions of counsel are not sufficient to meet the petitioner's burden of proof in these proceedings. The 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 record does not establish that the proffered position would require the beneficiary to have greater knowledge or skill than that possessed by a typical aircraft pilot. Therefore, the proffered position has not been established as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In his July 6, 2006 response to the director's second notice of intent to revoke, counsel questions CIS' authority to revoke the instant petition without providing an analysis of its prior decision in SRC 00 065 51145.³ While the AAO notes that each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in this record in reaching its decision in the present case, it has, nevertheless, reviewed the petitioner's prior filing to understand the basis for its approval. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). This review has found the prior record to provide no basis on which the proffered position could have qualified as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). The record supporting the prior approval offers no listing of the duties to be performed by the beneficiary. Neither does it demonstrate that the petitioner required the minimum of a baccalaureate degree or its equivalent for the proffered position. Moreover, the record contains no evidence to establish the proffered position as a specialty occupation.

As discussed above in relation to the instant petition, CIS requires information concerning the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). Accordingly, the

specialty occupation based on educational equivalency, as a degree in aeronautical science/engineering will prepare a worker for a career as a pilot. The duties listed on the Form ETA 750 are similar to those described by the petitioner for the proffered position in the instant case.

³ In the cited case of SRC 00 065 51145, the director approved a petition filed by the petitioner for the position of aircraft pilot on behalf of the beneficiary in this case.

petitioner's failure to describe the duties of the proffered position in its 2000 Form I-129 filing would have precluded a determination as to whether a baccalaureate or higher degree or its equivalent was normally the minimum requirement for entry into the position, as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). The absence of any supporting evidence in the record and the petitioner's failure to indicate it required a degree or its equivalent for the proffered position would have prevented the petitioner from establishing it as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the degree requirement is common to the industry in parallel positions among similar organizations or, alternatively, that the position was so specialized and complex that the performance of its duties was usually associated with a degreed individual. The same lack of evidence and the absence of a degree requirement on the part of the petitioner would also have precluded the petitioner from proving that it normally required a degree or its equivalent when filling the proffered position, as required to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). With regard to the final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – 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 – the absence of a description of the duties of the proffered position would have prevented a determination as to their specialization or complexity.

Accordingly, the prior record does not support the approval of the Form I-129 filed in 2000 as it lacks the most basic evidence required for the determination of a specialty occupation. Where a petition lacks required initial evidence, such as the deficiencies of evidence noted in the petitioner's previous petition, the director is required by regulation to request that evidence. 8 C.F.R. § 103.2(b)(8). The director failed to request this required evidence and simply approved the petition. As a result, the approval of the petitioner's 2000 H-1B petition was not only incorrect, but contrary to regulatory requirements. 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). 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).

With regard to counsel's contention that CIS may not revoke the approval of the instant petition since its validity has expired, the AAO notes the regulation at 8 C.F.R. § 214.2(h)(4)(11)(i)(B), which states: "The director may revoke a petition at any time, even after the expiration of the petition." Therefore, the expiration of the instant petition's validity on November 1, 2005 does not preclude its revocation in accordance with the regulatory requirements at 8 C.F.R. § 214.2(h)(11).

For reasons related in the preceding discussion, the AAO will withdraw the director's decision and remand the instant case to the director for further consideration. The director should issue a new notice of intent to revoke, specifying all the grounds for revocation and affording the petitioner a 30-day period in which to submit evidence in rebuttal. 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 August 10, 2006 revocation of the approved petition is withdrawn. The petition is remanded to the director for further consideration. The new decision, if adverse to the petitioner, shall be certified to the AAO for review.