



U.S. Citizenship  
and Immigration  
Services

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FILE: EAC 06 193 53723 Office: VERMONT SERVICE CENTER

Date: JAN 04 2008

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 a graphic art and creative talent agency established in 1999. It employs four employees and has an estimated \$700,000 stated gross income. It seeks to employ the beneficiary as a digital photographic technician. 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 because the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.<sup>1</sup>

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; (5) the Form I-290B, counsel's appeal brief and supporting documentation. The AAO reviewed the record in its entirety before issuing 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, a 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

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<sup>1</sup> Public records indicate that counsel is not in good standing with the state of New York for non-payment of dues. See, <https://iapps.courts.state.ny.us/attorney>. All representations will be considered; however, counsel will not receive notice of these proceedings.

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 petitioner states that it is seeking the beneficiary's services as a digital photographic technician. Evidence of the beneficiary's duties includes: the petitioner's letter of support; counsel's response to the director's RFE; the petitioner's job posting for the position; and counsel's appeal brief. The duties described in counsel's brief in response to the director's RFE, and counsel's appeal brief are identical and state the following duties:

1. Analyze original image and determine appropriate method to photograph/reproduce image and store digital file;
2. Forward high resolution digital file to client in accordance with client specifications including upload to ftp site if requested, and keep low res copy for company archives; work closely with client (often English-speaking) and artist (often Japanese-speaking) to ensure smooth communication and fulfillment of technical aspect of job requirements;
3. Photograph and upload images for Gallery Hanahou and Lele to exhibit on website and keep archival records, ensure screen shots are of highest standard and in keeping with original artworks;
4. Maintain on line library/archive of all artworks, work with other agents and clients in order to locate files and forward to third party as requested; create and oversee production of images using digital photographic techniques for promotional purposes including books, brochures and direct mail pieces – work closely with other agents, graphic designer and

publisher where appropriate to ensure highest quality of publications, and that reproductions of artist's work are as close to original as possible.

The petitioner's letter of support adds the following:

The position of digital photographic technician requires the services of someone who is fully qualified and proficient in the technical side of photography in order to understand and utilize appropriate lighting and composition, understand which film to use when, and have all other areas covered to ensure a professional quality photographic image is created. The position also requires someone who is technically proficient at treating photographic images in a digital environment and has been trained in photoshop, illustrator, dreamweaver and other computer programs relating to digital images. Other duties to be performed by digital photographic technician include: analyze original image and digital copy; manage color and quality for reproduction; scan and print images, create and oversee production of images for promotional purposes including books, brochures and direct mail pieces, create and upload high resolution images onto clients ftp sites and prepare low res[olution] images for CWC international website and for each individual artist's personal website.

The petitioner's job posting for the position stated the following:

We are looking for a recent graduate who has an interest in contemporary art and Japanese culture to work part-time as a creative digital photographic associate. Hours are approx[imately] 30 hours a week. We are looking for someone who is also conversant in written and spoken Japanese and English. This person must have a strong digital/photographic background as well as arts and/or visual communications and be fluent in photoshop, flash, quark and other relevant computer programs. They must be able to work as part of a team and be able to efficiently reproduce images as required and contribute ideas including technical aspects of various modes of promotion and marketing and developing concepts and themes for exhibitions, as well as communicate with artist and client. May include some travel to Japan.

To make its determination as to whether the employment described in the record qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2) which require that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, or that 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 *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 determining whether a proposed 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 first turns to the *Handbook* for its discussion of photographers. As stated by the *Handbook*, photographers:

produce and preserve images that paint a picture, tell a story, or record an event. To create commercial-quality photographs, photographers need technical expertise, creativity, and the appropriate professional equipment. Producing a successful picture requires choosing and presenting a subject to achieve a particular effect, and selecting the right cameras and other photographic enhancing tools....

\* \* \*

*Commercial and industrial photographers* take pictures of various subjects, such as buildings, models, merchandise, artifacts, and landscapes. These photographs are used in a variety of media, including books, reports, advertisements, and catalogs. Industrial photographers often take pictures of equipment, machinery, products, workers, and company officials. The pictures are used for various purposes—for example, analysis of engineering projects, publicity, or records of equipment development or deployment, such as placement of an offshore oil rig. This photography frequently is done on location.

The *Handbook's* information about the qualifications of photographers is as follows:

Entry-level positions in photojournalism or in industrial or scientific photography generally require a college degree in photography or in a field related to the industry in which the photographer seeks employment. Entry-level freelance or portrait photographers need technical proficiency. Some complete a college degree or vocational training programs.

The duties for the position are similar to those of a commercial photographer, as described by the *Handbook*. The *Handbook* does not indicate that a baccalaureate degree is the minimum educational requirement for commercial photographers. Accordingly, the listed duties do not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Based on the evidence in the record, the AAO finds that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish its degree requirement as the norm within its industry under the first prong of the second criterion, the petitioner submits six job advertisements. None, however, satisfy the requirements for establishing an industry standard. Based on the information provided in the advertisements, the AAO is unable to determine if any of the organizations advertising for positions are similar to the petitioner. Some of the postings state that a degree is “preferred” or that the “the ideal candidate will possess a B.S./B.A. in photography,” and although four of the companies require a degree, the advertisements do not list a degree in a specific discipline.

Therefore, the proffered position has not been established as a specialty occupation based on an industry-wide degree requirement. The petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations not requiring a degree in a specific discipline. Consequently, the petitioner fails to establish the second alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner has stated that this is a new position; therefore, eligibility under this criterion cannot be established.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the

attainment of a baccalaureate or higher degree. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty.

In its job posting, the petitioner states that the position requires someone who is “conversant in written and spoken Japanese and English.” Although the beneficiary’s fluency in the Japanese language may be beneficial to the petitioner, her bilingual abilities and the requirement for dual language proficiency do not transform the position into a specialty occupation. Furthermore, although universities provide bachelor’s degrees in modern languages, the ability to speak a language and to understand a culture has not been established in the record to be so specialized or complex that the knowledge required is usually associated with the attainment of a baccalaureate or higher degree in language.

The petitioner failed to establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve 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). Neither CIS nor any other 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).

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.

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.