U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: SRC 04 252 50188 Office: TEXAS SERVICE CENTER Date: JAN 19 2005

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]

prevent clearly unwarranted invasion of personal privacy

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

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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 is an aviation corporation that provides private jet services. It employs the beneficiary as a co-pilot/second-in-command for Falcon 10 corporate jet aircraft, in accordance with a previously approved petition to employ the beneficiary as an H-1B nonimmigrant worker in a specialty occupation 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). In order to continue this employment, the petitioner endeavors to continue the beneficiary's H-1B classification and extend his stay.

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel presents two basic contentions: first, that the Federal Aviation Administration (FAA) requirements for licensure are equivalent to a four-year degree in a specific specialty; second, that the director's denial of this petition is contrary to the Citizenship and Immigration Services (CIS) "determination that air pilots are a specialty occupation." Evidently, the latter contention stems from the fact that CIS had approved the previous petition that the petitioner had submitted for this beneficiary to work as its co-pilot.

The director's decision to deny the petition was correct. The AAO bases this determination upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary exhibits submitted with the brief. The AAO also considered the fact that CIS had approved the previous H-1B petition that the petitioner had filed for the beneficiary to serve in the same position.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

> which [1] 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 [2] 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. (Italics added.)

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 has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner's letter of support filed with the Form I-129 provided this information about the proffered position (at page 2):

> [The beneficiary] will function in the specialty occupation of Co-Pilot, utilizing his academic skills and work experience in the aviation [sic]. In this position he will be responsible:
>
> - Assisting the pilot in transporting materials and people by aircraft to designated locations.

- Reviews ship's papers to ascertain factors such as load weight, fuel supply, weather conditions, flight route and schedule.

- Order's [sic] changes in fuel supply, load, route or schedule to ensure safety of flight.

- Reads gauges to verify that oil, hydraulic fuel, fuel quantities and cabin pressure are at prescribed levels prior to starting engines.

- Assist pilot operating the aircraft such as start engines and taxis to [the] runway, set brakes and accelerates [sic] engines to verify operational readiness of components, contact control tower by radio to obtain takeoff clearance and instructions, logs information.

That letter of support also asserts (at page 2) that the position requires "at least a bachelor's degree and/or higher with a commercial pilot's license with an instrument rating issued by the [Federal Aviation Administration (FAA)]." On the other hand, counsel acknowledges that a specialty degree is neither a prerequisite nor a qualifying criterion for the license that the FAA requires:

> Currently, there is no four[-]year degree or other bachelor's program that authorizes any individual to obtain a pilot's license from the [FAA]. Issuance of a pilot's license by the FAA is strictly controlled by the FAA's own regulations. The FAA's own regulations do not require any academic coursework or degree requirement in aviation. While there are 4-year degrees available in aviation, the attainment of a degree does not qualify a person to obtain a pilot's license. Qualification for issuance of a pilot's license is largely dependant upon flight training, as delineated in the agency's regulation's at 14 CFR § 61. . . . No individual can fly any aircraft, without first attaining a pilot's license.
>
> [Appellate brief, at pages 1 and 2.]

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

CIS recognizes the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) as an authoritative source on the duties and educational requirements of a wide variety of occupations. The section "Aircraft Pilots and Flight Engineers" in the *Handbook's* 2004-2005 Internet version, a copy of which the petitioner has submitted into the record, clearly indicates that employers of pilots, co-pilots, and flight engineers do not normally require at least a bachelor's degree in aviation or any other specific specialty closely related to these positions. The following *Handbook* passage illustrates this fact:

> 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 usually are preferred for civilian pilot jobs. This primarily reflects the extensive flying time military pilots receive. Persons without Armed Forces training may become pilots by attending flight schools or by taking lessons from individual 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. Over the projection period, 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.

The *Handbook* indicates that the core requirement for pilot/co-pilot licensure is flying skill that is inculcated mostly by FAA-recognized flight training and flight experience:

> 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 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 *Handbook* recognizes that there is an industry trend towards requiring a college degree, but not one in any specific specialty:

> 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.

The earlier quoted paragraph from counsel's brief indicates his agreement with the *Handbook's* observation that the proffered position is not one that normally requires a specialty degree. Likewise, the petitioner's chief pilot stated: "Even the major airlines requirements don't systematically require a degree." (Chief pilot's letter of response to the RFE, at page 2.)

Counsel asserts that, while aircraft piloting or co-piloting positions do not normally require at least a bachelor's degree in a specific specialty, they do require the equivalent. According to counsel, the fact that the FAA requires licensure is sufficient to establish that the equivalent of a bachelor's degree in a specific specialty is required. Counsel takes this position even though the FAA does not require an actual degree and does not issue a license on the basis of a degree or a degree equivalent. Counsel states (at page 2 of his brief) that "[t]he required pilot's license issued by the FAA is the equivalent to a bachelor's degree," and that "[a]lthough there is no four[-]year or bachelor's degree that results in pilot licensure, the training and experience a pilot must complete in order to obtain the FAA pilot's license is the equivalent to the degree requirement." In the same vein, the petitioner states that even the major airlines do not require a degree "as they know that an experienced and well-trained pilot is worth any college graduate." (Chief pilot's letter of response to the RFE, at page 2.)

Neither the petitioner's excerpts from the Code of Federal Regulations (C.F.R.) on FAA licensure requirements, the *Handbook*, nor any documentation in the record supports the view of counsel and the chief pilot. The record contains no studies, reports, case law, CIS precedent decisions or policy directives, or testimony from recognized experts to substantiate that FAA pilot licensure criteria are the equivalent of a bachelor's degree in a specific specialty. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO rejects counsel's assertion that the proffered position is analogous to that of an attorney licensed to practice without attending law school. The argument is unsubstantiated and therefore not probative. Counsel offers no evidence that pilot and attorney training are similar, or that the substantive requirements for attorney and pilot licensure are alike.

Furthermore, counsel errs when he suggests that a licensure requirement is *per se* sufficient to qualify a position as a specialty occupation. That proposition is inconsistent with section 214(i)(l) of the Act, the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), and CIS application of these controlling authorities. In sum, because the petitioner has not established that the proffered position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) has not been satisfied.

Also, the petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the *Handbook* does not report the proffered position as one for which there is an industry-wide requirement for a bachelor's degree in a specific specialty. Not only are there are no submissions from professional associations, individuals, or firms in the petitioner's industry, but counsel acknowledges that a bachelor's degree in a specific specialty is not an industry requirement for the proffered position.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*). This section provides that, instead of proving a specialty degree requirement that is common in the industry, "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." The *Handbook* and C.F.R. excerpts in the record corroborate the acknowledgements of counsel and the petitioner's chief pilot that a degree is not required to perform the proffered position.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), for positions for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty, is not a factor in this proceeding. The petitioner does not claim to have exclusively recruited and hired only persons with such a degree, and, in fact, its chief pilot acknowledged that he does not have a college degree in any area. While the petitioner argues that the pilot or co-pilot's position has always required the equivalent of a bachelor's degree, the evidence of record does not substantiate this claim. As stated earlier in this decision, unsubstantiated assertions have no probative weight.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) because the evidence of record does not establish that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty. The totality of the evidence in the record establishes that FAA licensure and job performance as a pilot or co-pilot require knowledge and skills that are usually associated with flight training and flying experience, rather than with a degree in a specific specialty.

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 director's decision does not indicate whether he reviewed the approval of the earlier H-1B petition. However, the AAO is not bound by the fact that CIS had 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). 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. 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).

Counsel's request for oral argument (at paragraph 3 of his December 6, 2004 cover letter to the Form I-290B) has been considered. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument, and it will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. The written record of proceedings fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

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.