U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

JUN 12 2006

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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.

Robert P. Wiemann, Director
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, a corporation engaged in the distribution, sale, and installation of flooring and floor covering, employs the beneficiary as a marketing director, as authorized by 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 beyond the period approved in the initial petition, the petitioner endeavors to continue the beneficiary's H-1B classification and extend her stay.

The director denied the petition on the basis that the petitioner had failed to establish that the beneficiary is qualified to serve in a specialty occupation in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii) (C) and (D). The director found that the "description of duties provided by the petitioner are indeed duties of a Research Analyst which falls under the general [h]eading of Economist and Market Survey Researchers" as addressed in the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*). However, the director denied the petition on the basis that the petitioner had not established that the beneficiary possessed "a master's or graduate degree," which the director found to be the requisite educational credential indicated by the *Handbook*.

On appeal, counsel contends that, contrary to the director's decision, the relevant information in the *Handbook* does not preclude the holder of a pertinent bachelor's degree from qualifying for the position in question, and that the evidence of record establishes that the beneficiary's degree qualifies her for the proffered position.

The director's decision to deny the petition was correct, as the petitioner has not established that the beneficiary is qualified to perform services in a specialty occupation. The AAO bases its decision 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 and counsel's brief.

In contrast to the director, the AAO finds that the petitioner has not established that the beneficiary has attained a bachelor's degree or its equivalent. The AAO therefore exercises its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within our power to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Com'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F. 2d (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926.

The director's decision does not indicate whether he reviewed the approval of the prior nonimmigrant petition for the position in question. 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. If the previous nonimmigrant petition was approved based on the same unsupported 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). A prior approval does not preclude CIS from denying an extension of am original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL [redacted] (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL [redacted] (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
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> (B) completion of the degree described in paragraph (1)(B) for the occupation, or
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> (C) (i) experience in the specialty equivalent to the completion of such degree, and
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> (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(l)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position.

In implementing section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

> *(1)* Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
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> *(2)* Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
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> *(3)* Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)*(4)* would require one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; [1]

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The petitioner relies chiefly upon the November 10, 2003 "Evaluation of Education, Training, and Experience" provided by the Graduate Program Chair of the Lubin Graduate School of Business at Pace University, New York, who is also a professor of marketing at that institution. Based upon his review of the beneficiary's 1970 diploma from the Iran Girls School and information about the beneficiary's training and experience, the professor opined that the beneficiary had attained the equivalent of a U.S. "Bachelor of Business Administration Degree with a Concentration in Sales and Marketing." However, as discussed below, the professor's evaluation merits no evidentiary weight.

The AAO first reviewed the foreign education component of the professor's evaluation.

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[1] The petitioner should note that, in accordance with this provision, the AAO accepts a credentials evaluation service's evaluation of *education only*, not experience.

The only documentation provided by the petitioner regarding the Iran Girls School degree are copies of the diploma and a translation which states that the beneficiary obtained "a B.A. degree in Foreign Language Translations and Secretary." The petitioner states: "Due to the unstable social and political climate of the country, it is not possible for [the beneficiary] to obtain the original school transcripts as requested by the Service." (Petitioner's December 2, 2003 letter of reply to the RFE, at page 2.) The record also contains no secondary evidence as to the particular courses taken by the beneficiary and her grades.

In spite of the absence of a transcript or other evidence of the beneficiary's coursework and grades at the Iran Girls School, the Pace University professor states that his evaluation of the beneficiary's education at the Iran Girls School includes "the nature of [her] coursework, the grades attained in the courses, and the hours of academic coursework." The fact that the professor cites information that counsel and the petitioner described as unavailable casts doubt upon the factual basis of the professor's conclusions and the reliability of his evaluation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). For this reason, the AAO discounts the professor's evaluation.

It is also noted that the professor acted independently of any evaluation agency. Therefore, the professor's evaluation of foreign education does not merit recognition under any of the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) or (D). For this reason also, the professor's evaluation of the beneficiary's foreign education is discounted.

The AAO next reviewed the training and work experience component of the professor's evaluation, which concluded that the beneficiary's work experience and training is comparable to three years of "university-level training in sales and marketing." This portion of the professor's evaluation is also without merit.

The evidence of record does not establish that the professor qualifies for recognition under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*) as "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." The letter of endorsement from the assistant dean is unclear as to the actual authority of the professor providing the evaluation. The most direct statement is that the professor "has the authority *to make assessments concerning the granting* of college-level credit for experience in the fields of Marketing, Business, and related sub-disciplines." (Italics added.) The authority for making assessments concerning college-level credit is not the same as the authority to grant college-level credit, as required by the regulation.

The AAO also discounts the professor's evaluation of training and experience because the professor provided an insufficient factual basis for his opinion. The professor states that his opinion is based upon "a detailed attestation, describing her employment with an Iranian engineering firm identified as 'B.E.,' and a letter of reference from a more recent employer." The professor does not provide a copy of the "attestation" or the

letter of reference, and he does not provide descriptions by which the AAO can identify these documents with those in the record of proceeding. Accordingly, the AAO cannot credit the professor's evaluation of the attestation as being accurate or reliable, or worth any weight. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)).

The AAO also notes that the record's February 28, 2003 "Certification" from the petitioner is sparse, vague, and generic, and does not provide a meaningful factual basis for an evaluation. If this Certification is the professor's "letter of reference from a more recent employer," the professor's reliance on it is deficient.

The AAO also finds that the evidence of record about the beneficiary's training and experience is limited and does not satisfy the criterion for a favorable CIS determination under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), by which a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision imposes the following evaluation standards:

> [I]t must be *clearly demonstrated* [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:
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> *(i)* Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[2];
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> *(ii)* Membership in a recognized foreign or United States association or society in the specialty occupation;
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> *(iii)* Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
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> *(iv)* Licensure or registration to practice the specialty occupation in a foreign country; or

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[2] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

> *(v)* Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.
>
> [Italics added.]

The only evidence of the beneficiary's work with B.E. from 1970 to 1999 is her two-page, undated declaration of work experience, which is not corroborated by any documentation from that employer. Neither this document nor the assertions of counsel and the petitioner about the beneficiary's work for the petitioner clearly demonstrate that the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by a specialty occupation. The evidence of record fails to establish the degrees or experiential degree-equivalencies of the peers, supervisors, or subordinates with whom the beneficiary worked. Furthermore, the petitioner has presented no evidence that the beneficiary has achieved recognition of expertise as described in the regulation.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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