U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 04 019 52886 Office: VERMONT SERVICE CENTER Date: OCT 05 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an import/export company that employs two people and had a net income of $10,000 when the petition was filed. It seeks to extend the employment of the beneficiary as a commercial artist. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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).**

On December 6, 2004, the director denied the petition determining that the petitioner had not established that the position is a specialty occupation within the meaning of the regulations. The director also noted that the beneficiary was out of status when the petition was filed.

On appeal, current counsel for the petitioner and on behalf of the beneficiary acknowledges that the beneficiary's H-1B status expired December 15, 2002. Counsel contends that the petitioner's prior counsel erroneously filed an H-1B extension request with the New York District Office around December 10, 2002. The record shows that the Vermont Service Center received the H-1B extension request on November 8, 2003.[1] Thus, current counsel acknowledges that the beneficiary's H-1B status had expired prior to the filing of the petition. Counsel, however, notes the petitioner's desire that the Department of Homeland Security (DHS) allow the beneficiary to depart the United States voluntarily without being subject to the 3/10-year bar to reentry.

Counsel also states that Citizenship and Immigration Services (CIS) may revisit prior approvals and subsequently deny an extension but notes that the subsequent denial may not be arbitrary or capricious. Counsel contends that the petitioner has fully demonstrated that the position does in fact qualify for H-1B status and that the director's final request for evidence corroborates this claim as she only requested a copy of the labor condition application (LCA) in this matter.

The regulation at 8 C.F.R. § 214.2(h)(14) states: "a request for a petition extension may be filed only if the validity of the original petition has not expired." In the instant matter, the beneficiary had been out of status for approximately 11 months on the date the Service Center received the Form I-129 extension request. The AAO notes counsel's discussion of CIS prosecutorial discretion and counsel's explanation that the untimely filing of the beneficiary's extension application occurred due to errors made by prior counsel and through no fault of the beneficiary.[2] However, an appeal or motion based upon a claim of ineffective assistance of

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[1] The record contains a September 25, 2003 receipt notice informing the beneficiary that the proper fee had not been paid and an October 10, 2003 receipt notice informing the petitioner that the Form I-129 had not been properly completed.

[2] Current counsel for the petitioner and the beneficiary explains that the petitioner's prior counsel filed the H-1B extension with the New York District Office. Counsel claims that the petition was submitted before the beneficiary's H-1B status expired and would have been considered timely had the extension been properly submitted to the Vermont Service Center, the entity with authority to accept such submissions. Current counsel notes that prior counsel attempted to rectify the situation by later filing the extension with the Vermont Service Center but that by the time of the second submission, the beneficiary was already out of

counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this matter, the petitioner does not provide evidence that it has filed a complaint against its prior counsel with the appropriate disciplinary authorities. Accordingly, the petitioner has not met all the requirements to establish the ineffective assistance of counsel. As the validity of the previously approved petition had expired prior to the filing of the extension request, the petition extension may not be approved.

The AAO now turns to whether the proffered position qualifies as a specialty occupation. Preliminarily, the AAO notes counsel's reference to CIS' prior approval of the proffered position as a specialty occupation. However, the approval of a prior petition filed by the petitioner is not a basis for approving the instant Form I-129. CIS is limited to the information contained in the record of proceeding and each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii) and 8 C.F.R. § 103.8(d). If the prior nonimmigrant petition had been approved based on the facts that are contained in the current record, that approval would have been in error. 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).

Regarding the merits of the proceeding, section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> [A]n 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,

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status. Current counsel also refers to prior counsel's two affidavits admitting that he had made material errors in this matter.

> 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;
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> *(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 are 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) the Form I-129 filed November 6, 2003; (2) a May 5, 2004 request for evidence (RFE) establishing that the proffered position qualifies as a specialty occupation and an explanation regarding the filing of the petition after the beneficiary's status had expired; (3) the petitioner's July 28, 2004 response to the director's RFE with supporting documentation; (4) an October 6, 2004 RFE requesting a filed, completed, and endorsed Labor Condition Application (LCA); (5) the petitioner's November 3, 2004 response to the director's RFE; (6) the director's December 6, 2004 denial letter; and (7) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a commercial artist. Evidence of the beneficiary's duties includes the Form I-129 petition and the petitioner's July 28, 2004 response to the director's request for evidence. On the Form I-129, the petitioner noted that the beneficiary would "make drawings & teach art." In the petitioner's July 28, 2004 response to the director's request for evidence, the petitioner stated that in the proffered position of commercial artist, the beneficiary:

> [I]s responsible for drawing illustrations for use in our brochures, pamphlets, slides, presentations, and other media for the purpose of allowing our clients and potential clients to visualize who we are and the services we offer. [The beneficiary] studies layouts and

> sketches of proposed illustrations and related materials to become familiar with the requirements of the projects at hand.
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> [The beneficiary] determines the style, technique, and medium best suited to produce the desired effects and to conform with reproduction requirements. [The beneficiary] formulates concept and renders illustrations and details from models, sketches, memory and imagination. [The beneficiary] also selects type, draws lettering, and lays out material.

With the July 28, 2004 response, the petitioner submitted copies of ten (one is a duplicate) job announcements for various positions in the illustrator/graphic designer/artist fields, asserting that the job announcements demonstrated an industry standard of at least a baccalaureate degree in a relevant field. The petitioner also referenced the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook)* section on: (1) artists, noting that formal training is not strictly necessary, but that it is difficult to become skilled enough to earn a living without some training; and (2) designers, noting that a bachelor's degree is required for most entry-level positions. Counsel also cited an excerpt from the *Dictionary of Occupational Titles (DOT)* for commercial artists, including designers and illustrators, that provided a general definition for this occupation. The petitioner noted that it required all of its commercial artists to possess a bachelor's degree in graphic arts.

On December 6, 2004, the director determined: (1) that the record showed that the petitioner employs two people and claims a net annual income of $10,000; (2) that the *Handbook* sets no standard minimum requirement to perform the duties of the proposed position; (3) that the job announcements' educational discussions used terms such as equivalent degree, preferred degree, and desired degree, but did not specify special skills as a normal prerequisite to jobs in the arts; (4) that the petitioner had not shown that it had employed an individual with a baccalaureate degree in a specialized area; (5) that the petitioner had not established that organizations similar to the petitioner in type of business, number of employees, and net annual income required the services of individuals in parallel positions; and (6) that the petitioner had not demonstrated that the duties of the proffered position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The director concluded that the record did not establish that the job offered qualifies as a "specialty occupation."

On appeal, current counsel for the petitioner asserts that the director mischaracterized the beneficiary's work, erroneously minimized her work as being merely illustrative, and failed to consider that the beneficiary is responsible for exercising professional judgment as the petitioner's sole commercial artist. Counsel claims that the proffered position qualifies as a specialty occupation as corroborated by the director's decision to approve the prior petition submitted on the beneficiary's behalf. Counsel provides excerpts from the *DOT* for the positions of graphic designer and of illustrator, and asserts that both of these positions are considered professional positions. He also submits additional Internet postings for graphic designers. Counsel concludes that the proffered position clearly qualifies for designation as a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) and whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of

particular occupations. Based on the *Handbook*'s discussion of the occupational title of graphic designers, the AAO does not find the proffered position to fall within this particular design field. According to the *Handbook*, "[g]raphic designers . . . plan, analyze and create visual solutions to communication problems." The duties of the proffered position do not reflect this breadth of responsibility. Instead they are focused on the creation and presentation of illustrations to be used in the petitioner's advertising materials and presentation. As a result, they most closely correspond to that of an illustrator while containing some elements of the duties of an art director. The 2006-2007 edition of the *Handbook* indicates that: "*Illustrators* typically create pictures for books, magazines, and other publications, and for commercial products such as textiles, wrapping paper, stationery, greeting cards, and calendars." The *Handbook* reports that art directors: "develop design concepts and review material that is to appear in periodicals, newspapers and other printed or digital media. They decide how best to present the information visually, so that it is eye catching, appealing and organized. Art directors decide which photographs or artwork to use and oversee the layout design and production of the printed material." In this matter, the petitioner indicates that the beneficiary "[draws] illustrations for use in our brochures, pamphlets, slides, presentations, and other media," "studies layouts and sketches of proposed illustrations and related materials," "formulates concept[s] and renders illustrations and details from models, sketches, memory and imagination," and "selects type, draws lettering, and lays out material." The petitioner's description contains elements of duties that relate to both position types.

The *Handbook* recognizes that many avenues lead to employment as an illustrator and art director. The *Handbook* indicates that illustrators learn drawing and sketching skills through training in art programs and while some employers prefer candidates with a bachelor's degree, illustrators are also hired on the basis of their portfolios. The *Handbook* notes that art directors usually begin as entry-level artists and are promoted based on their artistic and leadership abilities. A baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into a position of an illustrator or art director. The petitioner has, accordingly, failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

The AAO acknowledges counsel's reference to the *DOT* and its discussion of commercial artists as proof that the proffered position qualifies as a specialty occupation and the excerpt from the Federal Register which provides *O*Net* information. However, the AAO does not consider these sources to be persuasive as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* and *O*Net* 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. A specific vocational preparation (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. Again, the record does not demonstrate that the occupation of illustrator or graphic designer would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

The AAO now turns to a consideration of the proffered position under the second criterion, whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. Factors often considered by CIS when determining the industry standard include: 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)).

To establish the degree requirement as the norm within the export/import industry, the petitioner submitted 21 job advertisements for positions including a flash illustrator/animator, an illustrator/designer, five graphic designers, a web/graphic designer/artist, a graphic specialist, and two graphic artists. The requirements listed in the job announcements varied widely, some preferring a bachelor's degree in graphic design, some requiring a general degree in fine arts or design and marketing. Most focused on the prospective employees' experience and portfolio. The petitioner provided no substantive evidence that the positions advertised would be parallel to the proffered position. The job announcements submitted came from a wide variety of companies, including a digital learning organization, an audio sales company, a law firm, a non-profit organization, and an international bank, organizations that are obviously dissimilar to the petitioner. Additionally, there is no evidence that the companies are similar in size and scope of the petitioner.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) which provides that an employer establish that it normally requires a degree or its equivalent for the position. The petitioner claims that all its commercial artists require the incumbent to posses the minimum of a bachelor's of arts degree in graphic arts or a related discipline. However, on appeal, counsel states that the beneficiary is the petitioner's sole commercial artist. Moreover, the Form I-129 indicates that the petitioner employs only two individuals, the beneficiary and the firm's president. While a petitioner may believe that a proffered position requires a degree, its opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, than 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. The petitioner does not provide evidence that it has ever employed individuals, other than the beneficiary, in the position of commercial artist. *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.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) which requires that the petitioner establish that 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. As observed above, the duties of the proffered position would not require the beneficiary to possess skill or knowledge beyond that typically held by an illustrator or art director, employment that the *Handbook* does not impose a specific degree requirement to perform. Without more persuasive evidence, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

Upon review of the totality of the record, the record fails to reveal any evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the AAO does not find the record to contain an [redacted] certified as of the time of filing. *See* 8 C.F.R. § 214.2(h)(4)(i)(B)(1). In response to the director's October 6, 2004 RFE, the petitioner stated that its prior counsel had submitted a certified [redacted] at filing, but could not provide it with a copy. Instead, the petitioner submitted a second [redacted] certified as of November 3, 2004. As the record does not establish that the petitioner had obtained a certified [redacted] at the time of filing, the AAO finds that it has failed to demonstrate compliance with H-1B filing requirements. For this additional reason, the petition will be denied. Moreover, as the beneficiary was out of status when the extension petition was filed, the petition may not be approved.

The AAO notes counsel's request that the beneficiary be allowed to depart the United States voluntarily. The issue is, however, beyond the scope of this proceeding and will not, therefore, be addressed.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in this proceeding 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