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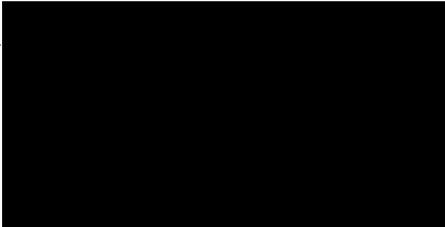
FILE: EAC 03 142 53109 Office: VERMONT SERVICE CENTER

Date: AUG 13 2005

IN RE: Petitioner: [Redacted]
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:



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 is a corporation engaged in the investment business. In order to employ the beneficiary as an arts advisor, the petitioner filed this H-1B petition in order 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth in the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the preponderance of the evidence of record establishes that the proffered position is a specialty occupation. In his brief on appeal, counsel focuses especially on the proposed duties as described in the record, the letter in which the Head of the School of Drama at Carnegie Mellon University (CMU) opined on the proffered position and the beneficiary's qualifications, and statements from the petitioner's vice president. Counsel argues (brief, at page 5) that the petitioner "has presented creditable, authoritative third party evidence" that the position is a specialty occupation.

The director's decision to deny the petition was correct. 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 on appeal.

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)(1) of the Act, 8 U.S.C. § 1184(i)(1), 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.

In its April 3, 2003 letter in support of the petition, the petitioner stated that as arts advisor the beneficiary “will plan, organize, and conduct research and make assessments as to current Latin American art, theater, dance, and music” and “prepare reports for and advise [the petitioner] as to current opportunities, trends, and talent that may be of interest to [the petitioner] for investment and promotional purposes.” Neither this letter nor any other portion of the record explains the criteria by which the petitioner decides what will be of investment and promotional interest or the content of the reports that the beneficiary would prepare.

In its July 11, 2003 letter of reply to the director’s RFE, the petitioner added these comments about its arts advisor position:

As we see the position unfolding, [the beneficiary] would attend a wide variety of artistic presentations in the United States and Latin America for the purpose of assessing these presentations and presenting organizations vis-à-vis our investment and philanthropic goals. In deciding what presentations to attend [and] where, [the beneficiary] will need to keep reading appropriate Latin American art, theater, dance, music, magazines, critical reviews and other sources. Based upon her knowledge of the performing arts, not just theater, [the beneficiary] will make an assessment for us as to which presentation or presenter or presenting organization could provide us with philanthropic and investment opportunities. Once we, with her help, decide to make an [sic] philanthropic or for profit investment, it will be for [the beneficiary] to monitor and follow up with the entity or individual and to evaluate how our investment is being used. We want her to be pro-active and to follow through to ensure that fair benchmarks are established for philanthropic institutions and to ensure that the object of our investment is well managed.

Neither this letter nor any other evidence of record delineates the petitioner's for-profit or philanthropic investment standards that the beneficiary would have to apply. Application of these standards appears to be the critical requirement of the proffered position, but, because the standards are not specified, it is impossible for the AAO to determine the types and levels of knowledge that they would require.

The AAO accords little evidentiary weight to the letter from the Head of the CMU School of Drama.

The Head of the CMU School of Drama assumes that performance of the proffered position will require the application of a highly developed fine arts background:

The challenge of assessing excellence and esthetics in the arts is highly specific and specialized. In order to determine quality within the context of cultural particularity, it is essential to have an intense and advanced education in the arts. One must be prepared to evaluate artistic product from a wide range of disciplines – all branches of the performing arts including dance, theater, music, and visual arts

The CMU letter is not convincing because it does not demonstrate that it is founded upon specific tasks that this particular beneficiary would perform or any of the petitioner's investment standards that the beneficiary would apply. The letter is an abstract discussion that does not relate to facts established about the position at hand.

The AAO finds that the total information about the proffered position that is presented in the letter and elsewhere in the record is too generalized and limited to support a conclusion that the petitioner's arts adviser would apply the theoretical and practical application of at least a bachelor's level of highly specialized knowledge in the arts.

The CMU letter is not probative for another reason also: it does not clearly indicate the academic degree that the Head of the Drama School would equate with the "intense and advanced education in the arts." The letter

does not state that performance of the proffered position requires at least a bachelor's degree in a specific specialty.

For the following reasons, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹ To the extent it is described in the record of this proceeding, the proffered position does not comport with any occupational category for which the *Handbook* indicates a normal entry-level hiring requirement of at least a bachelor's degree, or the equivalent, in a specific specialty. No evidence in the record establishes such a requirement. Accordingly, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) has not been satisfied.

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted attestations from other persons or firms in the petitioner's field or from a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty. As evident in the earlier discussion of this evidence, the letter from the Head of the CMU School of Drama does not establish a common educational requirement for arts advisors in the petitioner's industry. Counsel (brief, at page 4) also refers to hiring by talent agencies such as William Morris as evidence that the petitioner has satisfied this first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). However, as correctly noted by the director, the hiring requirements stated in the record's William Morris job advertisement do not include a degree in a specific specialty. Further, the job duties for the position at William Morris do not appear to be similar to that of an art advisor.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/.

As the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).

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.