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FILE: WAC 04 094 50382 Office: CALIFORNIA SERVICE CENTER Date: **AUG 25 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:
[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 California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is a supplier of children's furniture and bedroom furniture to U.S. businesses, with five employees. It seeks to employ the beneficiary as a web/graphic designer 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, filed by the petitioner. The AAO reviewed the record in its entirety before reaching its decision.

On appeal, the petitioner indicated it would submit a brief and/or evidence within 30 days of filing the Form I-290B. As the AAO found no brief or evidence in the file, it contacted the petitioner to determine whether this documentation had been forwarded. The petitioner's response again requests 30 days in which to file a brief or evidence. The request for additional time within which to submit evidence is denied. The record is complete and ready for adjudication.

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 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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner states that it is seeking the beneficiary's services as a web/graphic designer. Evidence of the beneficiary's duties includes: the Form I-129; a February 14, 2004 letter of support from the petitioner submitted at the time of filing; and counsel's March 25, 2004 response to the director's request for evidence.

In response to the director's request for evidence, counsel provided a job description from the petitioner indicating that the proffered position would require the beneficiary to:

- Design and produce a newsletter, media kit(s), and website;
- Create and design a company-owned furniture magazine;
- Manage and update the material on the petitioner's website;
- Consult with her supervisor to evaluate individual project needs;
- Prepare illustrations or sketches of new products according to instructions from clients or her supervisor;
- Provide detailed product information or sample presentations, or email to clients and her supervisor for selection and approval, and notify engineers to begin product development;
- Use software tools and technologies to transform design concepts into specific electronic application on and off-line;
- Create the layout or prepare instructions for workers who assemble and prepare the final layout for catalogs, magazines, and flyers;
- Review final layout and suggest improvements, and present final layout to supervisor for approval; and

- Prepare final layout for the printing shop on paper, film, or disk; and review quality of final product.

To determine whether the duties just described are those of a specialty occupation, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and 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 (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

In his denial the director concluded that the preceding duties identified the proffered position as closely aligned to the occupation of computer support specialists and systems administrators. The AAO does not agree. It concludes, instead, that the petitioner's proffered position is that of a graphic designer, employment described within the occupation of designers at page 242 of the *Handbook* (2004-2005 edition):

Graphic designers plan, analyze and create visual solutions to communications problems. They use a variety of print, electronic, and film media and technologies to execute a design that meet clients' communication needs Graphic designers use computer software to develop the overall layout and production design of magazines, newspapers, journals, corporate, and other publications. They also produce promotional displays and marketing brochures for products and services, design distinctive logos for products and business, and develop signs and signage systems . . . for business and government. An increasing number of graphic designers are developing material for Internet Web pages, computer interfaces, and multimedia projects

While the *Handbook*, at page 244, indicates that a bachelor's degree is required for most entry-level design positions, except for floral design and visual merchandising, it does not specifically discuss the degree requirements imposed on entry-level employment as a graphic designer. Instead, it states the following regarding the education needed to work as a designer:

[T]he Bachelor of Fine Arts degree is granted at 4-year colleges and universities. The curriculum in these schools includes art and art history, principles of design, designing and sketching, and specialized studies for each of the individual design disciplines, such as . . . computerized design

Based on the above discussion, the AAO concludes that a graphic designer is required to have a baccalaureate degree in fine arts, with specialized course work in graphic design, or a related discipline. It finds, therefore, that the petitioner has successfully established its proffered position as a specialty occupation under the first

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The petition may not be approved, however, as the record does not reflect that the beneficiary is eligible to perform the duties of the specialty occupation. The beneficiary received a Master of Arts in Computer Education and Technology from the California State University at Los Angeles on December 14, 2002. The beneficiary's resume reflects that she received a baccalaureate degree in Leisure and Recreation Service Technology in December 1999. As the director has not determined whether the beneficiary is eligible to perform the duties of a graphics designer, the petition will be remanded.

Therefore, for reasons related in the preceding discussion, the AAO will withdraw the director's decision and remand the instant case to the director for a decision as to whether the beneficiary qualifies to perform the duties of a specialty occupation. The director may request such evidence as may be necessary to assist in reaching that determination. The director shall then issue a new decision based on the evidence of record, as it relates to the statutory and regulatory requirements for H-1B nonimmigrant visa eligibility.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision of April 9, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, shall be certified to the AAO for review.