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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

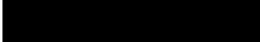


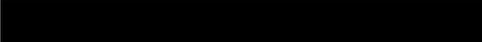
U.S. Citizenship
and Immigration
Services

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Date: **MAY 02 2011** Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, 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 appeal will be dismissed. The petition will be denied.

In the Form I-129, the petitioner alleges that it is a firm that designs advertising and marketing materials. It seeks to employ the beneficiary as a 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

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

The primary issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 [1] 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 [2] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a Graphic Designer. The petitioner did not provide a position description or minimum requirements for the proffered position when it submitted the petition. Counsel for the petitioner stated that the petitioner is in the business of developing advanced pantograph technology for protection of identification cards and that the petitioner requires a Graphic Designer to be responsible for the concept and design of all internal and external artwork design and production.

The petitioner submitted copies of the beneficiary's credentials along with a credential evaluation stating that the beneficiary's education is equivalent to a Bachelor of Arts Degree in Public Relations from an accredited college or university in the United States.

On April 7, 2009, the director issued an RFE requesting a more detailed job description and evidence that the beneficiary holds a bachelor's degree in graphic design.

In response to the RFE, the petitioner stated that it requires the person filling the proffered position to hold at least a Bachelor's degree in Public Relations and Marketing or a related field plus two years of experience in graphic design. The petitioner broke down the proffered duties as follows:

- Design and maintain the petitioner's website, which requires two years of experience in graphic and web design (65% of the time);
- Add artwork to the petitioner's website and product brochures, including the monthly newsletter, which requires a bachelor's degree in public relations, marketing or a related field plus two years of experience in graphic or web design (20% of the time);
- Maintain, update, and apply for federal and California contracts, which requires three years of experience with MS Office (12% of the time); and
- Maintain inventory control for major equipment, extended warranties for printers, and service contracts, which requires three years of experience with MS Office (3% of the time).

Therefore, according to the petitioner, only 20% of the beneficiary's duties require at least a bachelor's degree in public relations, marketing or a related field. The other 80% of the beneficiary's duties require only two to three years of experience.

The director denied the petition on July 31, 2009.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

On appeal, the petitioner states that its primary business is to provide new technologies, products, installation, training, and warranty services and that the proffered position is a newly created position. The petitioner argues that the proffered position of graphic designer is a specialty

occupation according to the *Handbook*. The petitioner further argues that the beneficiary previously held the same position of graphic designer in H-1B status with another company and therefore continues to qualify for H-1B classification.

The AAO disagrees that the proffered position as described by the petitioner is that of a graphic designer. According to the *Handbook*, 2010-11 online edition:

Graphic designers—or graphic artists—plan, analyze, and create visual solutions to communications problems. They find the most effective way to get messages across in print and electronic media using color, type, illustration, photography, animation, and various print and layout techniques. Graphic designers develop the overall layout and production design of magazines, newspapers, journals, corporate reports, and other publications. They also produce promotional displays, packaging, and marketing brochures for products and services, design distinctive logos for products and businesses, and develop signs and signage systems—called environmental graphics—for business and government. An increasing number of graphic designers also develop material for Internet Web pages, interactive media, and multimedia projects. Graphic designers also may produce the credits that appear before and after television programs and movies.

The first step in developing a new design is to determine the needs of the client, the message the design should portray, and its appeal to customers or users. Graphic designers consider cognitive, cultural, physical, and social factors in planning and executing designs for the target audience. Designers gather relevant information by meeting with clients, creative or art directors, and by performing their own research. Identifying the needs of consumers is becoming increasingly important for graphic designers as they continue to develop corporate communication strategies in addition to creating designs and layouts.

Graphic designers prepare sketches or layouts—by hand or with the aid of a computer—to illustrate their vision for the design. They select colors, sound, artwork, photography, animation, style of type, and other visual elements for the design. Designers also select the size and arrangement of the different elements on the page or screen. They may create graphs and charts from data for use in publications, and they often consult with copywriters on any text that accompanies the design. Designers then present the completed design to their clients or art or creative director for approval. In printing and publishing firms, graphic designers also may assist the printers by selecting the type of paper and ink for the publication and reviewing the mock-up design for errors before final publication.

Graphic designers use specialized computer software packages to help them create layouts and design elements and to program animated graphics.

Graphic designers sometimes supervise assistants who follow instructions to complete parts of the design process. Designers who run their own businesses also may devote a considerable time to developing new business contacts, choosing

equipment, and performing administrative tasks, such as reviewing catalogues and ordering samples. The need for up-to-date computer and communications equipment is an ongoing consideration for graphic designers.

Although the *Handbook* states that graphic designers may develop material for Internet Web pages, interactive media, and multimedia projects, this is not the same as designing and maintaining a website, which the petitioner stated will constitute 65% of the proffered position's duties. According to the petitioner, only 20% of the beneficiary's time will be spent adding artwork to the petitioner's website and product brochures. Therefore, the majority of the beneficiary's duties do not entail working as a graphic designer. Further, the petitioner stated that only 20% of the beneficiary's duties require at least a bachelor's degree or the equivalent and graphic design is not one of the stated acceptable fields by the petitioner that qualifies someone to add artwork to the petitioner's website and product brochures even though, according to the *Handbook*, a bachelor's degree in graphic design is usually required to perform the duties of a graphic designer.

Instead, the AAO finds that the majority of the proffered position's duties most closely fall under the job description of an Internet developer or Web developer/designer, which is found under the section for Computer Scientists and Database Administrators in the *Handbook* as follows:

The growth of the Internet and the expansion of the World Wide Web (the graphical portion of the Internet) have generated a variety of occupations related to the design, development, and maintenance of Web sites and their servers. For example, *webmasters* are responsible for all technical aspects of a Web site, including performance issues such as speed of access, and for approving the content of the site. *Internet developers* or *Web developers*, also called *Web designers*, are responsible for day-to-day site creation and design.

Of the education and training required for positions in the computer scientists and database administrators section, the *Handbook* states:

A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree. . . . For more technically complex jobs, persons with graduate degrees are preferred. . . . *Art or graphic design skills may be desirable for webmasters or Web developers.*

Despite employers' preference for those with technical degrees, individuals with post-secondary degrees in a variety of other subjects may find employment in these occupations.

(Emphasis added.)

Therefore, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for Web designers.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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.

As the *Handbook* indicates no specific degree requirement for employment as a web designer, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, 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.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its 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 established that parallel firms routinely require at least a bachelor's degree in a specific specialty.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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 evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for web designer positions, including degrees not in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than web design or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As discussed previously, the petitioner states that the majority of the duties to be performed by the beneficiary do not require at least a bachelor's degree in a specific specialty. Instead, the petitioner states that 2-3 years of experience is sufficient to perform 80% of the proffered duties. The AAO does not find that the proposed duties, as generically described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of web designers not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess skills and qualifications beyond those of a standard web designer. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel for the petitioner argues on appeal that because the beneficiary is working for another company in H-1B status performing what are allegedly the same duties, this is sufficient to demonstrate that the proffered position is a specialty occupation. However, no evidence was submitted that the proffered position is the same as the one held by the beneficiary with her previous employer. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, 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 any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they 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 USCIS 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 compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482

(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 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Beyond the decision of the director, the AAO finds that even if the petitioner were to demonstrate, which it did not do, that the proffered position is that of a specialty occupation graphic designer, the petitioner did not submit evidence that the beneficiary holds at least a bachelor's degree or the equivalent in a field related to graphic design in order to show that the beneficiary qualifies to perform services in a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(C) specifically and repeatedly states that the beneficiary must possess one of the listed qualifications required by or related to "the specialty," not "a specialty." As such, the petition could not be approved even if eligibility for the benefit sought had been otherwise established.

The AAO conducts appellate review on a de novo basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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