

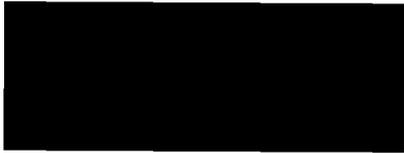
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



PUBLIC COPY

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Date: **SEP 07 2011**

Office: VERMONT 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 service center director 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.

On the Form I-129 visa petition, submitted April 1, 2009, the petitioner stated that it is a graphic designing firm with two employees. To employ the beneficiary in what it designates as a chief graphic designer position, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that the beneficiary is qualified for the proffered position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

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.

The degree referenced by section 214(i)(1)(B) of the Act, 8 U.S.C. § 1184(i)(1)(B), 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.

A bachelor's degree does not, *per se*, qualify a beneficiary for employment in a specialty occupation. Rather, the position must require a degree in a specific specialty. *See Matter of Michael Hertz, Assoc.*, 19I&N Dec. 558,560 (Comm. 1988). Further, the beneficiary must have a degree in that specific specialty. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

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,

- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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 also 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;
- (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;
- (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 [a] 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 [b] have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record contains a transcript and a diploma showing that the New York Institute of Technology (NYIT) awarded a master's degree in communications arts to the beneficiary during May of 2008.

In a letter, dated March 27, 2008 and submitted with the visa petition, the petitioner's vice president provided a description of the duties of the proffered position. The petitioner's vice president also stated: "As with any graphic designer position assuming the above duties, the usual minimum requirement for performance of the job is often at least a Bachelor's degree in related areas." The petitioner's vice president did not name or otherwise describe the degree or degrees that would qualify one to work in the proffered position.

The vice president further stated, "The position of a Chief Graphic Designer also demands a [higher] degree of responsibility such as reviewing and approving all design works prepared and submitted by junior graphic designers." The AAO notes that the petitioner stated, on the visa petition, that it has two employees. The petitioner's vice president stated, however, that the petitioner intends to hire additional workers in the future.

United States Citizenship and Immigration Services (USCIS) regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner appears to be stating that the beneficiary would perform supervisory duties, not immediately upon commencing work in the proffered position, but at some future date, contingent upon the petitioner expanding its operations and engaging more workers. Such duties may not be considered in determining whether the petitioner had specialty occupation employment for the beneficiary on the date it filed the visa petition, and should not have been included in the description of the beneficiary's prospective duties.

The service center issued an RFE on May 1, 2009. That RFE requested additional evidence to demonstrate that the beneficiary is qualified to work in the proffered position. The service center stated, "[The] evidence must show how the beneficiary's degree(s) in Communication Arts qualify/qualifies him/her for the proffered position as a(n) Chief Graphic Designer," and "If the Degree(s) is/are not in a directly related field submit a statement detailing how the degree relates."

In an undated statement submitted in response, the petitioner's vice president stated,

We believe the beneficiary's degree in communication arts does qualify him for the proffered position as chief graphic designer for the following reason:

As a common practice, a degree in communication arts is like an umbrella degree covering majors such as media design, online media, advertising (radio, TV commercial, print) and graphic design.

The beneficiary's major at [NYIT] was graphic design and he took many courses there in the field of graphic design. He received a master's degree in communication arts from [NYIT]. This University does not offer a master's degree in graphic design. A transcript of the beneficiary's studies at [NYIT] is attached for your review.

Although the petitioner's vice president stated that the beneficiary's major was graphic design, nothing on the beneficiary's diploma supports that assertion. Further, that NYIT does not offer a master's degree in graphic design does not support the proposition that the beneficiary's master's degree is in graphic design or is equivalent to a degree in graphic design.

The director denied the visa petition on July 31, 2009, finding that the evidence does not demonstrate that the beneficiary is qualified to work in the proffered position. On appeal, counsel submitted three letters and an appeal brief.

One letter, dated February 12, 2007, purports to be from [REDACTED]. It states that the beneficiary is a graduate student at NYIT in the Communication Arts Department, and is [REDACTED], which are apparently an advertising and a digital imaging class, respectively.

Another letter, dated February 16, 2007, is on the letterhead of Somethingdigital, a New York company. That letter is from [REDACTED], whose position at Somethingdigital is unstated. That letter represents that [REDACTED] is teaching a class in Digital Imaging and that the beneficiary is her teaching assistant.

The AAO notes that neither of those letters bears any relevance to whether the beneficiary's has a minimum of a bachelor's degree or the equivalent in a specific specialty that qualifies him for a chief graphic designer position.

The third letter, dated August 19, 2009, states that it is from [REDACTED]. That letter states that the beneficiary's degree program has several specializations and that the beneficiary chose the computer graphics area. It also addresses some of the classes the beneficiary took at NYIT and states that they relate to graphic design. It lists other classes and states that they contribute to a general understanding of the arts. It further states that the beneficiary has acted as a teaching assistant and is an excellent graphic designer.

The AAO will consider the criteria of section 214(i)(2) of the Act. The record contains no indication that a license is required to practice in the occupation of chief graphic designer. The petitioner must therefore demonstrate that the beneficiary has a minimum of a bachelor's degree or the equivalent in the specific specialty required by the proffered position.

The beneficiary's master's degree is in communication arts. Although the beneficiary presumably has an undergraduate degree as well, the petitioner and counsel have not argued, nor even suggested, that the beneficiary has any degree, other than his master's degree from NYIT, that qualifies him to work in the proffered position. Neither do the petitioner and counsel appear to assert that a degree in communication arts, *per se*, qualifies one for a chief graphic designer position. Rather, counsel argues that although the beneficiary's transcript states that the beneficiary was awarded a master's degree in communication arts, his degree is actually a degree in computer graphics, or the equivalent. Counsel asserts, or at least implies, that a degree in computer graphics qualifies one for a chief graphic designer position.

The assertion that the beneficiary's master's degree is in the computer graphics specialty is not supported by the diploma provided. The transcripts provided do indicate that the beneficiary has taken a class in computer graphic art, a class in multimedia web design, a class entitled graduate art studio, a class in multimedia tools, an introduction to animation class, and a class in TV studio operations. He has also taken classes entitled vocabulary of media criticism, media & culture, externship program, seminar, and film history.

Although various letters state the conclusion that those classes render the beneficiary's degree into a degree in graphic arts, none of them include the analysis, if any, by which that conclusion was reached. None have discussed the number of semester hours of graphic design classes that must be taken to obtain a bachelor's degree in graphic design. None have discussed what mandatory classes such a program would necessarily include, or provided a source for that information. None compare the classes the beneficiary has taken to those that would result in a degree in graphic design. The AAO is not swayed by the conclusion that the beneficiary has a degree in graphic design, or the equivalent of such a degree, absent any explanation of the reasoning that led to it.

A bachelor's degree does not, *per se*, qualify a beneficiary for employment in a specialty occupation. Rather, the position must require a degree in a specific specialty. *See Matter of Michael Hertz, Assoc.*, 19I&N Dec. 558, 560 (Comm. 1988), and the beneficiary must have a degree in that specific specialty. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968). Because licensure is not required to work in the proffered position, and because the petitioner has not demonstrated that the beneficiary has a minimum of a bachelor's degree or the equivalent in a specific specialty directly related to the proffered position, it has not demonstrated that the beneficiary is qualified for the proffered position pursuant to any of the alternative criteria of section 214(i)(2) of the Act.

The petitioner has not demonstrated that the beneficiary is qualified to work in the proffered position. The appeal will be dismissed and the petition denied on that basis.

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. The appeal will be dismissed and the petition denied.

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