

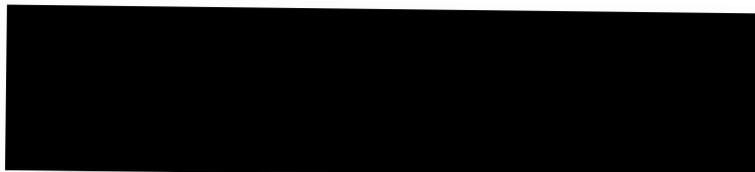


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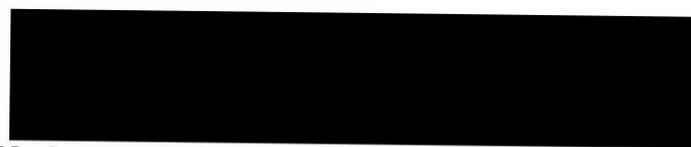
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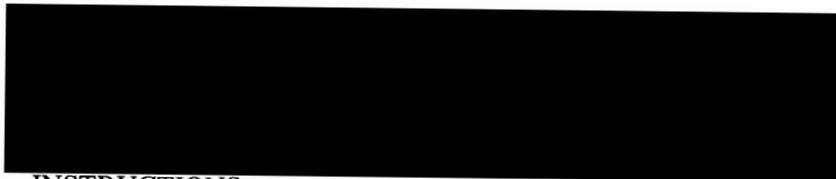
FILE: WAC 04 233 50656 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 2006**

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:

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.

for Michael T. Kelley
Robert P. Wiemann, Director
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.

The petitioner is a store equipment wholesale and retail company that seeks to employ the beneficiary as an industrial designer. The petitioner endeavors 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 because the petitioner did not establish that a bona fide specialty occupation existed. On appeal, counsel submits a brief.

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.

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 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) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an industrial designer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's August 16, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: creating various types of designs, product packaging, catalog, label and tag designs; composing floor layout and display units according to different store types and customer requests; using AutoCAD and 3-D rendering programs to lay out designs of store equipment according to specifications provided by the customer; instituting statistical calculation in measuring and advanced mathematics to provide a rendering that is in visual prospectus of the store situation; using advanced theory of mathematics, concepts of interior design, and industrial design as a fundamental tool to make renditions of computer graphical display of equipment, interior design and functional perspective of client needs; reviewing various design approaches, as well as researching contemporary design and modern design utilized for various theme or business settings; and making a 3-D rendering of various store equipment, display units, plastic and metallic modeling units to gather information regarding what structure, supplies, raw materials are needed to create the projects. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in industrial design.

The director found that the petitioner did not establish that the beneficiary would be performing the duties of the specialty occupation. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director acknowledged that a position as an industrial designer is a specialty occupation. Counsel also states that the petitioner met its burden of proof in establishing that its business activity required the services of an industrial designer.

The AAO concurs with counsel and the director that a position as an industrial designer is generally a specialty occupation. The AAO, however, does not find that the proffered position is an industrial designer. The duties are most like those of an interior designer. The *Handbook* states:

Interior designers are involved in planning the interior spaces of almost all buildings—offices, airport terminals, theaters, shopping malls, restaurants, hotels, schools, hospitals, and private residences. Designers help to improve these spaces in order to boost office productivity, increase sales, attract a more affluent clientele, provide a more relaxing hospital stay, or increase the building's market value.

Following the initial meeting with the client, the designer will formulate a design plan and estimate the costs on the basis of the client's goals and budget. Today, designs often are created with the use of computer-aided design (CAD), which provides a more detailed layout and also allows for easier corrections than sketches made by hand. Once the designer has completed the proposed design, he or she will present it to the client and make revisions on the basis of the client's input.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the interior designer job description in the *Handbook* confirms that the job duties submitted in response to the director's request for evidence parallel the responsibilities of an interior designer. The AAO notes that the *Handbook* indicates that a bachelor's degree is required for most entry-level design positions. The *Handbook* further indicates that interior design is the only design field subject to government regulation, with many states requiring designers to be licensed or registered. In reviewing the website for the American Society for Interior Designers,¹ the State of California does not require licensing or registration, but does have a voluntary program for those designers who wish to call themselves "certified interior designers." To qualify for this title, a designer must have some combination of six to eight years of education and experience, and pass a comprehensive set of exams. California Business and Professions Code, Section 5801, indicates that a person may become a certified interior designer with a minimum of a two-year degree and four years of professional experience or a combination of training and experience to total eight years. These requirements clearly reflect that one can become a certified interior designer in California without a bachelor's degree or its equivalent in interior design.

The petitioner submitted numerous Internet job postings for industrial designers. As noted above, the AAO finds that the proffered position is an interior designer, rather than an industrial designer. Thus, the advertisements have little relevance. The record does not include any documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner submitted a newspaper advertisement for the proffered position. The AAO notes that this advertisement was published on September 14, 2004, and appears to have been published in response to the director's August 26, 2004 request for evidence. This does not establish the petitioner's hiring practices. Nor does the petitioner's statement regarding its hiring practices establish a history. The petitioner stated, "We normally require a degree for the industrial designer and graphical designer . . . our previous industrial designer who is no longer with us at this time was required to have a bachelor degree in industrial design or a relevant field and did have such a degree." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not contain any evidence of the petitioner's past hiring practices and, therefore, the petitioner has not met its burden of proof in this regard.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

¹ <http://www.asid.org/legislation/Factsheet+of+Interior+Design+Registration+Laws.htm>, accessed 2/17/06.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The duties do not appear to be more complex than those of interior designers in the State of California. *See* California Business and Professions Code Section 5800(a). Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the beneficiary would be performing the duties of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

On appeal, counsel asserts:

A denial by the AAU [sic] on new and different reasons would be a violation of the foregoing regulations. In addition, a denial by an administrative appellate body (such as the AAU) on grounds of which the party did not have prior notice has been held to be a denial of due process of law.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

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