

PUBLIC COPY

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DA

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

JUL 07 2003

File: EAC-02-128-53502 Office: VERMONT SERVICE CENTER Date:

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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a design showroom, as well as a manufacturer and distributor of fashion accessories. It has nine employees and a gross annual income of \$1 million. It seeks to employ the beneficiary as an international marketing coordinator for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a statement from the petitioner's president.

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), provides in part for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director denied the petition because the petitioner had not demonstrated that a baccalaureate degree is required for the proffered position, or that the beneficiary's educational background in fashion design management qualifies her for a marketing position. On appeal, the petitioner's president states, in part, that the director approved a petition for the petitioner's former employee who held the proffered position with the same job title and job duties, and submits a copy of such petition in support of her claim. She also states that the beneficiary was already working in H-1B status with another

employer as a "fashion merchandising manager," where she performed the identical duties as those listed in the instant petition. The petitioner's president further states that the record contains sufficient evidence, such as approved petitions for similar positions in similar businesses, to demonstrate that the degree requirement is an industry standard.

The petitioner's statement on appeal is not persuasive. The Bureau does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Bureau considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- Researching new marketing trends in Asia, in Europe and in the United States. This entails not only meeting with representatives of companies from Asia, Europe and the United States but further entails traveling to these areas to attend trade-shows and meet[ing] with representatives to determine marketing and trends and new product availability in the area. . . .
- Identifying customer needs. Build customer relationships and stay in constant communication to ensure that the customer (usually other companies) is shipping a steady flow of merchandise available, to ensure that the pricing and cost of the merchandise is competitive and to develop product lines that fit the customer's needs and market.
- Participating in and attending primary market trade shows. These shows are where we can view new products, meet others in the same field to develop business relationships, define trends in the field, determine competitive pricing and thrive.
- Communicating with manufacturers. The product that we chose [sic] to sell must be manufactured in a cost-effective manner to compete in the marketplace. The employee must communicate directly with markets here in the United States and overseas in order to negotiate pricing with these markets, which requires a detailed knowledge of pricing schemes and of the economics involved in the manufacturing process.

- Determining market prices in the United States and abroad. In order to know the amount to expend in purchasing and selling a product, the employee must be familiar with the world markets, currency fluctuations and quota schemes. In order to market most cost-effectively, a thorough knowledge of business markets and economics is necessary. In addition, the United States sets up quota systems with regard to import of goods from abroad. As quotas begin to be met, we must actively locate other markets in order to meet our customer's demands.
- Choosing and deciding on upcoming new products resulting from market research. The employee must review the market research performed in order to determine future product. The research entails traveling to shows all over the world and analyzing the products and costs to develop similar products cost-effectively and gaining a comprehensive knowledge in the trends of the future.
- Applying feedback from meetings and trade shows to develop and to execute product lines and business plans for the company. Once the information is obtained, analysis of the buyer's feedback is necessary to understand their [sic] needs and demands, which will be applied in the future to meet consumer requests and demands.

Furthermore, an International Marketing Coordinator must be knowledgeable in all aspects of merchandising, which is the core of our business. This includes the following:

- Knowledge of pricing structures;
- U.S. Customs Quota Systems;
- Product development;
- Sourcing in the United States and overseas in such countries as China, India, Korea, Egypt, Pakistan, Turkey, Mexico and Portugal;
- Establishing and maintaining manufacturing, shipping, distribution and warehousing channels for the sale and marketing; and
- Most importantly, integrating cost components into the manufacturing and purchasing

equation in a cost-effective manner for corporate and individual customers.

The record contains, in part, the following:

- Form I-797A, Notice of Action, dated 05/01/01, addressed to the petitioner, reflecting the H-1B approval of the petitioner's former employee, [REDACTED] valid from 4/30/01 to 01/01/04;
- Copy of the petitioner's H-1B petition for its former employee, [REDACTED] reflecting the identical position title and job duties as those listed in the instant petition;
- Form I-797A, Notice of Action, dated 01/19/00, addressed to Fifty Seventh St. Collection D/B/A Seigo Neckwear, reflecting the H-1B approval of the petitioner's former employee, [REDACTED] valid from 01/13/00 to 12/31/02;
- An evaluation from a credentials evaluator asserting that [REDACTED] Bachelor of Arts in Economics degree conferred by a Japanese institution is the equivalent of a bachelor's degree in economics from an accredited U.S. institution;
- Form I-797A, Notice of Action, dated 11/18/99, addressed to [REDACTED] a fashion retail/wholesale business, reflecting the H-1B approval of the beneficiary, valid from 12/01/99 to 11/30/02;
- Copy of [REDACTED] H-1B petition for the beneficiary, listing the same job title, fashion merchandising manager, as in the instant petition, and duties that include formulating and implementing merchandising policies and procedures for the petitioner, and monitoring market conditions and price trends;
- Form I-797A, Notice of Action dated 12/04/00, addressed to Laytners Linen Home, a manufacturer of linen and home products, reflecting the H-1B approval of [REDACTED] valid from 11/30/00 to 05/01/03;
- Copy of Laytners Linen Home's H-1B petition for [REDACTED] listing the job title as merchandiser, and job duties similar to those listed in the instant petition;
- In his cover letter dated 03/28/00, the president of Laytner's Linen stated that [REDACTED] holds a Bachelor of Science degree in fashion merchandising management;
- Form I-797A, Notice of Action dated 01/25/01, addressed to Finlay, a fine jewelry design and manufacturing

business, reflecting the H-1B approval of Hui-Wen Lo, valid from 01/24/01 to 12/30/03;

- Copy of Finlay's H-1B petition for [REDACTED] listing the job title as international merchandising planner, and job duties that include analyzing sales data for products sold across the country, tracking sales, monitoring stock needs, and handling replenishments;
- Copy of a Bachelor of Science degree for Hui-Wen Lo from the Fashion Institute of Technology of State University of New York;
- Form I-797A, Notice of Approval dated 11/29/00, addressed to [REDACTED] a fashion accessories and handbags business, reflecting the H-1B approval of [REDACTED] valid from 11/27/00 to 10/01/03;
- Incomplete copy of [REDACTED] petition for Seiko Mizutani, listing the job title as merchandising associate, with the portion listing the proposed duties missing;
- An evaluation from a credentials evaluator asserting that [REDACTED] holds the equivalent of a Bachelor of Arts degree in marketing conferred by an accredited American college or university;
- Four forms I-797A, Notice of Approval, addressed to [REDACTED] a fashion manufacturer, for two international marketing managers, one fashion merchandiser, and one fashion merchandiser/marketing director;
- Form I-797A, Notice of Approval, addressed to [REDACTED] an off-price apparel retailer, for an international marketing coordinator/merchandiser position;
- Form I-797A, Notice of Approval, addressed to Hermes of Paris, a clothing manufacturer, for an international merchandising coordinator/designer position;
- Form I-797A, Notice of Approval, addressed to WR Design, a clothing manufacturer, for a production merchandiser position;
- Form I-797A, Notice of Approval, addressed to Dakota Lingerie d/b/a [REDACTED] which specializes in the marketing, distribution, and production of intimate apparel, for a merchandiser position;
- Form I-797A, Notice of Approval, addressed to Aeropostale, a brand name and retail store, for an assistant allocator position;
- Form I-797A, Notice of Approval, addressed to MaxMara USA, Inc., which is engaged in the import, sale and

distribution of ladies' apparel, for a fashion merchandiser position; and

- Form I-797A, Notice of Approval, addressed to [REDACTED] a division of Kellwood Corp., a clothing manufacturer, for an assistant merchandiser position.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Bureau does not agree with the petitioner's assertion that the proffered position would normally require a bachelor's degree in fashion merchandising management or a related field. The proffered position is similar to that of a marketing manager. In its *Occupational Outlook Handbook (Handbook) 2002-2003* edition, the Department of Labor (DOL) describes the position of a marketing manager as follows:

Marketing managers develop the firm's detailed marketing strategy. . . . [T]hey identify potential markets--for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied.

A review of the DOL's *Handbook* at page 28 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment in marketing managerial jobs. A wide range of educational backgrounds is suitable, but many employers prefer those with experience in related occupations plus a broad liberal arts background. In addition, most marketing management positions are filled by promoting experienced staff or related professional or technical personnel.

The petitioner's assertion that the proffered position is also similar to that of a fashion merchandising manager is noted. An Internet search reveals that many fashion schools offer associate degrees in fashion merchandising. For example, <http://fashiondegrees.com/Brooks-Fashion-Design-College-Long-Beach.html> shows that Brooks Fashion Design College in Long Beach, California, offers an Associate of Arts Degree in Fashion Merchandising. It is also noted that the beneficiary holds an associate's degree in Fashion Merchandising Management from the Fashion Institute of Technology in New York City. In view of the foregoing, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner's former international marketing coordinator held a bachelor's degree in economics, and the petitioner asserts that it normally requires a baccalaureate degree in a business administration, merchandising management or an equivalent thereof, for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Bureau must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3 d 384 (5th Cir. 2000). The critical element is not the title of the position or 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *Supra* at 387.

the Bureau was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See *id.* at 388.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree in business administration, merchandising management or an equivalent thereof, for its international marketing coordinator positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, the evidence in the record of similar petitions having been approved by the director is noted. For reasons discussed herein, however, this office is not convinced that the petitioner has persuasively demonstrated that a bachelor's degree in a specific specialty, or an equivalent thereof, is required for the position being offered to the beneficiary. The AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

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.