

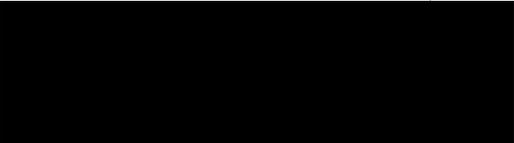
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: EAC-02-032-56356

OFFICE: VERMONT SERVICE CENTER

DATE: OCT 23 2003

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:



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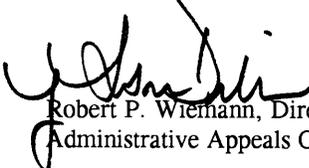
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Vermont Service Center and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a fashion apparel manufacturer and merchandiser that employs 31 persons and has a gross annual income of \$4,400,000. It seeks to employ the beneficiary as a fashion designer. The director denied the petition because the petitioner did not establish that the position qualifies as a specialty occupation.

On appeal, counsel submits a brief. Counsel states, in part, that case law, regulations, proposed regulations, the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and other publications establish that the position of fashion designer is a specialty occupation.

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 for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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 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.

The petitioner asserts that the fashion designer position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title 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 CIS considers. 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. 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 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To

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." See *id.* at 387.

interpret the regulations any other way would lead to absurd results: if CIS were 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 baccalaureate or higher degrees. See *id.* at 388.

In its initial petition, the petitioner set forth the following description of duties for the proposed fashion designer position: "[d]esigns sportswear/apparel; formulates ideas and concepts; draws and sketches patterns for articles using measuring and drawing instruments; analyzes trends to create line; utilizes design mechanical graphic tools and CAD software and hardware, etc." Additionally, the petitioner's support letter, dated September 27, 2001, detailed the job duties to be performed by the beneficiary as follows:

[D]esigning sportswear/apparel; formulating ideas and concepts; creating visual designs for presentation boards and design catalogs; drawing and sketching patterns for articles using measuring and drawing instruments; comparing apparel materials (fabrics, thread); writing specifications describing factors such as color scheme, constructions, and type of material to be used; utilizing knowledge of garment constructions; and analyzing trends for season to create line.

The petitioner required a bachelor's degree in fine art with a major in fashion design with three years of experience in the field.

Subsequent to the filing of the petition, the director requested from the petitioner evidence of its hiring pattern with respect to fashion designers. The director also sought evidence concerning the beneficiary's prior nonimmigrant visa status and proof of the beneficiary's one-year physical presence outside of the United States if she had held H-1B status for six years prior to the instant nonimmigrant visa petition.

In response to this request, counsel reiterated previously cited case law, regulations, and Department of Labor (DOL) publications and adduced new evidence with respect to the beneficiary's status and physical presence outside of the United States for one year. Counsel also provided an excerpt from the DOL's *Occupational Outlook Handbook's* (*Handbook*) section on fashion designers from its most recent edition (2002-2003).

The director issued a second request for evidence from the petitioner concerning the beneficiary's physical presence outside

of the United States for one year as well as evidence concerning how the beneficiary was hired for the petitioner's proffered position.

In response to this request, the beneficiary provided additional evidence concerning her physical presence outside of the United States for one year. In his response, counsel did not address the director's request for information concerning the petitioner's hiring practice.

The director denied the petition for failure to prove that the proffered position was of such complexity, uniqueness, or specialization as to require the attainment of a bachelor's degree in a field of study that consisted of the theoretical and practical application of a body of highly specialized knowledge. The director specifically referenced the petitioner's failure to provide evidence of its normal hiring requirement for the fashion designer position.

Counsel's appellate brief reiterates past discussions. Counsel also submits a proposed regulation from the Department of Labor (DOL) concerning labor certification applications for permanent employment published in the Federal Register in May 2002. See *Labor Certification for Permanent Employment of Aliens in the United States; Implementation of New System*, 67 Fed. Reg. 87 (proposed May 6, 2002) (to be codified at 20 C.F.R. part 656). The proposed regulation sets forth an appendix with occupations that require a bachelor's degree. The fashion designer occupation is included in the appendix.

The petitioner's proffered position is a fashion designer position. The petitioner's description of duties for the position reflect the duties described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* at pages 120-121:

When creating a design, designers often begin by researching the desired design characteristics, such as size, shape, weight, color, materials used, cost, ease of use, fit, and safety.

Designers then prepare sketches - by hand or with the aid of a computer - to illustrate the vision for the design. . . . [D]esigners create detailed designs using drawings, a structural model, computer simulations, or a full-scale prototype. Many designers increasingly are using computer-aided design (CAD) tools to create and better visualized the final product.

Fashion designers design clothing and accessories.

Some high-fashion designers are self-employed and design for individual clients. Other high-fashion designers cater to specialty stores or high-fashion department stores. These designers create original garments, as well as those that follow fashion trends. Most fashion designers, however, work for apparel manufacturers, creating designs of men's, women's, and children's fashions for the mass market.

At page 122, the *Handbook* sets forth training and educational requirements for the fashion designer position as follows: "A bachelor's degree is required for most entry-level design positions, except for floral design and visual merchandising." However, the *Handbook* also states that "[i]n fashion design, employers seek individuals with a 2- or 4-year degree who are knowledgeable in the areas of textiles, fabrics, and ornamentation, as well as trends in the fashion world."

The *Handbook* clearly shows that a fashion designer position does not require a bachelor's degree to enter into the position. The *Handbook* demonstrates that an individual with a two-year degree could obtain a fashion designer position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that employers of fashion designers require a 4-year degree as a standard for the fashion design industry. The record does not contain any evidence concerning an industry professional association or expert affidavits. Thus, the petitioner has not established the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. The petitioner did not provide any evidence concerning its hiring pattern or credentials of employees who hold fashion designer positions. Thus, the petitioner has not established the third

criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

There is evidence that the nature of the position's 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's operations, apparel manufacturing, are similar to the employers described in the *Handbook* for fashion designers. The petitioner's proffered position involves design, conceptual formulation, visual design creation, drawing and sketching ability using measuring and drawing instruments, material comparisons, trend analysis, and CAD software and hardware utilization. The proffered position's duties reflect the *Handbook's* description of duties for fashion designers that require the theoretical and practical application of a body of highly specialized knowledge. The *Handbook* specifies, as noted above, that a bachelor's degree is usually a requirement for employers hiring fashion designers into entry-level positions. (Emphasis added.) The duties of the petitioner's proffered position require knowledge, skills, and abilities that are specialized and complex and usually associated with the attainment of a baccalaureate or higher degree. Thus, the petitioner has established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In counsel's appellate brief, reference is made to *Mindseye v. Ilchert*, No. C-87-2062 (N.D. Cal. March 4, 1988) as evidence that the fashion designer position is a specialty occupation. However, that decision has not been accepted and published as precedent and is distinguishable factually since the petitioner in that case had presented evidence from experts concerning the proffered position. Additionally, the proposed regulation submitted by counsel as evidence to establish that a fashion designer position is a specialty occupation is not probative evidence since the proposed regulation only lists occupations that require a bachelor's degree and does not list specific degree specialities for each occupation. The regulation is not final and limited in scope to the permanent alien labor certification program not temporary nonimmigrant visa petitions such as the H-1B special occupation classification.

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 sustained that burden.

ORDER: The appeal is sustained. The director's decision will be withdrawn and the petition will be approved.