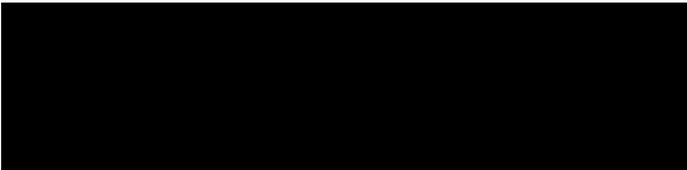




U.S. Citizenship
and Immigration
Services

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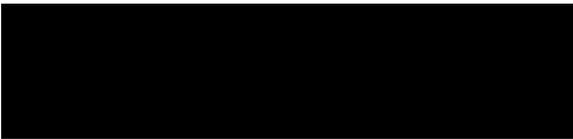
Dr

FILE: WAC 04 019 50447 Office: VERMONT SERVICE CENTER Date: DEC 23 2005

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.

Or
Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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 an importer, exporter, and wholesaler of headwear that seeks to employ the beneficiary as a product designer. The petitioner, therefore, 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, finding that the proposed position does not qualify for classification as a specialty occupation, and that the beneficiary does not qualify to perform the duties of a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation. Counsel does not address the director's finding that the beneficiary does not qualify to perform the duties of a specialty occupation. Counsel contends that the director's decision "was arbitrary and capricious based on prejudicial selective reading of our response." Counsel asserts that "[t]he analysis of the denial clearly shows the examiner was prejudicially predisposed to deny the case based on arbitrary and capricious personal feeling rather than examination of the facts and evidence of the case."

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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.

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 proposed position.

The petitioner, an importer, exporter, and wholesaler of headwear, proposes to hire the beneficiary as a product designer. The petitioner’s October 1, 2003 letter of support stated that the duties of the proposed position are “to develop creative products design concepts leading to final designs and logos through collective efforts of our production department.” In its April 28, 2004 response to the director’s request for evidence, the petitioner offered the following additional information:

The job duties of the proffered position are development of design concepts and conversion of abstract design concepts into design sketches or drawings and design models with application of theoretical knowledge based on advanced academic training and the designer’s personal artistic ability to discern different nuances and subtleties in color, shape, and style. Our product designer also uses computer-aided programs to perform his/her work more efficiently. To perform these job duties, a person must have at the minimum a four year college education or its equivalent in a design-related area with course work including but not limited to design studio, computer-aided designs and design theories.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook* offers the following information in its discussion of designers:

Designers are people with a desire to create. They combine practical knowledge with artistic ability to turn abstract ideas into formal designs for the merchandise we buy, the clothes we wear, the Web sites we use, the publications we read, and the living and office space we inhabit. Designers usually specialize in a particular area of design, such as

automobiles, industrial or medical equipment, home appliances, clothing and textiles, floral arrangements, publications, Web sites, logos, signage, movie or TV credits, interiors of homes or office buildings, merchandise displays, or movie, television, and theater sets.

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 clothing that follows established trends. Most fashion designers, however, work for apparel manufacturers, creating designs of men's, women's, and children's fashions for the mass market.

The duties of the proposed position appear closely aligned to those of fashion designers, as discussed in the *Handbook*. The *Handbook* states the following with regard to the educational qualifications required for fashion designers:

In fashion design, employers seek individuals with a 2- or 4-year degree who are knowledgeable in the areas of textiles, fabrics, and ornamentation, and about trends in the fashion world.

These findings do not support counsel's contention that a bachelor's degree is the normal minimum requirement for entry into this occupation. The fact that employers require an associate's degree or a bachelor's degree is not synonymous with the regulatory requirement that a bachelor's degree be the minimum requirement for entry into the field in order to qualify for classification as a specialty occupation.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

A 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 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.

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.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. No evidence has been submitted to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner that do not require the services of a person with a degree.

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. None of these items were submitted.

The petitioner asserted in its April 28, 2004 response to the director's evidence that it employs two persons in positions similar to the one proposed here. However, to qualify under this criterion, evidence to support the assertion that the petitioner normally requires a degree or its equivalent must be presented. Simply 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)).

Moreover, the petitioner stated that these two employees are graphic designers. According to the *Handbook*, graphic designers "plan, analyze, and create visual solutions to communications problems," and they "use a variety of print, electronic, and film media and technologies to execute a design that meets clients' communications problems." These duties are not synonymous with those of the proposed position.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed 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 in the specialty. Again, the record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner.

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. As the proposed position does not qualify for classification as a specialty occupation, the beneficiary's qualifications for the position are immaterial.

As the petition was properly denied, counsel's statements regarding the arbitrary and capricious nature of the director's decision, as well as the contention that she was prejudicially predisposed to deny the case, are without merit and will not be addressed.

The petitioner has not established that the proposed position qualifies for classification as a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

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.