

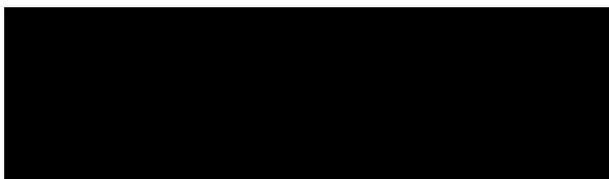
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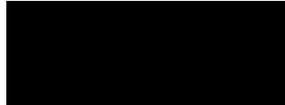
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FILE: EAC 03 179 53810 Office: VERMONT SERVICE CENTER

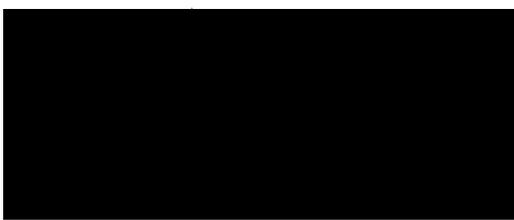
Date: JUL 07 2005

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 clothing manufacturer that seeks to employ the beneficiary as a textile 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 because the proffered position is not a specialty occupation. 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 a textile designer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail developing and directing the preparation of color and design combinations for use on the petitioner's product; compute the amount and areas to be covered by specific color schemes depending on the particular product involved; being responsible for creating new lines and researching current trends; selecting colors that will make the line unique and salable; setting color story and reviewing textile lines; re-fabricating styles from one year to next; creating new patterns and styles; developing line, making artistic sketches that will be made into sample that will be shown to the sales forces for their approval/selection; designing original artwork; coloring new patterns with commercial and fashionable appeal; utilizing CAD (computer aided design) to develop new patterns; and scheduling design and color work. The petitioner indicated that the specific duties are so specialized and complex that they may only be performed by an individual with a relevant baccalaureate degree.

The director requested additional information about the proffered position. The director requested evidence to show that the petitioner's requirement of a bachelor's degree in a specific field of study is a standard minimum requirement. The director requested evidence that the petitioner routinely hires those who have a degree to perform the duties affiliated with the proffered position. The director noted that neither the workers' resumes or a statement from the petitioner would serve as documentary evidence and explained that documentary evidence may include but is not limited to copies of the employees' degrees and that pay stubs or copies of W-2's may be submitted as proof that the petitioner has employed these workers.

The petitioner responded and provided details about the proffered position and stated that the tasks are complicated and specialized, and require theoretical and practical application of highly specialized knowledge obtained from extensive coursework. The petitioner discussed the relevant coursework completed by the beneficiary. The petitioner referred to an unpublished decision, the 1986-1987 Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) and the Department of Labor's *Dictionary of Occupational Titles* (*DOT*) to support its contention that a textile designer is a professional occupation.

Additionally, the petitioner submitted a letter from a competitor, which stated that it requires a bachelor's degree in textile design or a closely related field for the position of textile designer. The petitioner stated that it requires applicants for the position of textile designer to have at least a bachelor's degree and that it has previously hired fashion designers with bachelor's degrees in clothing and textiles. The petitioner submitted certificates of graduation for two individuals.

The director determined that the proffered position was not a specialty occupation. The director found that the petitioner had not convinced CIS that the position offered qualifies as a specialty occupation. The director noted that by demonstrating that the degree requirements are an industry-wide standard among similar firms and institutions, CIS may be convinced that a textile designer employed by the petitioner is a specialty occupation. The director found that the record does not contain evidence clearly establishing that the position offered requires individuals to hold a baccalaureate degree in a specialty.

The director determined that the evidence of record did not establish that the specific nature of the duties that the beneficiary will perform qualifies at the H-1B level or that the petitioner routinely requires a baccalaureate degree in a specific field of study as a prerequisite for the job offered.

On appeal, counsel states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The petitioner submits a position evaluation from an adjunct professor at the Fashion Institute of Technology (FIT) in New York City. The letter indicated that FIT does not even offer an associate degree in textile design because the subject "is so complex, such that it can only be offered only on the bachelors level." Counsel states that the position evaluation indicates the field of textile designer normally requires a bachelor's degree in a related field and cites the letter:

Having reviewed [the petitioner's] description of the duties of the position of an interior designer, [sic] it is our opinion that the position requires the services of an individual as [the beneficiary] who holds the equivalent of a Bachelor of Arts degree in textile design . . .

Additionally, the petitioner refers to two letters from to small apparel companies which it contends is similar in size and that both letters indicate that they hire textile designers who have at least a bachelor's degree in textile design or a related degree.

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 considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 872, 1102 (S.D.N.Y. 1989)).

In determining whether a 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.

A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by fashion designers who work for apparel manufacturers, creating designs of men's, women's, and children's fashion for the mass market.

The petitioner fails to establish the first criterion because the *Handbook* states that in fashion design, employers seek individuals with a 2- or 4- year degrees who are knowledgeable in the areas of textiles, fabrics, and ornamentation, and about trends in the fashion world. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion, an employer may show that a specific degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that this particular position is so complex or unique that it can be performed only by an individual with a degree. On appeal, counsel contends that the petitioner submitted sufficient documentation establishing that a baccalaureate or higher degree is normally required for entry into the position of textile designer. The petitioner submitted internet job postings from various apparel manufacturers. This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. Some postings specifically state that a bachelor's degree is required yet another posting vaguely states a design or related degree. One posting indicates that it will consider appropriate experience in place of a degree. Additionally, a deficiency in the postings is that the companies are obviously dissimilar to the petitioner. Some of the postings are for companies that vary greatly in size from that of the petitioner such as Nike and Target. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

Additionally, the petitioner submitted two letters from companies which the petitioner states are its competitors. Both letters indicate that the companies require individuals with bachelor's degrees in a specific specialty for a textile design position. While relevant, two letters do not establish an industry hiring norm.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner indicated that it has employed two fashion designers with bachelor's degrees and submitted certificates of graduation from foreign universities for both but did not submit any proof of employment such as payroll stubs or W-2's.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. Counsel constructed a graph which he contends that clearly illustrates that the duties of the proffered position are so "complex or unique that it can be performed only by an individual with a degree." This graph lists the duties of the position and relates them to corresponding coursework. Counsel concludes that a person without a related bachelor's degree cannot effectively achieve these specialized and complex functions and thereby satisfy the expectations of the petitioner's clients. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Once again, the *Handbook* reveals that the proffered position is performed by fashion designers, an occupation that may require either a 2- or 4- year degree.

As related in the discussion above, and by the statement from the *Handbook*, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall 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.