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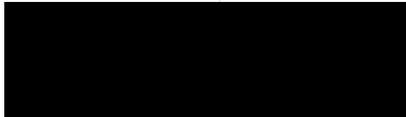


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FILE: SRC 04 231 50310 Office: TEXAS SERVICE CENTER

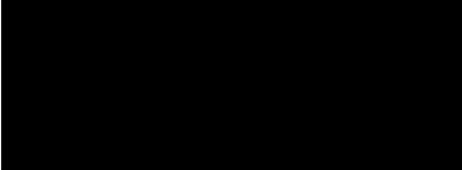
Date: **AUG 18 2006**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 retail designer clothing company, was established in 2000, has 4 employees, and gross annual income of \$250,000. It seeks to employ the beneficiary as a fashion designer 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE, dated September 17, 2004; (4) the director's denial letter; and (5) Form I-290B, with the petitioner's appeal brief.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a fashion designer.

At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position would require the beneficiary to ensure garment development, execution and fit, along with detailed construction development. The petitioner specified the job duties as follows:

- Develop, design, and merchandise new line of vintage reconstructed softgoods line for both men and women;
- Responsible for research of current trends, concepts and styling;
- Develop first and second samples and patterns;
- Establish quality standards;
- Follow through on all technical aspects and production;
- Ensure designs meet merchant line plans, price points, and overall trend and creative direction set for season; and
- Approve fabrics, trim, fit and finish of garments.

The petitioner stated that it required a bachelor’s degree.

The director found that the proffered position was not a specialty occupation because the duties are not so specialized and complex as to require a bachelor's degree in a specific field of study. The director noted that the petitioner submitted no evidence to establish that a baccalaureate degree or its equivalent is normally the minimum requirement for entry into the position. 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 references the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. In the response to the RFE, the petitioner submitted Internet job advertisements from design and retail companies to demonstrate the industry requirement for a related bachelor's 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 first turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO agrees that the position duties are those of a fashion designer, based on the discussion of that occupational title in the 2006-2007 edition of the *Handbook*.

The 2006-2007 *Handbook's* description of the employment of fashion designers states:

Fashion designers help create the billions of clothing articles, shoes, and accessories purchased every year by consumers. Designers study fashion trends, sketch designs of clothing and accessories, select colors and fabrics, and oversee the final production of their designs. Clothing designers create and help produce men's, women's, and children's apparel, including casual wear, suits, sportswear, formalwear, outerwear, maternity, and intimate apparel. ... Some fashion designers specialize in clothing, footwear, or accessory design, while others create designs in all three fashion categories.

The design process from initial design inception to final production takes between 18 and 24 months. The first step in creating a design is researching fashion trends and making predictions of future trends. Some designers conduct their own research, while others rely on trend reports published by fashion industry trade groups. Trend reports indicate what styles, colors, and fabrics will be popular for a particular season in the future. Textile manufacturers use these trend reports to begin designing fabrics and patterns while fashion designers begin to sketch preliminary designs. Designers will then visit manufacturers or trade shows to procure samples of fabrics and decide which fabrics to use with which designs.

Once designs and fabrics are chosen, a prototype of the article using cheaper materials is created and then worn by a model to see what adjustments to the design need to be made. During this time, designers usually will narrow down their choices of which designs to offer for sale.

After the final adjustments and selections have been made, samples of the article using the actual materials are sewn, and then marketed to clothing retailers. Many designs are shown at fashion and trade shows a few times a year. Retailers will then place orders for certain items, which are then manufactured and distributed to stores.

...

Depending on the size of the design firm and level of experience, fashion designers may have varying levels of involvement in different aspects of design and production. In large design firms, fashion designers often are the lead designers who are responsible for creating the designs, choosing the colors and fabrics, and overseeing technical designers who turn the designs into a final product. They are responsible for creating the prototypes and patterns and work with the manufacturers and suppliers during the production stages. Large design houses also employ their own patternmakers, tailors, and sewers who create the master patterns for the design and sew the prototypes and samples. Designers working in small firms, or those new to the job, usually perform most of the technical, patternmaking, and sewing tasks in addition to designing the clothing.

With respect to the educational qualifications for fashion designers, the *Handbook* states:

In fashion design, employers seek individuals with a 2-year or 4-year degree who are knowledgeable about textiles, fabrics, ornamentation, and fashion trends. Designers must have a strong sense of the esthetic—an eye for color and detail, a sense of balance and proportion, and an appreciation for beauty. Fashion designers also need excellent communication and problem-solving skills. Despite the advancement of computer-aided design, sketching ability remains an important advantage in fashion design. A good portfolio—a collection of examples of a person's best work—often is the deciding factor in getting a job.

In addition to creativity and sketching ability, fashion designers also need to have sewing and patternmaking skills, even if they do not perform these tasks themselves. Designers need to be able to understand these skills so they can give proper instructions as to how the garment should be constructed. Fashion designers also need strong sales and presentation skills in order to persuade clients to purchase their designs. Good teamwork and communication skills also are necessary because of the increasingly international nature of the business that requires constant contact with suppliers, manufacturers, and buyers around the world.

Aspiring fashion designers can learn these necessary skills through internships with design or manufacturing firms. Some designers also gain valuable experience working in retail stores, as personal stylists, or as custom tailors. Such experience can help designers gain sales and

marketing skills while learning what styles and fabrics look good on different people. Designers also can gain exposure to potential employers by entering their designs in student or amateur contests. Because of the global nature of the fashion industry, experience in one of the international fashion centers, such as Milan or Paris, can be useful.

Beginning fashion designers usually start out as pattern makers or sketching assistants for more experienced designers before they can advance to higher level positions. Experienced designers may advance to chief designer, design department head, or other supervisory position. Some designers may start their own design company, or sell their designs in their own retail stores. A few of the most successful designers can work for high-fashion design houses that offer personalized design services to wealthy clients.

The *Handbook* does not establish a baccalaureate degree requirement for fashion designers. Instead, it emphasizes fashion design experience, creativity, and skills such as sketching ability, sewing and patterning, in addition to communication and problem-solving skills. The *Handbook* is clear that a baccalaureate degree in a specific specialty or its equivalent is not the normal minimum requirement for entry into the occupation.

Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS when determining the criterion 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. 1095, 1102 (S.D.N.Y. 1989)). As earlier discussed, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The record of job vacancy announcements from other employers are not probative. To establish its degree requirement as the norm within its industry, the petitioner submitted 30 Internet job postings for fashion

designers. Counsel contends that the advertisements are proof that a bachelor's degree is common in the fashion design industry. The AAO does not agree. None of the advertisements are published by organizations that may be considered similar to the petitioner, a retailer of vintage clothing with 4 employees. For example, one of the advertisements is for manufacturing and production in an unspecified business; another is from a golf club manufacturer, seeking a manager of a golf apparel company; five are from the same global retailer of footwear, apparel, and gear.

The advertisements contain information that is inconsistent with at least a bachelor's degree in a specific specialty being a requirement common to the industry for positions parallel to the one proffered here, for the advertisements indicate that a bachelor's degree in a major unrelated to fashion design would be acceptable: some of the advertisements specify a bachelor's degree only, without designating a specific major or concentration of studies. Further, the evidence of record does not establish that the positions advertised are parallel to the one proffered here. Some of the advertisements list duties that are more extensive than the duties listed for the proffered position. Some of the advertisements provide too little information about the advertised position to provide a basis for comparison on how closely they approximate the position proffered here. Furthermore, there is no evidence of record to establish that the advertisements are representative of individual advertisers' usual course of recruiting and hiring. Also, there is no evidence to establish that the limited set of fashion-related advertisements for a specific degree accurately represents a requirement that is common to the industry for the particular position here proffered.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. Neither the record's description of the duties comprising the proffered position nor any evidence of record distinguishes the proffered position as more complex than or unique from such fashion designer positions as the *Handbook* indicates may be performed by individuals with less than a baccalaureate or its equivalent in a specific specialty directly and closely related to fashion design.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific 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.

To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Counsel indicated that the position is newly created. In that the record provides no evidence related to the petitioner's hiring practices for the proffered position, it does not establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The job description of the petitioner's fashion designer does not, however, outline duties of the complexity or specialization to require the attainment of a baccalaureate degree or higher. As described in the record, the position involves basic generic duties for fashion design. The duties, as described, do not establish that they are more specialized and complex than fashion designer positions which the *Handbook* indicates can be performed without the knowledge usually associated with at least a bachelor's degree in a specific specialty.

Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.