U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: EAC 02 162 53514 Office: VERMONT SERVICE CENTER Date: JAN 06 2004

IN RE: Petitioner: [redacted]
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:

[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 which 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 Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a domestic clothing retailer. It has 3400 employees, a gross annual income of $11,000,000 and seeks to employ the beneficiary as an assistant menswear designer. The director determined that the proffered position did not qualify as a specialty occupation.

On appeal, counsel asserts that the proffered position satisfies all criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), and consequently qualifies as 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, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The first 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 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:

> [A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

When determining whether a particular job qualifies as a specialty occupation, the AAO considers the specific duties of the offered position, combined with the nature of the petitioning entity's business operations. The duties of the proffered position were detailed as follows, with the filing of the I-129 petition:

> The person whom we employ for this professional position as an assistant designer will have some responsibility for handling some aspects of design projects. This employee will assist with the coordination of the promotion of most segments of [the] employer's in house design work.
>
> This employee will also be responsible for assisting in researching new fashion trends in the United States. Prepare assortment sheets for each session [sic]. This employee will comment on garment product features and quality of garments.
>
> The major focus of this job is the computer rendering of the garments that were designed by our creative design team. The employee will take rough sketches and create a computer rendering that includes all of the technical aspects and specifications that will be utilized by the manufacturers to actually product [sic] the garment. The beneficiary will use computer graphics software such as **Primavision** [Emphasis Petitioner's]. Primavision software is [a] computer design system that is used by staff to reduce a free hand or conceptual designs into a standardized

> design format. These standardized designs, commonly known as Technical sketches, detail sketches and construction sketches, include instructions as to style, fabric, stitching and construction. . . .
>
> The beneficiary must also be able to create a technical package for production by using computer software such as Excel. The beneficiary will use these software systems to make colorway instruction, fabrication sheets, trim sheets, as well as artwork information (for embroidery, print and logo, etc.). . . .
>
> . . . .
>
> At Aeropostale, Inc., our designers are also responsible for organizing and designing presentation boards and color boards.

The petitioner further noted with the filing of the I-129 petition that it required a minimum of a baccalaureate level education with a concentration in Fashion Design for the offered position.

Subsequent to the filing of the I-129 petition, the director requested additional evidence from the petitioner. Specifically, the director asked the petitioner to provide: a detailed statement setting forth the beneficiary's proposed duties and responsibilities; the educational requirements of the proposed position and a statement of how the beneficiary's education relates to the position; and a list of all fashion designers employed by the petitioner, their job titles, duties, and educational backgrounds.

In response to the director's request, the petitioner provided the following:

> **JOB DUTIES**
>
> The person whom we employ for this professional position will handle aspects of design projects on behalf of our company. This employee will assist with the coordination of the promotion of all segments of [the] employer's in-house design work. As part of her responsibilities this employee will also be responsible for[:]
>
> 1. researching new fashion trends abroad and in the United States;
>
> 2. prepare line lists for each season;

3. make sample requests for presentation;

4. design details while coordinating with technical designers; assist other designers and other departments to help them exchange ideas in fashion designing; [and]

5. will provide contact with our clients overseas, explain garment product features and quality of garments.

Furthermore, this employee must be knowledgeable of all types of fabrics and their respective properties and characteristics. This includes knowledge of their structure, including chemical properties and components.

Most importantly is the ability to integrate cost components into the equation so that finished garments can be produced cost effectively. In addition, this employee will create these designs by using professional equipment and graphical applications through computer graphic software such as Macintosh environment and QuarkXpress/Adobe[,] PhotoShop/Adobe Illustrator, etc.

. . . .

The beneficiary will use these software systems to make size spec sheets, colorway instruction, fabrication sheets, trim sheets, as well as artwork information (for embroidery, print and logo, etc.), labeling, packaging sheets and care instructions. . . . As you can plainly see, there are a multitude of factors and calculations that the beneficiary must undertake in order to successfully produce the necessary technical design reports.

Furthermore, the employee must be knowledgeable of all types of fabrics and their respective properties and characteristics. This includes knowledge of their structure, including chemical properties, wearability, washability and other components. Most important is the ability to integrate cost components into the manufacturing equation so that the finished garments can be produced in a cost effect[ive] manner.

It is critical that the individual occupying this position can originate a creative,

> intelligent, marketable line that can attract attention and generate revenue for the company. This employee must have the ability to create a strong image for the new line, as the current apparel market is extremely competitive. Our designers must have a grasp of clients' [sic] needs and respond in a short time frame to market conditions. This employee will have to quickly assess the content and price of competing lines and create formidable collections in response.

In further response to the director's request, the petitioner supplied the names of other beneficiaries granted H-1B status in unrelated cases. Also submitted were copies of I-129 petitions, approval notices and petitioner support letters for positions claimed by the petitioner to be sufficiently similar to the offered position to indicate a precedent for the granting of the present petition.

In denying the I-129 petition, the director referred to the U.S. Department of Labor's *Occupational Outlook Handbook,* 1998-99 edition, (*Handbook)*, and noted that a bachelor's degree is not the standard minimum requirement for entry into the offered position.

On appeal, counsel states that the offered position satisfies all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), and, therefore, qualifies as a specialty occupation. Counsel disputes the *Handbook* educational requirements as cited by the director, and references more recent editions of the same publication.

The *Handbook* describes the duties 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 publications we read . . .
>
> The first step in developing a new design or altering an existing one is to determine the needs of the client, the ultimate function for which the design is intended, and its appeal to customers. 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. After consulting with the client, an art or design director, or a product development team,

> designers 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 visualize the final product. Computer models allow greater ease and flexibility in exploring a greater number of design alternatives, thus reducing design costs and cutting the time it takes to deliver a product to market. . . .
>
> . . . .
>
> *Fashion designers* design clothing and accessories. . . . Most fashion designers . . . work for apparel manufacturers, creating designs of men's, women's, and children's fashions for the mass market.

Id. at 120-121. The duties of the proffered position fall within those set forth above. The *Handbook* notes that a bachelor's degree is required for most entry-level design positions, except for floral design and visual merchandising. It further specifies, however, that in fashion design, employers seek individuals with a two or four year degree who are knowledgeable in the areas of textiles, fabrics, and ornamentation, as well as trends in the fashion world. A bachelor's degree is not, therefore, the minimum requirement for entry into the position. *Id.* at 122. The petitioner has, accordingly, failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has also failed to satisfy the remaining three regulatory criteria for a specialty occupation:

First, the record does not reflect that a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the offered position is so complex or unique that it can be performed only by an individual with a degree. Counsel notes in his letter of appeal that he was including various classified advertisements to establish that a degree requirement was common to the industry. No such advertisements were included, however, nor were they included on the exhibit list attached thereto. The record also contains reference to other beneficiaries in unrelated proceedings who were granted H-1B status for allegedly similar positions, as well as copies of numerous I-129 petitions, supporting employer letters and Citizenship and Immigration Services (CIS) approval notices. It is the petitioner's position that this documentation establishes that CIS has already determined that similar positions qualify as specialty occupations. This record of proceeding does not, however, contain the entire records of proceeding in the aforementioned submissions. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted

are not sufficient to enable the AAO to determine whether the original H-1B petitions referred to were approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approvals were granted in error, no such determination may be made without review of the original records in their entireties. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding now before the AAO, however, the approval of the prior petition would have been erroneous. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See,* e.g., *Matter of Church of Scientology International,* 19 I&N Dec. 593, 597 (Comm.1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery,* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied,* 485 U.S. 1008 (1988).

It should also be noted, with regard to this regulatory criterion, that the duties of offered position do not appear to be so complex or unique that they can be performed only by individuals with a baccalaureate level education in a specific specialty.

Second, the petitioner notes that it normally requires a minimum of a degree for entry into the offered position. In support of that assertion, counsel lists two assistant designers, both of whom hold a bachelor's degree in fine arts. The employer's self imposed hiring standards will not, however, establish that a particular position is a specialty occupation. Were that so, any petitioner could qualify any given position as a specialty occupation by simply requiring an applicant to possess a bachelor's degree in a specific specialty for entry into the position. The proffered position must still require the theoretical and practical application of a body of highly specialized knowledge to qualify as a specialty occupation, regardless of the petitioner's hiring requirements. The position in this instance, does not. *Cf. Defensor v. Meissner,* 201 F. 2d 384 (5th Cir. 2000).

Finally, the petitioner has not established that the nature of the specific duties of the offered position 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 duties appear to be common to the industry, and positions requiring the performance of those duties are filled by employers with individuals possessing both two and four year degrees.

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

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 failed to sustain that burden. The appeal will be dismissed.

ORDER: The appeal is dismissed.