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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536

[redacted]

FILE: EAC 02 082 52750 Office: VERMONT SERVICE CENTER Date: JAN 09 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 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 Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of sports apparel. It employs seven people and has a gross annual income of $11,000,000. It seeks to temporarily employ the beneficiary as a merchandiser. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the director erred in making his decision and that the position is 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 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 director denied the petition because the petitioner did not provide sufficient evidence that the proffered position met the terms of a specialty occupation.

The petitioner states that the beneficiary will:

- Supervise product sourcing, research and review materials, conduct costing, negotiate price, deliveries, and act as a liaison between [the petitioner] and overseas vendors, agents and contractors;
- Conduct day-to-day coordination and approvals with our factories/buying agents in India, China and Kyrgyzstan[;]
- Set and monitor goals for each product line to grow sales and margin;
- Oversee sales research; Select products from overseas according to industry trends and case studies;
- Responsible for all aspects of product development including sourcing of fabric, trims and other materials;
- Approve fit samples, fabrics, lab dips, bitlooms and washes with our buyers like Izod, Van Heusen, etc.;
- Assist in hiring Associate Merchandisers; Train and coordinate activities of Merchandisers to ensure time- and cost-effective completion of product development and sourcing projects;
- Coordinate inventory;
- Create garment technical specifications packages, flat design sketches for line presentation and boards[.]

On appeal, counsel states that the petitioner met all four of the regulatory requirements for establishing the proffered position as a specialty occupation.

In order to determine whether the beneficiary qualifies for the benefit sought, it is necessary to address the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A) to determine whether the position can be considered a specialty occupation. The petitioner need only show that the position meets one of the criteria in order to establish it as a specialty occupation. Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Section 214(i)(1)(B) of the Act provides further information about what is necessary in order to meet this criterion, in that it defines the term "specialty occupation" as an occupation that requires "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." (Emphasis added).

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the *Dictionary of Occupational Titles (DOT)*. The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation.

The *DOT* is not considered a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The Department of Labor's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience

normally required to enter into an occupation and advance within that occupation.

Counsel states that the *Handbook* supports the petitioner's position that a baccalaureate degree is required for the occupation of merchandiser:

> Further, the duties of Merchandiser are most closely related to those of a "Purchasing Manager, Buyer and Purchasing Agent" in the Department of Labor's Occupational Outlook Handbook. The OOH states that: "Many manufacturing firms put a greater emphasis on formal training. They prefer Applicants with a Bachelor's or a Master's Degree in engineering, business, economics, or one of the applied sciences."

There is no clear standard for how one prepares for the proffered position, as currently described. The requirements vary by employer as to what course of study might be appropriate or preferred, but it is apparent that a baccalaureate degree in a specific specialty is not required. It is not obvious how an engineering or applied science degree could be relevant to the proffered position or industry. As a result, the proffered position cannot be considered to have met this criterion.

II. 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.

A. Degree Requirement is Common to the Industry

Factors often considered by Citizenship and Immigration Services (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. 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Slattery,* 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook's* conclusions about a degree requirement for the proffered position were discussed in the previous section, and shall not be repeated here.

The attention of CIS is drawn to the remarkable similarity of the letters submitted to show that a degree requirement is common to

the industry. It is noted that, other than the information specific to each company, the letters are exact copies of one another. As the letters appear to have been drafted by the same individual, CIS must question whether they represent the true testimony of the avowed authors. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988).

Counsel submitted a number of Internet job listings, but they are not for companies of similar size or the same industry as the petitioner. The duties of the position rather than the title, determine whether the position is parallel to the proffered position; from the brief descriptions in the job listings, it is not possible to determine whether the positions are parallel. In addition, while the listings indicate that a bachelor's degree is required, most had no specific field stated. Rather than bolster the petitioner's assertion, these position announcements support the premise that there is no requirement for a degree *in a specific specialty*.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform it.

The petitioner has submitted no documentation that the position of a merchandiser is either unique or so complex that only an individual with a degree in a specific specialty could perform them.

III. The employer normally requires a degree or its equivalent for the position

Counsel states that the individual previously in the position held a degree equivalent to a master's degree in business administration. It is not clear whether the petitioner is stating that this level of education and this specialty is the minimum requirement for the proffered position. On page six of the appeal, following a discussion of the previous employee's education and background, counsel states, "[The petitioner's] minimum requirement of a Bachelor's Degree in the same field is therefore consistent with the Petitioner's recruiting policy." It appears that counsel is asserting that the degree must be in business administration to meet the petitioner's requirements.

Given the variation in academic specialties (business administration for the previous employee and fashion design and merchandising for the beneficiary), the petitioner has not established that it normally requires a degree in a specific specialty for this position.

IV. 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

Neither counsel nor the petitioner has provided evidence that the specific duties of the proffered position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree. Counsel states on appeal:

> It is clear that the tasks to be performed by the Merchandiser requires [sic] specialized knowledge in Textile and Fashion Merchandising, Purchasing and Product Development. . . . In light of the above, it is reasonable to conclude that, consistent with the requirements of the implementing regulations, the nature of the specific duti4es are [sic] so specialized and complex that **the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.** (Emphasis in the original).

Counsel provides no evidence beyond the above statement to support the assertion that the duties of this position are specialized and complex. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO agrees that the tasks of the proffered position require specialized knowledge, but the petitioner has not established that that knowledge is so complex that it would usually be gained through attaining a bachelor's degree.

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

Beyond the decision of the director, even if the position were a specialty occupation, the petitioner did not establish that the beneficiary is qualified to perform the job. The credentials

evaluation submitted by the petitioner indicates that the beneficiary:

> [H]as, as a result of her educational background, professional training and employment experiences (3 years of experience = 1 year of university-level credit), and educational background the equivalent of an individual with a bachelor's degree in fashion design and merchandising from an accredited college or university in the United States.

The evaluator, however, is not qualified to make this assessment. He is qualified to make a determination that the beneficiary's degree is equivalent to a U.S. degree (he determined that her degree was the equivalent to three years of United States university education), but is not qualified to make the determination that her work experience is equivalent to academic study. In considering whether the beneficiary qualifies under this category by virtue of her education, practical experience, and/or specialized training, 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

> [E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:
>
> > (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.
> >
> > (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
> >
> > (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

> (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evaluator is not qualified to make an assessment of the beneficiary's work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) states that the evaluator must have "authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience." The petitioner did not submit any evidence pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), (4), or (5) to support the assertion that the beneficiary's education, specialized training and/or work experience is equivalent to a baccalaureate degree in a specific specialty.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.