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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 106 53654 Office: CALIFORNIA SERVICE CENTER Date: AUG 22 2005

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 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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and certified his decision to the Administrative Appeals Office (AAO) for review. The appeal will be dismissed. The petition will be denied.

The petitioner is a clothing design contractor that seeks to employ the beneficiary as a fashion designer. The petitioner 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 petitioner did not establish that an employer-employee relationship existed. The director also determined that the proffered position was not a specialty occupation.

On appeal, the petitioner's previous counsel submits a brief statement along with the Form I-290B and a copy of *Matter of Aphrodite Investments Limited,* 17 I&N Dec. 530 (Comm. 1980). The AAO notes that previous counsel indicated on the Form I-290B, which was timely filed on July 8, 2002, that he would submit a brief and/or evidence to the AAO within 30 days. As of this date, however, the record does not contain any additional evidence. The AAO, therefore, considers the record complete, and it shall render a decision based upon the evidence before it at the present time. The petitioner retained new counsel on November 17, 2004.

The AAO will first address the issue of whether an employer-employee relationship exists between the petitioner and the proposed beneficiary. The regulation defines a U.S. employer at 8 C.F.R. § 214.2(h)(4)(ii) as a person, firm, corporation, contractor, or other association, or organization in the United States which:

> *(1)* Engages a person to work within the United States;
>
> *(2)* Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee.

The petitioner is a corporation incorporated under the laws of the State of California and has engaged the beneficiary to work in her individual capacity as a fashion designer. The beneficiary established the corporation and is its owner and president.

The director found that the relationship between the petitioner and the beneficiary is less than arms length, and that the petitioner does not meet the definition of a U.S. employer.

In response to the director's request for evidence, counsel submitted the petitioner's articles of incorporation, and stated that the petitioner meets the regulatory requirements for an employer. On appeal, counsel cites *Matter of Aphrodite* to support its position that a sole owner of a corporation can be employed by the corporation and be in an employer-employee relationship. The AAO finds in this case that the petitioner is a separate legal entity from the beneficiary, and that the beneficiary would not be self-employed.

Established tenets of corporate law, as well as cases such as *Matter of Aphrodite,* state that a corporation has a separate legal identity from its owner. As such, a corporation may hire that same individual and will be in an employer-employee relationship with that individual, as is the case in the instant matter.

The AAO now turns to whether the proffered position is a specialty occupation. Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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 fashion designer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 25, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: designing clothing and accessories, specializing in fashions for women; analyzing fashion trends; comparing fabrics and other materials and integrating these with the beneficiary's personal touch to create unique designs; sketching rough and detailed drawings of apparel and writing specifications describing factors such as color scheme, construction and type of material to be used; conferring and coordinating with workers who draw and cut patterns and constructing garments to fabricate sample garments; examining sample garments on and off models and modifying design as necessary; cutting patterns

and constructing samples, using sewing equipment; arranging for showing of sample garments at sales meetings or fashion shows; and attending fashion and fabric shows to observe new fashions and fabrics. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in fashion design or the equivalent.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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 states that the director disregarded supporting documentation, including an expert opinion letter and a previous AAO decision. Counsel states, "If a fashion designer is not a specialty occupation, the thousands of H1B approvals for fashion must have granted [sic] in error and, therefore, should be revoked."

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 turns first to 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. 1095, 1102 (S.D.N.Y. 1989)).

The *Handbook* states, "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. . . . Graduates of 2-year programs normally qualify as assistants to designers." In his response to the director's request for evidence, counsel stated that the proffered position is for a fashion designer, not an assistant to a designer, so the minimum requirement for the position must be a 4-year degree. This reasoning is not persuasive. While some 2-year graduates may start as assistants to designers, the industry standard is clearly that both 2- and 4-year degree holders are typically hired in the industry.

No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a fashion designer job.

The petitioner submitted no evidence regarding parallel positions in the petitioner's industry. In response to the director's request for evidence, counsel submitted a copy of a letter that was apparently used in another case, regarding a different petitioner and beneficiary. The primary purpose of the letter was to evaluate that

beneficiary's qualifications as a fashion designer. There is one line in the letter that states, "A 4-year degree in fashion design is considered essential for a career as a fashion designer." The letter was written by a professor at Seattle Pacific University. CIS may, in its discretion, use as advisory opinions statements submitted 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). In this case, the opinion letter provides different information than that in the *Handbook,* and speaks to generalities, rather than the proffered position.

Counsel also submitted copies of course catalogs from three colleges and universities. Simply establishing that a four-year degree is available does not establish that hiring a person with a four-year degree is an industry standard, or that it is required for entry into the job.

Finally, counsel submitted a copy of an AAO decision from 1993 regarding fashion designers. It had been copied repeatedly, and is difficult to read. Nonetheless, it appears that the decision was based on evidence submitted from the petitioner's competitors regarding their standard requirements for the position. The petitioner in the current matter has provided no probative evidence regarding an industry standard. In addition, while 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. This is a new position and the petitioner is not able to meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

On appeal, counsel states that there have been "thousands of H1B approvals" for fashion designers. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As related in the discussion above, 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.