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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 08 153 52385 Office: CALIFORNIA SERVICE CENTER Date: APR 01 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 designer, importer, wholesaler, and distributor of custom jewelry. To employ the beneficiary in a position designated as a designer, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that the petitioner will employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

Section 214(i)(l) of 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry

into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner provided a portion of the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) that relates to commercial and industrial designer positions and asserted that the proffered position qualifies as such a position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The *Handbook*, which is available in printed form, may also be accessed on the Internet, at http://www.stats.bls.gov/oco/.

The AAO notes that the petitioner's stock in trade appears to consist exclusively of fashion accessories, including purses, handbags, wallets, belts, fashion jewelry; and hair accessories. The *Handbook* states that fashion designers design clothing and accessories, which indicates that workers designing items such as the petitioner distributes are more correctly classified as fashion designers than as commercial and industrial designers.

As to the educational requirement of fashion designer positions, the *Handbook* states, "Fashion designers typically need an associate or a bachelor's degree in fashion design." The *Handbook* does not support the proposition that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the proffered position.

The petitioner also provided vacancy announcements posted by various companies at employment websites.

Two of the announcements are for Product Designer positions in Clifton, New Jersey, apparently with the same company. They may even be different announcements for the same position. One of the announcements states that the position requires a "Bachelor's degree in Visual/Graphic Arts, or equivalents." A "Job Overview" in the other announcement states that there is no education requirement for the position. A bulleted item in the body of that same announcement, however, states that the position requires a bachelor's degree in Visual/Graphic Arts or equivalents.

One of the announcements is for a "Fashion designer – Hair Accessories," position in Atlanta, Georgia and states that the position requires a "BS/BA Degree in Fashion Design or a related field."

Two of the announcements are for "Jewelry Designer" positions in Dallas, Texas. Whether they are for the same company and for the same position is unclear. In any event, one of the announcements states that the position requires a "Bachelor's degree in Design/design related field." The other states that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

The last announcement is for a "Jewelry Designer" position in Warren, New Jersey. It also states that the position requires a bachelor's degree, but does not state that the degree must be in any specific specialty.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. The requirement of a college degree with no specific major, for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988).

The vacancy announcements provided appear to be for four positions with four companies, at least one of which does not require a degree in a specific specialty. Even if they unanimously required such a degree, the advertisements submitted are insufficient to establish the degree requirement in a specific specialty as "common to the industry in parallel positions among similar organizations." 8 C.F.R. § 214(h)(4)(iii)(A)(2).

Regardless, given that the *Handbook* indicates that a requirement of a bachelor's degree in a specific specialty is not a generally-accepted requirement for the position, and especially given that one of the vacancy announcements clearly does not require a bachelor's degree in a specific specialty, the evidence provided is insufficient to show that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, or that a degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner asserts that it currently employs two other designers, but provided no evidence that they have bachelor's degrees. The record does not show that the petitioner ever previously employed anyone in the proffered position. The evidence does not show, therefore, that the petitioner normally requires that the incumbent in the proffered position possess a bachelor's degree in a specific specialty.

Although the statements by the petitioner are relevant and have been taken into consideration, little weight can be accorded them in the absence of supporting evidence. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner asserted that the beneficiary will supervise its other two designers, and asserted that this, in itself, demonstrates that the proffered position requires a degree in a specific specialty. It did not explain, however, why that additional duty demands a bachelor's degree in fashion design or any other specific specialty. The evidence does not demonstrate that the nature of the duties specific to the proffered 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.

To determine whether a particular job qualifies as a specialty occupation position, the AAO does not solely rely on the job title or the extent to which the petitioner's descriptions of the position and its underlying duties correspond to occupational descriptions in the *Handbook*. Critical factors for consideration are the extent of the evidence about specific duties of the proffered position and about the particular business matters upon which the duties are to be performed. In this pursuit, the AAO must examine the evidence about the substantive work that the alien will likely perform for the entity or entities ultimately determining the work's content.

The AAO finds that the director was correct in his determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the documents submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.