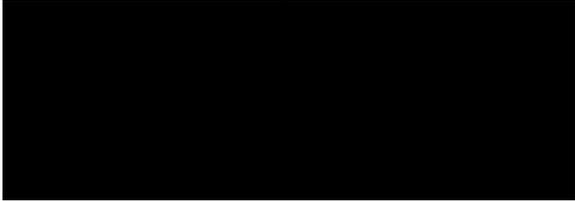


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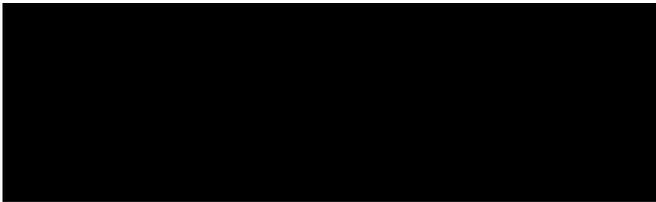
MAR 03 2005

FILE: WAC 03 198 50577 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 an importer and wholesaler of women's shoes, with 6 employees. As it designs the shoes it imports, it seeks to hire the beneficiary as an industrial designer. The director denied the petition based on his determination that the beneficiary was not qualified to perform the duties of 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; (3) the petitioner's and counsel's responses to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B. The AAO reviewed the record in its entirety before reaching its decision.

Although the director's denial does not discuss the nature of the proffered position, it finds the beneficiary unqualified to perform the duties of the position because she does not possess the bachelor's degree required for employment. In that the AAO has concluded that the proffered position is not a specialty occupation, it will first analyze the petitioner's employment before moving to a consideration of whether the beneficiary is qualified to perform the duties of a specialty occupation.

To qualify its position as a specialty occupation, 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 an industrial designer. Evidence of the beneficiary’s duties includes: the Form I-129, with a June 18, 2003 letter of support from the petitioner; and the petitioner’s September 10, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner stated it required the services of an industrial designer to “originate and develop ideas to design women’s shoes.” The specific duties of the position were described as follows:

- Read fashion publications and attend fashion shows;
- Consult with sales and management executives;
- Compare leather and other shoe material;
- Create new shoe designs based on personal tastes and knowledge, and present designs to the client or design committee to discuss the need for modification;
- Design products for custom applications and in response to requests;
- Sketch rough and detailed drawings, and construct samples using sawing equipment; and
- Evaluate design ideas based on factors such as appealing appearance, design-function, relationships, serviceability, materials and methods engineering, application, budget, price, production costs, methods of production, market characteristics, and client specifications.

To determine whether the duties just described are those of a specialty occupation, the AAO first considers 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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.Min. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

Having reviewed the duties of the proffered position, the AAO concludes that the petitioner is not seeking an industrial designer, a profession described by the 2004-2005 edition of the DOL *Handbook* as responsible for the development of such manufactured products as automobiles, computer equipment and furniture. Instead, the duties described by the petitioner appear to be those assigned to the profession of fashion designers who design clothing and accessories. As discussed by the *Handbook*:

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.... Designers usually specialize in a particular area of design....

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 or users....

Designers then prepare sketches or diagrams...to illustrate the vision for the design....

Fashion designers design clothing and accessories. Some high-fashion designers are self-employed and design for individual clients. Other high-fashion designers cater to specialty stores or high-fashion department stores.... Most fashion designers, however, work for apparel manufacturers, creating designs of men's, women's, and children's fashions for the mass market.

Having concluded that the proffered position is closely aligned to that of fashion designer, the AAO turns to the *Handbook's* discussion of the educational requirements for this occupation to determine whether the attainment of a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the field:

A bachelor's degree is required for most entry-level design positions....

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....

Based on the above discussion of the education that may prepare individuals for employment as fashion designers, the AAO concludes that the proffered position does not require the beneficiary to hold the minimum of a baccalaureate or higher degree, or its equivalent, and, therefore, does not qualify as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion, may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

A review of the record finds the petitioner to have provided no evidence to establish its position as a specialty occupation under any of the remaining criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Although the petitioner, in response to the director's request for evidence, stated that a bachelor's degree was the minimum requirement for its proffered position, that statement, unsupported by the documentation, is insufficient proof of the petitioner's normal hiring practices. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg.Comm. 1972). Further, this statement contradicts information previously provided by the petitioner in its June 18, 2003 letter of support. At the time of filing, the petitioner specifically stated that the beneficiary's associate of arts degree met its "academic requirement." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). For the reasons, just discussed, the AAO will not accept the statements made by the petitioner in response to the director's request for evidence as establishing that it normally requires a degree or its equivalent for its proffered position.

Although the petitioner has not specifically claimed that the duties of its position are so specialized and complex that the knowledge required to perform them is normally associated with a baccalaureate or higher degree, it contended, at the time of filing, that its position required the beneficiary to have specialized knowledge of "drafting techniques, elements of design, art history, color theory, art techniques, history of architectural interiors, space planning, lighting design, architecture and construction, textiles for interior design, materials for interior design, remodeling, architectural rendering, drawing, contract design, interior design workshop, and resources for interior design." However, the AAO notes that much of this description appears related to the knowledge needed by an interior designer, rather than a fashion designer performing the duties identified by the petitioner. Therefore, it will not accept the petitioner's statements regarding the breadth of knowledge required to perform the duties of its position. With nothing else in the record that might establish the position as requiring a higher degree of knowledge and skill than that normally required of a

fashion designer, the AAO finds the petitioner to have failed to establish that its proffered position qualifies as a specialty occupation under the fourth and last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position, had it been determined to qualify as a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In his denial, the director found the beneficiary to be unqualified to perform the duties of the proffered position as she did not hold a bachelor's degree in design or its equivalent. The AAO will now conduct its own review of the record to determine whether the evidence submitted by the petitioner meets any of the requirements just noted.

Although the beneficiary is presented as holding an associate degree in interior design from The Fashion Institute of Design & Merchandising in Los Angeles, California, the AAO notes that the record includes two certificates from the Fashion Institute, one dated September 22, 1987 with the name of Maple Lee and the other dated June 19, 1987 showing the name of Piper Lee. No explanation of these discrepancies is offered by counsel or the petitioner, nor are they resolved in the related evaluation provided by the Center for Applied Research, Evaluation and Education, Inc. Accordingly, the AAO determines that the petitioner has failed to

document that beneficiary holds an associate's degree. As already noted, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592. However, even if the petitioner had established the beneficiary as holding an associate's degree from the Fashion Institute, it would not have qualified her to perform the duties of a specialty occupation. As already noted by the director, the beneficiary must have a baccalaureate or higher degree, or its equivalent, in a field directly related to the specialty to be found qualified to work in a specialty occupation.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant based on:

- (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 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.

In response to the director's request for evidence, counsel submitted an academic evaluation from [REDACTED] Chairman of the Department of Art Designs at Fuzhou University, Fujian Province, China which finds the beneficiary's combined education and employment to constitute the equivalent of a bachelor's degree in industrial/art design at Fuzhou University. However, as already noted by the director, this evaluation does not establish that the beneficiary holds the equivalent of a baccalaureate degree in design. First, the evaluation

does not come from an official at an accredited college or university as specified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Further, an evaluation must establish that a beneficiary has the equivalent of a U.S. baccalaureate degree, not the equivalent of a degree awarded by a university outside the United States. Finally, having reviewed the employment records submitted by counsel, the AAO finds no evidence that allows it to reach the evaluator's conclusions regarding the beneficiary's past employment. The translated copies of her employment records provide no information on the duties performed by the beneficiary, nor do they document all the employment identified by the evaluator. Instead, these translations identify only the beneficiary's titles and employers, including "designer" in a research and development office, "design engineer" at a construction company and "general manager" with an electronics firm. In that the AAO can find no evidence in the record before it to support the conclusions reached by the evaluator regarding the beneficiary's employment, it will discount these conclusions. Academic evaluations serve the AAO as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept it or may give it less weight. *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988).

Other than the evaluation just discussed, the record contains no evidence that responds to the evidentiary requirements of the first four criteria. Therefore, the AAO turns to an analysis of whether the beneficiary can meet the requirements at 8 C.F. R. § 214.2(h)(4)(iii)(D)(5) – the beneficiary has acquired the equivalent of a degree in the specialty occupation through a combination of education, specialized training and/or work experience in areas related to the specialty and that the beneficiary has achieved recognition of her expertise in the specialty occupation as a result of such training and experience.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

To qualify a beneficiary under the fifth criterion, a petitioner must establish that the beneficiary's experience included the theoretical and practical application of specialized knowledge required by the specialty occupation. In its June 18, 2003 letter of support, the petitioner noted the beneficiary's employment history in design. However, as already discussed, the record contains no evidence that describes the duties performed by the beneficiary during her various employments. As a result, the petitioner cannot establish that the work performed by the beneficiary required the type of knowledge required by its proffered position. Further,

there is nothing in the record to indicate that the beneficiary's work experience was gained while working with peers, supervisors or subordinates who have degrees or the equivalent in fashion design, or resulted in any recognition of her expertise in the field of fashion design. Accordingly, the AAO finds that the petitioner has failed to establish that the beneficiary has the equivalent of a degree required by the position based on a combination of education, specialized training, and/or work experience in areas related to the proffered position per the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The AAO notes that, based on the limited description that has been provided regarding the beneficiary's titles and employers, it does not appear that the beneficiary's employment required her to apply the specialized knowledge required by the proffered position of fashion designer. That conclusion is in line with the unsupported evaluation from Huang Hao at Fuzhou University who described the beneficiary's duties as an industrial designer, an interior designer, the general manager of an electronics firm, and a marketing manager for a shoe company. None of the beneficiary's past jobs appear to have required her to perform as a fashion designer and, therefore, to apply the specialized knowledge of that particular design field.

For reasons related in the preceding discussion, the petitioner has failed both to establish that its proffered position is a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, although the AAO's conclusion regarding the nature of the petitioner's employment differs from that of the director, it concurs with the director's denial of the petition and shall not disturb it. The AAO reviews appeals on a *de novo* basis and may deny an application or petition that fails to comply with the technical requirements of the law on grounds not identified by a director in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.