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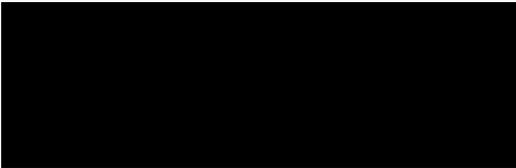
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FILE: WAC 04 206 51587 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 a manufacturer and distributor of urban street wear, with four employees. It seeks to employ the beneficiary as a fashion designer 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 he determined that the position was not 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 response to the director's request; (4) the director's denial; and (5) the Form I-290B, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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:

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 seeks the beneficiary’s services as a fashion designer and states that the proffered position requires a bachelor’s degree in art or fashion design. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s July 13, 2004 letter in support of the petition and its November 17, 2004 response to the director’s request for evidence. As described, the duties of the proffered position would require the beneficiary to:

- Draft and sketch clothing patterns based on client needs, finalizing all aspects of the designs;
- Construct, in conjunction with the production technician and production assistant, sample garments for review by the petitioner’s clients, estimate costs for each design, produce a 3-D model of each design prior to manufacturing;
- Arrange photo samples of the design and make them available online to company staff, manufacturers and clients;
- Be responsible for performing and monitoring all lab dips, fabric approvals, trims, screen prints, and other processes necessary in clothing manufacturing; and conduct quality assurance;
- Analyze new and existing fashion trends and integrate them into the existing product line;
- Create new product samples with the help of the production technician, researching new fabrics and using latest design software to create 3-D models; and
- Meet regularly with the petitioner’s president and independent sales representatives to incorporate new design ideas into production.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 *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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The petitioner has stated that the proffered position is that of a fashion designer. To determine whether the duties of the proffered position support the petitioner's characterization of its employment, the AAO turns to the 2006-2007 edition of the *Handbook* for its discussion of fashion designers. As stated by the *Handbook*:

Fashion designers help create the billions of clothing articles, shoes, and accessories purchased every year by consumers. Designers study fashion trends, sketch designs of clothing and accessories, select colors and fabrics, and oversee the final production of their designs. Clothing designers create and help produce men's, women's, and children's apparel, including casual wear, suits, sportswear, formalwear, outerwear, maternity, and intimate apparel

...

Computer-aided design (CAD) is increasingly being used in the fashion design industry. While most designers initially sketch designs by hand, a growing number also translate these hand sketches to the computer. CAD allows designers to view designs of clothing on virtual models and in various colors and shapes

Depending on the size of the design firm and level of experience, fashion designers may have varying levels of involvement in different aspects of design and production Designers working in small firms . . . usually perform most of the technical, patternmaking, and sewing tasks in addition to designing the clothing

Based on the above discussion, the AAO finds the petitioner's description of the duties of the proffered position to establish it as that of a fashion designer, employment for which, the *Handbook* reports, employers seek individuals with a "2- or 4-year degree who are knowledgeable about textiles, fabrics, ornamentation, and fashion trends." Accordingly, as the *Handbook* reports that the duties of a fashion designer may be performed by individuals who do not hold the minimum of a baccalaureate degree or its equivalent, the proffered position may not be established as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel references the discussion of designers in the 2004-2005 edition of the *Handbook* as proof of the proffered position's degree requirement. While the AAO acknowledges that the previous edition of the *Handbook* indicated that a bachelor's degree was "required for most entry-level design positions, except for

floral design and visual merchandising,” and that individuals without four-year degrees were limited to jobs assisting designers, the *Handbook* did not state that employment as a designer required a baccalaureate degree in a specific academic field directly related to design, as required for classification as a specialty occupation. Accordingly, the discussion of the design occupation in the 2004-2005 *Handbook* does not establish that, at the time of filing, the proffered position qualified as a specialty occupation based on the normal hiring practices of U.S. employers.

The AAO also notes that the record contains online articles on the evolving requirements of fashion design; two articles from *Black Enterprise* magazine that address training for careers in design; a *Federal Register* listing of occupations and related educational/training requirements from the Department of Labor’s (DOL) *Occupational Information Network (O*Net)*, which indicates that a baccalaureate degree is required for employment as a fashion designer; and a letter from a professor in the clothing and textiles program at Seattle Pacific University (SPU), stating that employment as a fashion designer requires a four-year degree in fashion design or a related field. The submitted evidence does not, however, establish the proffered position as a specialty occupation.

The media articles do not address degree requirements in the fashion industry. The online articles on the design industry report only the increasing importance of technology and business training in fashion design. While the print articles indicate that the “fashion design industry is highly competitive, requiring educational and technological training,” that in fashion design “employers seek persons who are knowledgeable about textiles, fabrics and ornamentation” and that individuals seeking a career in fashion design should take courses in “fashion design, manufacturing/production and merchandising, perhaps at a local college or university,” they do not speak to a specific degree requirement.

The *O*Net*, which has replaced the DOL’s *Dictionary of Occupational Titles (DOT)*, is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides 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. A Specific Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. 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 Job Zone rating of 5 given to the position of fashion designer does not indicate that a bachelor’s degree in a specific specialty is required.

Although the SPU professor indicates that her academic position requires her to stay current in all areas of the fashion industry and that she has been a professor in the SPU clothing and textiles program for more than 30 years, the record offers no evidence to establish her authority to speak to the hiring practices of U.S. employers in the fashion industry. Going on record without supporting documentation is not sufficient to meet 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 professor does not cite any industry surveys, trade publications or other industry data in support of her conclusions. Therefore, her statements regarding a degree requirement are insufficient to overcome the *Handbook’s* finding that U.S. employers do not normally require a baccalaureate degree in a design field when hiring fashion designers.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the petitioner has submitted 19 Internet job advertisements for fashion designers or employment related to fashion design to establish its degree requirement as the norm within its industry. None, however, satisfy the criterion's requirements.

Of the 19 positions advertised, none are published by organizations that can be identified as similar to the petitioner and that advertise employment parallel to the proffered position, as required to establish a proffered position as a specialty occupation under the first prong of the criterion. While several listings indicate that the employment advertised would require a successful applicant to design clothing/accessories for manufacture, they fail either to offer a meaningful description of the positions advertised or to describe the employment of a fashion designer. Moreover, of the 19 listings, only eight indicate a requirement for a baccalaureate degree in a field directly related to the employment advertised. Accordingly, the job listings submitted by the petitioner do not establish the proffered position as a specialty occupation based on an industry-wide degree requirement.

On appeal, counsel contends that, by statute, the job listings need only show that a bachelor's degree is the minimum requirement for entry into the position, not that the degree is in a related academic field. He asserts that CIS has erred by imposing on the petitioner a higher standard than that required by law. However, a job that can be performed by a range of degrees or a degree of generalized title, without further specification, does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position.

The record also fails to establish that the proffered position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. The letter from the SPU professor states that the complexity of the discipline and intellectual skills required for expertise in fashion design require a baccalaureate degree in fashion design or another related field. However, the professor makes no such claim with regard to the proffered position. Her letter does not state that she finds the proffered position to be that of a fashion designer, or even that she reviewed the duties of the proffered position prior to preparing her opinion. Accordingly, the professor's letter provides no basis for distinguishing the proffered position from similar, but nondegreed employment based on its unique nature or complexity. The petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and(4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, the petitioner has submitted no evidence to establish its normal hiring practices regarding the proffered position. Accordingly, it cannot establish the position as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a related academic field. The AAO's review of the record does not find the petitioner to have described duties that would require the beneficiary to have greater knowledge or skills than those normally possessed by fashion designers, employment that the *Handbook* reports does not require a four-year degree in a directly related field. Neither do the duties, as discussed, require the beneficiary to possess skills other than those of a fashion designer. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel points to the professor's letter as proof that the proffered position would require the beneficiary to master the theoretical framework of various disciplines and have proficient intellectual skills to be effective, and that such competencies may be gained only through a baccalaureate degree in fashion design or a related field. However, as previously discussed, while the expert opinion submitted by the SPU professor discusses at length the specialized and complex nature of the occupation of fashion designer, it does not address the duties of the proffered position. Accordingly, it cannot be used to establish the nature of the position's duties.

On appeal, counsel also contends that legal precedent requires CIS to approve the instant petition. He cites an unpublished decision of a federal district court in California, *Mindseye v. Ilchert*, ___ F. Supp. ___. No. C846199 SC (N.D. Cal. December 11, 1987) and submits a copy of the court's decision. Counsel also points to a May 21, 1985 decision by the AAO, which, he states, finds the position of fashion designer to be a specialty occupation and submits a copy of this decision as well. The AAO notes the submission of both the unpublished court decision and the prior AAO decision, but finds neither relevant to the issues that are now before it.

In *Mindseye v. Ilchert*, the court found the former Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), to have denied H-1 temporary worker status to an alien based on irrelevant factors – the size of the petitioner's operations and the level of salary offered to the beneficiary. As neither the petitioner's size, nor the salary to be paid to the beneficiary is an issue before the AAO, the court's conclusions in this regard are not relevant to this proceeding. Moreover, in contrast to the broad precedential authority of the case law of a U.S. circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. As the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

With regard to the 1985 AAO decision in which the AAO found the proffered position of fashion designer to be a specialty occupation, the AAO notes that the decision was made based on the petitioner's ability to establish a history of hiring only degreed individuals and the practice of hiring degreed designers in the New York fashion business. In the instant case, the petitioner has submitted no evidence to establish that it has a practice of employing degreed fashion designers and has provided insufficient documentation to establish that a degree requirement in a directly-related field is the norm within its industry. Accordingly, the grounds on which the AAO approved the position in the case cited by counsel are not present here.

Counsel also asserts that the beneficiary has been previously approved for H-1B status as a fashion designer and that such approvals should be given deference, as indicated by a 2004 CIS memorandum issued by former Associate Director of Operations William Yates.¹ However, CIS' approval of earlier petitions filed on behalf of the beneficiary by another employer does not require the approval of the instant Form I-129. The AAO finds no indication that the director reviewed the records on which the prior decisions were reached. However, if the records contained no evidence beyond that found in the instant case, CIS would have erred in approving the previously filed petition. CIS is not bound 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). Further, each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d). Moreover, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director had approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *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).

Beyond the decision of the director, the AAO does not find the record to establish that the beneficiary is qualified to perform the duties of a fashion designer.

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 Memorandum from William R. Yates, Associate Director for Operations, Citizenship and Immigration Services, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004).

- (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.

To establish the beneficiary's qualifications, the petitioner submitted evaluations of the beneficiary's academic and employment experience prepared by the Academic Credentials Evaluation Institute (ACEI), Inc. in Beverly Hills, California and the Foundation for International Services (FIS), Inc. in Bothell, Washington. While both evaluations find the beneficiary to hold the equivalent of a baccalaureate degree in fashion design, neither is sufficient proof that the beneficiary is qualified to perform the duties of a specialty occupation.

The ACEI evaluation states that the beneficiary's academic credentials when combined with his employment experience establish his degree equivalency in fashion design. However, the AAO will not accept a credentials evaluation service's opinion of the academic credit to be awarded for employment experience. A credentials evaluation service may only evaluate a beneficiary's foreign academic credentials. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Accordingly, the ACEI evaluation does not demonstrate the beneficiary's degree equivalency. An evaluation by a credentials evaluation organization serves CIS as an advisory opinion only. Where an evaluation is in any questionable, the AAO may discount it or give it less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The FIS evaluation also fails to establish that the beneficiary holds the equivalent of a baccalaureate degree in fashion design. The evaluation notes that the beneficiary's Costa Rican engineering studies equate to two and two-thirds years at a U.S. university and that he holds an associate's degree in fashion design from a regionally-accredited institute in the United States. It does not, however, state that these academic credentials establish that the beneficiary has the equivalent of a four-year U.S. degree in fashion design. Instead, it references a second expert opinion letter from the previously-noted SPU professor which analyzes the beneficiary's education and employment experience and finds them to provide him with the equivalent of a baccalaureate degree.

To establish a degree equivalency based on training or employment experience, a petitioner must submit an evaluation from an official who has the authority to grant college-level credit for training and/or experience in

the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The expert opinion prepared by the SPU professor states that she finds the beneficiary's academic credentials and his employment experience to provide him with the equivalent of a bachelor of arts degree. She asserts that she is "authorized to grant university-level credits for training and/or experience in the field of textiles and clothing." The AAO will not, however, accept the professor's opinion as proof of the beneficiary's degree equivalency. The record contains insufficient documentation from Seattle Pacific University to establish the professor's authority to award academic credit for experience or the university's operation of a program that awards credit for life experience. The supporting letter provided by the SPU Director of Family and Consumer Sciences indicates only that the professor supervises independent studies and internships and "[i]n that capacity she is authorized to grant college level credits for training and/or experience in the field of textiles and clothing. The director does not state that SPU has a program that grants academic credit for training and/or employment.² Accordingly, the record does not establish that the beneficiary holds the equivalent of a U.S. baccalaureate degree in a specialty related to fashion design. Where an academic equivalency evaluation is in any way questionable, the AAO may discount it or give it less weight. See *Matter of Sea, Inc.* 19 I&N Dec. 817 (Comm. 1988).

For the reasons previously discussed, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO will 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 met that burden.

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

² A review of the SPU website (www.spu.edu) finds no listing for any programs that grant academic credit for training and/or employment experience.