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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services



D2

FILE: WAC 02 106 53654 Office: CALIFORNIA SERVICE CENTER Date: JUL 14 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:



EXHIBIT COPY

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner and the beneficiary filed a complaint in the U.S. District Court for the Central District of California seeking declaratory relief requiring Citizenship and Immigration Services (CIS) to approve the H-1B petition. *Psychedelic Mystic Inc.; Chisato Ikezawa vs. Alberto R. Gonzalez, et al*, CV-05-8588 NM (PJWx) (filed December 8, 2005). Upon review, the AAO, on its own motion, reopens the proceeding to reconsider its previous decision pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The AAO will withdraw its prior determination. The petition will be approved.

The petitioner is a clothing designer contractor, with one employee. 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) prior counsel's response to the director's request; (4) the director's denial; (5) the Form I-290B, with additional documentation; and (6) the AAO's dismissal of the appeal. 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 indicates that the proffered position requires a bachelor’s degree of fine arts in fashion design or its equivalent. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s January 25, 2002 letter in support of the petition and prior counsel’s April 26, 2002 response to the director’s request for evidence. As described, the duties of the proffered position would require the beneficiary to:

- Design clothing and accessories, specializing in fashions for women;
- Analyze fashion trends, compare fabrics and other materials, and integrate these findings with [the beneficiary’s] personal touch to create unique designs;
- Sketch rough and detailed drawings of apparel and write specifications describing factors such as color scheme, construction, and type of material to be used;
- Confer and coordinate with workers who draw and cut patterns, and construct garments to fabricate sample garment;
- Examine sample garments on and off models and modify design as necessary to achieve desired effect;
- Cut patterns and construct samples using sewing equipment;
- Arrange for the showing of sample garments at sales meetings or fashion shows; and
- Attend fashion and fabric shows to observe new fashions and fabrics.

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 2004-2005 edition of the *Handbook* for its discussion of fashion designers. As stated 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 . . . clothes we wear

Designers . . . prepare sketches . . . to illustrate the vision for the design

Fashion designers design clothing and accessories Most fashion designers . . . work for apparel manufacturers, creating designs of men's, women's, and children's fashions for the mass market. [*Handbook* at page 242].

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, an industry in which, the *Handbook* reports, 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." However, as those with two-year degrees normally may qualify only as "assistants to designers" or for entrance to a formal baccalaureate degree program, the *Handbook* establishes that employment as a full-fledged fashion designer usually requires a four-year degree. It does not, however, indicate that the four-year degree required for employment must be in a directly related academic field, as required for classification as a specialty occupation. Accordingly, 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)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The record also fails to establish the proposed duties as comprising a position that is identifiable with an industry-wide standard or a position that is distinguishable, by its uniqueness or greater complexity, from similar, but non-degreed employment, as required to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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.

The petitioner, a newly-formed company, does not have a history of recruiting and hiring for the proffered position and so cannot establish it as a specialty occupation based on its normal hiring practices. However, the AAO finds that the petitioner has demonstrated that the proposed duties are sufficiently specialized and complex that their performance requires knowledge usually associated with the attainment of a baccalaureate degree in fine arts in a design-related field. Therefore, the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Accordingly, the AAO withdraws its prior determination that the proffered position is not a specialty occupation.

The AAO now turns to the record before it to determine whether the beneficiary is qualified to perform the duties of the proffered position.

To prove that a beneficiary is qualified to perform the duties of a specialty occupation, a petitioner must 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.

To establish the beneficiary's qualifications to perform the duties of a fashion designer, the petitioner has provided copies of the beneficiary's 2000 diploma from the American InterContinental University, an academic institution accredited by the Southern Association of Colleges and Schools, and the beneficiary's academic transcripts from that institution. The evidence submitted by the petitioner establishes that the

beneficiary holds a bachelor of fine arts in fashion design. Accordingly, the petitioner has established that the beneficiary holds a U.S. degree required to perform the duties of the proffered position. The beneficiary is qualified to perform the duties of a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1).

For the reasons previously discussed, the petitioner has established both that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation. Accordingly, the AAO will withdraw its prior decision.

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 met that burden.

ORDER: The AAO's prior decision is withdrawn. The petition is approved.