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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: WAC 07 126 50001 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2009**

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The 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 dry cleaner with four employees that seeks to employ the beneficiary as an industrial designer.[1] The petitioner, therefore, endeavors to extend the beneficiary's classification 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 on the basis of his determination that the petitioner had failed to establish: (1) that the proposed position qualifies for classification as a specialty occupation; and (2) that the beneficiary qualifies to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains the following: (1) the 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) the petitioner's Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

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

[1] The petitioner described itself on the Form I-129 as a textile company. In its response to the director's request for additional evidence, the petitioner stated that it is a dry cleaning business. Tailoring services are also performed.

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 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.

On the Form I-129, the petitioner entitled its proposed position "industrial designer," and described the proposed duties as "clothing design and manufacture." Finding this description inadequate, the director requested, among other items, a more detailed description of the work to be performed by the beneficiary in his June 14, 2007 request for additional evidence. In his September 4, 2007 response to the director's request for additional evidence, counsel stated that the beneficiary would spend fifty percent of his time on design engineering; thirty percent of his time on fashion design marketing research; ten percent of his time on cutting room management; and ten percent of his time on inspection area management. Specifically, the beneficiary would perform the following duties:

- Cost particular designs, styles, and products;
- Engineer lay-out of production flow;
- Design, grade, and mark patterns;
- Make samples from beginning to end before bulk production begins, so as to determine which types of machine to pull, set their layout, select the proper type of thread, and choose the necessary skilled labor to ensure smooth production;
- Assume responsibility for planning production flow so as to minimize production problems and defects;
- Research international clothing markets;
- Research availability and cost of fabrics;
- Research design trends;
- Recommend new clothing products to management, based upon potential popularity and profitability;
- Oversee setting of daily and weekly schedules for the cutting room crew;
- Ensure that proper materials, patterns, and types of equipment are being used;
- Determine where cut pieces of fabric need to be transferred;
- Ensure that products transferred from the sewing area to the inspection area are put together exactly as explained on specification sheets;
- Educate inspectors how each style, color, and lot should be trimmed, inspected, tagged, folded, and packed; and
- Prioritize order in which orders will processed so as to meet customer's expectations.

Counsel stated that the proposed position is a "hybrid position" involving design engineering, marketing, management, and "the art of clothing design." Counsel stated that although the proposed position was entitled "industrial designer," it most closely matched the duties of fashion designers, as such positions are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*).

In determining whether a proposed position qualifies as a specialty occupation, USCIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

As a preliminary matter, the AAO concurs with counsel's suggestion in his September 4, 2007 letter that the duties of the proposed position are not closely matched to those of industrial designers, as those positions are discussed in the *Handbook*. In its discussion of the duties of commercial and industrial designers, the 2008-2009 edition of the *Handbook* states, in pertinent part, the following:

> Commercial and industrial designers combine the fields of art, business, and engineering to design the products people use every day. In fact, these designers are responsible for the style, function, quality, and safety of almost every manufactured good. Usually designers specialize in one particular product category, such as automobiles and other transportation vehicles, appliances, technology goods, medical equipment, furniture, toys, tools and construction equipment, or housewares.
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> The first steps in developing a new design, or altering an existing one, are to determine the requirements of the client, the purpose of the product, and to the tastes of customers or users. When creating a new design, designers often begin by researching the product user or the context in which the product will be used. They ascertain desired product characteristics, such as size, shape, weight, color, materials used, cost, ease of use, fit, and safety. To gather this information, designers meet with clients, conduct market research, read design and consumer publications, attend trade shows, and visit potential users, suppliers and manufacturers.
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> Next, designers prepare conceptual sketches or diagrams—by hand or with the aid of a computer—to illustrate their vision of the product. After conducting research and consulting with a creative director or other members of the product development team, designers then create detailed sketches or renderings. Many designers use computer-aided design (CAD) tools to create these renderings. Computer models make it easier to adjust designs and to experiment with a greater number of alternatives, speeding and improving the design process. Industrial designers who work for manufacturing firms also use computer-aided industrial design (CAID) tools to create designs and machine-readable instructions that can direct automated production tools to build the designed product to exact specifications. Often, designers will also create physical models

> out of clay, wood, and other materials to give clients a better idea of what the finished product will look like.
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> Designers present the designs and prototypes to their client or managers and incorporate any changes and suggestions. Designers often work with engineers, accountants, and cost estimators to determine if a product can be made safer, easier to assemble or use, or cheaper to manufacture. Before a product is completed and manufactured, designers may participate in usability and safety tests, watching consumers use prototypes and then making adjustments based on those observations.[2]

The AAO finds that these duties are not synonymous with those proposed for the beneficiary. While the *Handbook's* narrative indicates that industrial designers are responsible for most manufactured goods, it does not indicate that clothing is one of those types of goods; it makes no mention of clothing or fashion in any of the examples of the types of goods it mentions. Further, the AAO notes, as did counsel, the existence of a separate entry in the *Handbook* dedicated to fashion designers. As such, the AAO places little relevance on the *Handbook's* information regarding the duties and responsibilities of commercial and industrial designers or its information regarding the educational qualifications necessary for entry into that occupation.

Having made that determination, the AAO turns next to the *Handbook's* description of the duties and responsibilities of fashion designers. The AAO finds the duties of the proposed position similar to those of fashion designers, as discussed in the *Handbook*:

> Fashion designers help create the billions of dresses, suits, shoes, and other clothing 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. *Footwear designers* help create and produce different styles of shoes and boots. *Accessory designers* help create and produce items such as handbags, belts, scarves, hats, hosiery, and eyewear, which add the finishing touches to an outfit. (The work of jewelers and precious stone and metal workers is described elsewhere in the *Handbook*.) Some fashion designers specialize in clothing, footwear, or accessory design, but others create designs in all three fashion categories.
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> The design process from initial design concept to final production takes between 18 and 24 months. The first step in creating a design is researching current fashion and making predictions of future trends. Some designers conduct their own research, while others rely on trend reports published by fashion industry

[2] *See* http://stats.bls.gov/oco/ocos290.htm (accessed July 26, 2009).

trade groups. Trend reports indicate what styles, colors, and fabrics will be popular for a particular season in the future. Textile manufacturers use these trend reports to begin designing fabrics and patterns while fashion designers begin to sketch preliminary designs. Designers then visit manufacturers or trade shows to procure samples of fabrics and decide which fabrics to use with which designs.

Once designs and fabrics are chosen, a prototype of the article using cheaper materials is created and then tried on a model to see what adjustments to the design need to be made. This also helps designers to narrow their choices of designs to offer for sale. After the final adjustments and selections have been made, samples of the article using the actual materials are sewn and then marketed to clothing retailers. Many designs are shown at fashion and trade shows a few times a year. Retailers at the shows place orders for certain items, which are then manufactured and distributed to stores.

Computer-aided design (CAD) is increasingly being used in the fashion design industry. Although 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, thus saving time by requiring fewer adjustments of prototypes and samples later.

Depending on the size of their design firm and their experience, fashion designers may have varying levels of involvement in different aspects of design and production. In large design firms, fashion designers often are the lead designers who are responsible for creating the designs, choosing the colors and fabrics, and overseeing technical designers who turn the designs into a final product. They are responsible for creating the prototypes and patterns and work with the manufacturers and suppliers during the production stages. Large design houses also employ their own patternmakers, tailors, and sewers who create the master patterns for the design and sew the prototypes and samples. Designers working in small firms, or those new to the job, usually perform most of the technical, patternmaking, and sewing tasks, in addition to designing the clothing. (The work of pattern makers, hand sewers, and tailors is covered in the statement on textile, apparel, and furnishings occupations elsewhere in the *Handbook*.)

Fashion designers working for apparel wholesalers or manufacturers create designs for the mass market. These designs are manufactured in various sizes and colors. A small number of high-fashion (*haute couture*) designers are self-employed and create custom designs for individual clients, usually at very high prices. Other high-fashion designers sell their designs in their own retail stores or cater to specialty stores or high-fashion department stores. These designers create a mixture of original garments and those that follow established fashion trends.

> Some fashion designers specialize in costume design for performing arts, motion picture, and television productions. The work of costume designers is similar to other fashion designers. Costume designers, however, perform extensive research on the styles worn during the period in which the performance takes place, or they work with directors to select and create appropriate attire. They make sketches of designs, select fabric and other materials, and oversee the production of the costumes. They also must stay within the costume budget for the particular production item.
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> * * *
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> The global nature of the fashion business requires constant communication with suppliers, manufacturers, and customers all over the United States and the world. Most fashion designers travel several times a year to trade and fashion shows to learn about the latest fashion trends. Designers also may travel frequently to meet with fabric and materials suppliers and with manufacturers who produce the final apparel products.[3]

The AAO finds that these duties generally encompass those of the proposed position. The *Handbook* states the following with regard to the educational qualifications required for fashion designers:

> In fashion design, employers usually seek individuals with a 2- or 4-year degree who are knowledgeable about textiles, fabrics, ornamentation, and fashion trends.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which requires a demonstration that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. As noted by the *Handbook*, employers normally seek individuals with 2- or 4-year degrees, and counsel conceded in his September 4, 2007 letter that only 54 percent of fashion designers possess baccalaureate degrees. As employers often find 2-year degrees acceptable, a baccalaureate or higher degree in a specific field of study is not the normal minimum entry requirement. As such, fashion designer positions do not normally qualify for classification as specialty occupations under the first criterion.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as 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.

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[3] *See* http://www.bls.gov/oco/ocos291.htm (accessed July 26, 2009).

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by USCIS 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)).

As already discussed, the petitioner has not established that its proposed position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

Accordingly, the petitioner's submission does not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which requires a demonstration that the proposed position is so complex or unique that it can only be performed by an individual with a baccalaureate degree, or its equivalent. It finds no evidence that would support such a finding, as the proposed position is similar to the fashion designer positions described in the *Handbook*, which do not require a baccalaureate degree, or its equivalent, as a minimum entry requirement. There has been no demonstration that the duties of the proposed position are more complex or unique than the general range of fashion designer positions in other, similar organizations. The *Handbook* indicates that such positions generally do not normally require at least a baccalaureate degree in a specific specialty; and the evidence of record does not establish the proposed position as unique from, or more complex than, the general range of such positions.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine the petitioner's ability to meet this 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. However, the record contains no such information, and the assertions of counsel indicate that this is the first time that the petitioner has filled this position. As the record does not establish a prior history of hiring only persons with at least a bachelor's degree in a specific specialty for the proposed position, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to have a higher degree of knowledge and skill than that normally expected of fashion designers. Therefore, 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. There is no information in the record to support a finding that the proposed position is more specialized and complex than the fashion designer positions for which the *Handbook* indicates no requirement for the highly specialized knowledge usually associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*), (*2*), (*3*), and (*4*), and the petition was properly denied.

In his January 10, 2008 appellate brief, counsel contends that "[i]n its denial the Service admits that were this position being sought by a larger company it would be approvable"; that the director "clearly discriminates against small entrepreneurial companies such as [the petitioner]"; and cites to *Young China Daily v. Chappell*, 742 F.Supp. 2d 552, 554 (N.D. Cal. 1989). The AAO disagrees with counsel's analysis.

First, the director did not state that the proposed position would have been approvable if the petitioner were a larger company. The director stated that industrial designer positions often qualify for classification as a specialty occupation, particularly those at large companies where only persons with degrees with fashion marketing and design can perform the proposed duties. However, following the lead of counsel's September 4, 2007 letter, which stated that the duties of the proposed position were more closely aligned to those of fashion designers than to industrial designers, the director analyzed the duties of the proposed position as those of a fashion designer. Given that counsel had specifically stated that the duties of the proposed position were similar to those of a fashion designer as that position is described in the *Handbook*, and that the director analyzed the proposed duties as those of a fashion designer, the AAO finds irrelevant the comments of the director regarding industrial designers.

Furthermore, the AAO notes that *Young China Daily* does not stand for the proposition cited by counsel. In *EG Enterprises, Inc. v. Department of Homeland Security*, 467 F. Supp. 2d 728, 737 (E.D. Mich. 2006), the court stated the following:

> What [the petitioner] fails to grasp is that the duties of the proffered position, *combined with* the position title and business size, are all components in the H-1B visa petition analysis [emphasis in original] . . . the Sixth Circuit, in an unpublished case, had also determined that the size of the employer is a relevant consideration, although not determinative:
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> > [The court in *Young China Daily*], on which [the petitioner] relies for this allegation of error, made only the narrow ruling that the duties of a graphic designer at a small newspaper do not necessarily differ from those of a graphic designer at a major newspaper. This leads neither to the general conclusion that the skills required to be a manager of a small company are necessarily the same as those required to be a manager at a large company, nor to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of the duties of its manager. *China Chef, Inc. v. Puelo*, 12 F. 3d 211 (table), 1993 WL 524276 at *2 (6th Cir. Dec. 15, 1993). . . .
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> [R]eliance in this case on *Young China* does not lead the court to the specific conclusion that the size of [the petitioner's] business is not relevant to the nature of [the beneficiary's] proffered duties. Although USCIS should not rely exclusively on the size of the employer's business when making a determination as to whether a position qualifies as a "specialty occupation," the Court does not find it an abuse of discretion for USCIS to consider size as just one factor in its analysis. It is reasonable to assume that the size of an employer's business has an impact of the duties of a particular position. . . .

Accordingly, the AAO is not persuaded by counsel's citation of *Young China Daily*. First, the director did not deny the petition based upon the size of the petitioner. In fact, her comments regarding the size of the petitioner related to the duties of an industrial designer as discussed in the *Handbook* which, as agreed upon by counsel, the director, and the AAO, are not analogous to the duties of the position proposed here. Second, counsel has misunderstood the court's decision in *Young China Daily*, as it does not stand for the proposition cited by counsel.

Counsel's assertions on appeal have failed to overcome the director's denial. The proposed position does not qualify for classification as a specialty occupation.

The second issue before the AAO is whether the beneficiary qualifies to perform the duties of a specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

> (*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.

The first criterion requires a demonstration that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary did not earn a degree in the United States, so he does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. While the record contains an evaluation stating that the beneficiary's work experience is equivalent to a bachelor's degree, that evaluation does not satisfy this criterion because it is not based upon the beneficiary's degree alone. As the beneficiary does not possess a foreign degree, there is no degree to evaluate. The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

> *(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;
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> *(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);
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> *(3)* An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
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> *(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;
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> *(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 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.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*), as there has been no demonstration that the evaluator has the 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. The evaluator states the following:

> [A]s part of my current responsibilities at the university, I have the authority to grant college level credit for experience and/or training.

However, no evidence to support this assertion has been submitted. For an evaluation to qualify under this criterion, the evaluator must demonstrate both (1) that he or she has the authority to grant college-level credit for training and/or experience in the specialty;[4] and (2) that the college or university has a program for granting such credit based on an individual's training and/or work experience. No evidence to establish either of these criteria has been submitted. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)).

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[4] The AAO notes that the materials submitted regarding the evaluator's professional background indicate she has no background in the field of fashion design.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*), which requires that the beneficiary submit 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).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*2*), the beneficiary is unqualified under this criterion because the evaluation submitted by the petitioner was not based upon a degree; it was based upon his work experience.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(*4*), which requires that the beneficiary submit 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.

The AAO next turns to the fifth criterion. When USCIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[5];

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

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[5] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

While the record contains letters of regarding the beneficiary's work history, they do not establish that this work experience included the theoretical and practical application of specialized knowledge required by the specialty; that it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the field; and that he achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (*i*), (*ii*), (*iii*), (*iv*), or (*v*) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(*1*)(*2*)(*3*)(*4*), or (*5*), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). The petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the AAO finds that the director properly denied the petition on this ground.

Finally, the AAO notes that the beneficiary is currently in H-1B status. Although the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition, 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. If the previous nonimmigrant petition was approved based upon the same unsupported assertions that are contained in the current record, the approval would constitute material 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 USCIS 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). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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 nonimmigrant petitions on behalf of a 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).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial 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 petitioner has failed to demonstrate that the proposed position qualifies for classification as a specialty occupation or that the beneficiary qualifies to perform the duties of 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 sustained that burden.

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