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Date: **OCT 14 2011** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 remain denied.

The petitioner is engaged in the wholesale and retail sale of hair accessories with 12 employees and a gross annual income of \$4,990,811. It seeks to employ the beneficiary as a product 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, concluding that the petitioner failed to establish that the proffered position is a specialty occupation and that its offer of employment was authentic.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker, and supporting documentation; (2) the director's request for additional evidence (RFE) and the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, Notice of Appeal or Motion. The AAO reviewed the record in its entirety before reaching its decision.

The central issue is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 [1] 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 [2] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position;
or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act 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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary's services as a product designer. The initial letter from the petitioner submitted with the petition stated:

[The beneficiary] will be required to research and forecast trends in hair styles and accessories by visiting retail outlets and fashion shows and conventions; based on the completed research [the beneficiary] will design all aspects of

products including performing initial sketches, detailed drawings, structural models, computer graphics and full scale prototypes; research, mock up and test all products (before and after production) to assure products meet company and clients' standards; make changes to product and inventory selection according to anticipated consumer demand and preferences; will develop and execute artwork for brochures, print collateral, advertising and package design to enhance retail sales.

The petitioner added that the beneficiary would spend approximately 20 percent of her time on research and forecasting trends in hair styles, 35 percent of her time designing products, 15 percent of her time testing products, 15 percent of her time making changes in product and inventory, and 15 percent of her time executing artwork for packing and advertising materials.

The petitioner submitted a copy of the beneficiary's diploma showing that she had been awarded a foreign master's degree in fine arts from the Ewha Woman's University in 1993.

On June 27, 2009, the director issued an RFE requesting among other items, additional evidence that the proffered position is a specialty occupation, including a more detailed job description, evidence of the petitioner's past employment practices, the nature of the petitioner's business, and an organizational chart. The director also requested additional information regarding the beneficiary's qualifications including an evaluation of the beneficiary's foreign degree.

In response to the RFE, the petitioner provided the same job description as initially submitted. The petitioner noted that it had employed two technical product designers in the past and that one was approved for H-1B visa classification in 2003 and a second was approved for a three-year H-1B visa classification in 2004. The petitioner provided the diplomas for these two employees. The petitioner further provided two advertisements: (1) for a product designer for a consumer products corporation that listed a bachelor's degree in the overview of the position but did not indicate that a bachelor's degree in a specific discipline was required; and (2) for a product designer to design floors for a building products manufacturer that required a bachelor's degree in graphical design/fine arts or equivalent experience.

The petitioner also provided a listing of its employees showing that it employed a president, a vice-president of sales, three accountants, a sales executive, seven shipping personnel, a technical designer, a graphic designer, and the proposed position of product designer.

The record also included the petitioner's federal tax returns which showed that the petitioner earned a gross income of \$5,200,598 in 2008.

The director denied the petition on October 14, 2009.

On appeal, counsel for the petitioner indicates that no supplemental brief or evidence will be submitted with the appeal. On the Form I-290B, counsel asserts that the petitioner submitted substantial evidence that the position was a specialty occupation and that the degree requirement is common among similar organizations and that the nature of the job duties are specialized and complex. Counsel contends, however, that the director's most egregious error was in not finding

that the petitioner normally requires a bachelor's degree for the position. Counsel refers to the approvals of two of the petitioner's employees for H-1B classification and asserts that these positions are similar to the proffered position.

The central issue when determining whether a proffered position comprises a bona fide job offer for the H-1B nonimmigrant classification is to determine whether the petitioner has established that it has sufficient specialty occupation work to employ the proposed beneficiary for the duration of the H-1B nonimmigrant classification. In that regard, the AAO will first consider whether the proffered position is a specialty occupation.

To make its determination whether the employment 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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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 proffered position is that of a product designer. The product designer occupational category is addressed in the *Handbook* (2010-2011 online edition) under the heading commercial and industrial designers; however upon review of the general description of duties provided by the petitioner and the nature of the petitioner's business – the proffered position most closely resembles that of a fashion designer. To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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 *Handbook* states in pertinent part:

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.

* * *

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 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 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.

The training and qualifications required for fashion designers are described as follows in the DOL *Handbook*, 2010-11 online edition:

Education and training. Fashion designers typically need an associate or a bachelor's degree in fashion design. Some fashion designers also combine a fashion design degree with a business, marketing, or fashion merchandising degree, especially those who want to run their own business or retail store. Basic coursework includes color, textiles, sewing and tailoring, pattern making, fashion history, computer-aided design (CAD), and design of different types of clothing such as menswear or footwear. Coursework in human anatomy, mathematics, and psychology also is useful.

The National Association of Schools of Art and Design accredits approximately 300 postsecondary institutions with programs in art and design. Most of these schools award degrees in fashion design. Many schools do not allow formal entry into a program until a student has successfully completed basic art and design courses. Applicants usually have to submit sketches and other examples of their artistic ability.

Aspiring fashion designers can learn these necessary skills through internships with design or manufacturing firms. Some designers also gain valuable experience working in retail stores, as personal stylists, or as custom tailors. Such experience can help designers gain sales and marketing skills while learning what styles and fabrics look good on different people.

Designers also can gain exposure to potential employers by entering their designs in student or amateur contests. Because of the global nature of the fashion industry, experience in one of the international fashion centers, such as Milan or Paris, can be useful.

Handbook notes that a bachelor's degree in fashion design may be one avenue to employment as a fashion designer, it is not the only or even preferred method. The *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for fashion designers.

As the *Handbook* indicates no specific degree requirement for employment as a fashion designer, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The two advertisements submitted do not provide information that establishes that the advertising companies or ultimate employers are similar to the petitioner's 15 employee hair accessory business. In addition, the descriptions in the advertisements are generic as is the petitioner's description of the duties of the proffered position. There is insufficient detailed information to ascertain the actual day-to-day duties of the proffered position and to determine that the proffered position is parallel to either of the positions advertised. Moreover, one of the two advertisements does not specify that a bachelor's degree in a specific discipline is required. The advertisements submitted do not establish that parallel firms routinely require at least a bachelor's degree in a specific specialty for a position similar to the proffered position.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of avenues available to obtain employment as a fashion designer, including associate degrees and bachelor's degrees not in a specific specialty. The petitioner's general description of duties fails to demonstrate that the beneficiary would be required to perform any complex duties on a full-time basis. Therefore, the record lacks sufficiently detailed information to distinguish

the proffered position as unique from or more complex than a fashion designer or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner has also failed to provide probative evidence establishing that it only hires persons with at least a bachelor's degree in a specific specialty for the proffered position. The AAO acknowledges the approval of two of the petitioner's employees in positions titled technical designer and graphical designer for H-1B classification. Although the petitioner provides the educational credentials for the two employees, the petitioner does not describe the actual duties of the two employees in those positions. The director's decision in this matter does not indicate whether the prior approvals of the other employees' nonimmigrant petitions were reviewed. If, however, the previous nonimmigrant petitions were approved based on the same descriptions and evidence contained in this record, the approvals would constitute material and gross 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).

We reiterate that the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. Again, the critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The actual duties of the proffered position and the nature of the petitioner's business are critical factors in determining whether the petitioner's self-imposed standards are legitimate or a methodology to bring individuals into the United States to perform non-specialty occupations. Upon review of the totality of the record of proceeding, the petitioner has not established that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. The AAO here augments its earlier comments regarding the petitioner's failure to establish this criterion given the generic description of duties provided and the nature of the petitioner's business and personnel. The petitioner failed to establish that the beneficiary would perform specialized and complex duties usually associated with the attainment of a baccalaureate or higher degree on a full-time basis. Accordingly, the AAO concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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

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