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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: Office: CALIFORNIA SERVICE CENTER FILE: 

JAN 18 2012

IN RE: Petitioner: 
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:

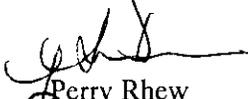


INSTRUCTIONS:

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 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 remain denied.

The petitioner is in the business of fashion design, manufacturing and sale. It seeks to employ the beneficiary as a fashion merchandiser 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.

The record of proceeding before the AAO contains: (1) Form I-129 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, with counsel's brief and supporting materials. 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 fashion merchandiser. The petitioner indicated in the Form I-129 that it was established in 2007 and employs two individuals. The gross and net annual income was listed as “undetermined.” The petitioner’s letter in support of the petition states that the beneficiary would “direct and manage the product

development process from design to merchandise." More specifically, the proffered duties include:

- Study current fashion trends to understand consumer preferences;
- Forecast consumer buying habits;
- Act as liaison between design, production and sales team;
- Prepare and present marketing strategies;
- Organize, prepare and maintain new season collection at fashion shows and retail outlet;
- Develop visual merchandising displays; and
- Plan merchandise promotion campaigns.

The petitioner submitted the beneficiary's educational credentials establishing that she holds a U.S. bachelor's degree in fashion merchandising.

On August 20, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation, including a more detailed job description and additional information regarding the petitioner's business.

In response to the RFE, the petitioner explains that its business is rapidly expanding and that its gross sales in the first half of 2008 amounted to almost \$600,000. The petitioner also states that it now employs 10 individuals. The petitioner provides a description of the beneficiary's proposed duties and argues that the duties are so specialized and complex that the position requires the attainment of a bachelor's degree in fashion merchandising. Additionally, the petitioner maintains that a bachelor's degree is common in the industry. The RFE response is accompanied by a sample of online job postings for similar positions, financial statements, tax documentation, trade show listings, and evidence relating to the approval of an H-1B petition on behalf of one of the beneficiary's classmates as a fashion merchandiser for another company.

The director denied the petition on December 2, 2009.

On appeal, counsel for the petitioner argues that the evidence submitted is sufficient to establish that the proffered position is a specialty occupation. Counsel maintains that the position of fashion merchandiser is not akin to a marketing manager or market research analyst. Counsel further states that the duties of the proffered position are complex and require the attainment of a bachelor's degree. The petitioner's appeal is accompanied by a letter where [REDACTED] opines that the position of fashion merchandiser is a specialty occupation. A sample of fashion merchandising job postings is also included with the appeal.

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 AAO notes that at the time the petition was filed, the petitioner employed two employees and had an undetermined income. USCIS regulations, however, affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 ('Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998). The petitioner's current number of employees and income is therefore not relevant to the instant determination.

Contrary to counsel's claims, the description of the duties of the proffered position is akin to those listed in the *Handbook* section pertaining to advertising, marketing, promotions, public relations, and sales managers. The training and qualifications required for advertising, marketing, promotions, public relations, and sales managers are described as follows in the DOL *Handbook*, 2010-11 online edition:

For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A relevant course of study might include classes in marketing, consumer behavior, market research, sales, communication methods and technology, visual arts, art history, and photography.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration,

public affairs, public speaking, political science, and creative and technical writing.

Most advertising, marketing, promotions, public relations, and sales management positions are filled through promotions of experienced staff or related professional personnel. For example, many managers are former sales representatives; purchasing agents; buyers; or product, advertising, promotions, or public relations specialists. In small firms, in which the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed January 3, 2012). Therefore, although a bachelor's degree may be preferred, the *Handbook* does not indicate that at least a bachelor's degree in a specific specialty is required for these positions.

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 petitioner fails to explain how its fashion merchandiser position differs from the above-mentioned description of marketing manager in the *Handbook*, or from the *Handbook's* description of a market research analyst. The duties listed in the *Handbook* are relevant to all industries, including the fashion industry. The duties of the proffered position, including the attendance at trade shows, market surveys, merchandise planning and placement are no different than those of a marketing manager in any other industry. As described in the record of proceeding, the proposed duties do not 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 therefore 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 opinion letter submitted by the petitioner with the appeal also does not establish that a bachelor's degree in a specific specialty is the minimum entry requirement for the proffered position.

states only that the requirement of a bachelor's degree in fashion design or related field is "common for many Fashion Merchandisers." She states that she considers such a degree the minimum requirement for fashion merchandiser positions, but her opinion is conclusory in nature and not supported by independent, objective evidence. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988).

In support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner also submits a sample of advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. The advertisements provided, however, establish at best that a bachelor's degree is generally required, but not at least a bachelor's degree or the equivalent in a *specific specialty*. In addition, the advertisements are not limited to fashion merchandising positions in the fashion industry. One advertisement states that a degree in jewelry design or merchandising is required, but does not specify whether a two- or four-year degree is sought. Another advertisement states that a bachelor's degree in textile, apparel merchandising or design is preferred. It is generally unclear from the job postings provided what industry the hiring companies are in and whether they would be similar to the petitioner and, as such, it also cannot be determined whether the jobs would be considered parallel to that of the proffered position. As a result, the petitioner has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions.¹

¹ According to the *Handbook's* detailed statistics on marketing managers, there were approximately 2,200 persons employed as marketing managers by agencies, brokerages, and other insurance related activities in 2008. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed January 3, 2012). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just four job postings with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the insurance agency / brokerage industry.

Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

Next, the AAO finds that the petitioner also fails 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 degrees acceptable for marketing positions, including degrees not in a specific specialty. As discussed previously, the petitioner failed to demonstrate that it has sufficient work and resources for the beneficiary 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 marketing management or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 finds that, to the extent that they are described in the record of proceeding, the duties of the proffered position do not appear more specialized and complex than marketing positions not associated with the attainment of at least a bachelor's degree in a specific specialty. The AAO, therefore, 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).

The petitioner, through counsel, notes on appeal that an H-1B petition was approved for a fashion merchandiser on behalf of one of the beneficiary's classmates. The AAO, however, 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'r 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).

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 the nonimmigrant petitions on behalf of the 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).

As such, even if the job postings supported the finding that the job of fashion merchandiser for a three-person fashion business required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

For the reasons above, 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.