

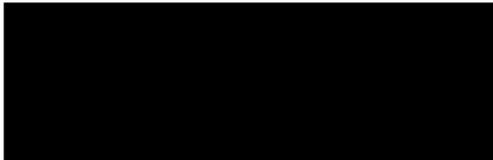
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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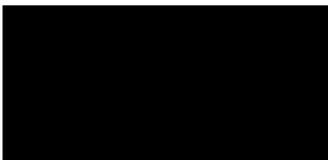
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Date: **JAN 30 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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 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.

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 in this case is whether the position of fashion designer within the petitioner's organization 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 (5<sup>th</sup> 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 designer at an annual salary of \$38,230 for a period of three years. The petitioner indicated in the Form I-129 that it was established in 2007 and employs approximately 15 individuals. The petitioner’s gross

annual income is \$3,413.511. The petitioner's letter in support of the petition states that the beneficiary's primary duties and responsibilities will include:

- Conduct extensive research on the latest fashion trends and styles;
- Develop preliminary design sketches using computer aided design (CAD) software, CS4 illustration, Photo shop, or by hand. Study current fashion trends to understand consumer preferences;
- Procure samples of fabric from tradeshow and textile manufacturers;
- Create prototypes and maintain communication with production team to ensure smooth production process in line with designing concept; and,
- Participate in fashion showings, exhibits, tradeshow, and marketing to clothing retailers.

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

On November 24, 2010, the director issued an RFE requesting additional evidence that the proffered position qualifies as a specialty occupation. The director noted that the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) indicates that a bachelor's degree is not the minimum requirement for entry into a fashion designer position. The director thus requested that the petitioner provide evidence that a degree requirement is common to the industry in parallel positions or, in the alternative, that the particular position offered is so complex or unique that it can only be performed by a degreed individual.

In response to the RFE, the petitioner explains that its business is rapidly expanding and that a fashion designer within its organization must hold at least a bachelor's degree. 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 design. Additionally, the petitioner maintains that a bachelor's degree is common in the industry. The RFE response is accompanied by the petitioner's corporate tax returns, lease agreements, product catalogs, a sample of online job postings for fashion design positions, an opinion letter by the general manager of a company that claims to be similar to the petitioner, and the beneficiary's educational credentials. The petitioner also submits a copy of the bachelor's and master's diplomas awarded to [REDACTED] the individual who previously served as a fashion designer in the petitioner's organization.

The director denied the petition on January 19, 2011.

On appeal, counsel for the petitioner argues that the evidence submitted is sufficient to establish that the proffered position qualifies as a specialty occupation. Counsel maintains that a bachelor's degree is normally the minimum requirement for the position of fashion designer, that such a degree requirement is common in the fashion industry, and that the proffered position is so unique and complex as to require the attainment of a bachelor's degree. The petitioner's appeal is accompanied by a letter where Professor [REDACTED] opines that the position of fashion designer is a specialty occupation, as well as a sample of online job postings.

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 *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 *Handbook* states that "employers usually seek [fashion] designers with a 2-year or 4-year degree who are knowledgeable about textiles, fabrics, ornamentation, and fashion trends." See Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2011-2012 ed., available at <http://www.bls.gov/oco/ocos291.htm> (last accessed January 24, 2012). Therefore, the *Handbook* does not indicate a minimum of a bachelor's degree in a specific specialty is required for fashion design 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 *Handbook* states that "[f]ashion 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." The *Handbook* further explains that:

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.

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.

\* \* \*

The petitioner fails to explain how its fashion designer position differs from the *Handbook's* description of fashion designer above. 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.

concedes that individuals with an associate's degree may be employed as fashion designers. She states, however, that the position of fashion designer within the petitioner's company requires more advance responsibilities in conceptualization, design and production of clothing. The duties

described in her letter, however, are indistinguishable from those listed in the Handbook and do not reflect a more advanced level of responsibility such that a bachelor's degree would be required. 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).

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 sometimes, but not always, required in a *specific specialty*. In addition, some of the advertisements simply require a "degree" without specifying whether it is an associate's or bachelor's. It is generally unclear from the job postings provided whether the employer companies are similar to the petitioner's in size and scope, or whether the particular duties of the position would be akin to those of the fashion designer within the petitioner's company. Thus, it 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.<sup>1</sup>

Next, the AAO finds that the petitioner 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 qualifications acceptable for fashion design positions. Also, the petitioner has not established that the beneficiary would perform complex duties within the petitioner's

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<sup>1</sup> According to the *Handbook's* detailed statistics on marketing managers, there were approximately 22,000 persons employed as fashion designers in 2008, almost 3,000 of them in the apparel manufacturing sector. *Handbook*, 2011-12 ed., available at <http://www.bls.gov/oco/ocos291.htm> (last accessed January 24, 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 the small sample of job postings submitted with regard to determining the common educational requirements for entry into parallel positions in similar organizations in the industry. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). 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").

As such, even if the job postings supported the finding that the job of fashion designer for a 15-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.

organization. Therefore, the evidence in the record is insufficient to distinguish the proffered position as unique from or more complex than fashion design positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

The petitioner states that the individual who now serves as Director of the Design Department was previously employed as a fashion designer and holds both a bachelor's and a master's degree. While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation"). Here, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 fashion design positions not associated with the attainment of at least a bachelor's degree in a specific specialty. The petitioner maintains that the position of fashion designer within its organization is unique and complex, yet the LCA submitted with the petition for a Level I wage. It must therefore be concluded that either (1) the position is a low-level, entry position relative to other designers and, thus, based on the statistics-based findings of the *Handbook*, the proffered position is not a specialty occupation; or (2) the LCA does not correspond to the petition. In other words, even if it were determined that the proffered position requires at least a degree in a specific specialty or its equivalent, such that it would qualify as a specialty occupation, the petition could still not be approved due to the petitioner's failure to submit an LCA that corresponds to a position higher than a Level I position. 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 designer despite the *Handbook's* indication that a bachelor's degree is not commonly required. 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).

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 remain 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.