



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF S-P-F-D-, INC.

DATE: AUG. 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a fashion/apparel design company, seeks to temporarily employ the Beneficiary as a “chief creative designer” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the position offered to the Beneficiary does not qualify as a specialty occupation.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in finding that the proffered position is not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge,
and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human

endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(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.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (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.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted 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 proposed position. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

In its initial letter of support, the Petitioner described the Beneficiary's proposed duties as follows:

[The Beneficiary] will be temporarily employed as a Chief Creative Designer at [the Petitioner]. This position requires that [the Beneficiary] utilize her knowledge and skills in Fashion Design or related fields to perform the following job duties: Conceptualize and execute high end apparel designs and collections for the younger generation according to design themes, season and fashion trends; understand design ideas and design fashion apparel accordingly by creating detailed sketches of fashion designs to achieve designed aesthetic effects, taking into consideration factors that include intended markets, age, gender, and socioeconomic status; produce sample

apparel and evaluate sample apparel on and off models to modify designs to achieve the best intended aesthetic effects; draft production requirements such as color schemes, materials used, matching accessories and specific ways of cutting and sewing [*sic*] the materials; coordinate with production facilities during all phases of production process to assure product quality; participate in fashion shows to represent the firm and to seek market information in order to stay ahead of the competition to maintain and promote the reputation of the [Petitioner's] brand name.

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Fashion Designers" corresponding to Standard Occupational Classification (SOC) code 27-1022 at a Level I wage.¹

In response to the Director's request for evidence (RFE) and again on appeal, the Petitioner provided the following description of the Beneficiary's proposed duties:

Over 80% of the time will be devoted to the design process:

- a. Conceptualize and execute high end apparel designs and collections for the younger generation according to design themes, season and fashion trends;
- b. Understand design ideas and design fashion apparel accordingly by creating detailed sketches of fashion designs to achieve designed aesthetic effects, taking into consideration factors that include intended markets, age, gender, and socioeconomic status;
- c. Produce sample apparel and evaluate sample apparel on and off models to modify designs to achieve the best intended aesthetic effects;
- d. Draft production requirements such as color schemes, materials used, matching accessories and specific ways of cutting and sewing [*sic*] the materials; and
- e. Coordinate with production facilities during all phases of production process to assure product quality[.]

¹ We will consider the Petitioner's classification of the proffered position at a Level I wage (the lowest of four assignable wage levels) in our analysis of the position. The "Prevailing Wage Determination Policy Guidance" issued by the U.S. Department of Labor (DOL) provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks and require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.* A Level I wage should be considered for research fellows, workers in training, or internships. *Id.*

(b)(6)

Matter of S-P-F-D-, Inc.

20% rest of the time will be devoted to research on current fashion and market trends to be more relevant and to increase sales:

- a. Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting garment designs; [and]
- b. Participate in fashion shows to represent the firm and to seek market information in order to stay ahead of the competition to maintain and promote the reputation of the [Petitioner's] brand name[.]

According to the Petitioner, the specific job duties of the position “cannot be performed by anyone who does not have at least a Bachelor’s degree in Art, Fashion Design, or a related field of studies with relevant work experience.”

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the Petitioner has not adequately and consistently demonstrated the substantive nature of the proffered position and its associated job duties.

In this matter, the job description provided both initially and in response to the Director’s RFE identifies typical duties associated with a fashion designer, yet the record lacks sufficient evidence to demonstrate that the duties as described will actually be performed by the Beneficiary or that the Petitioner’s organization actually has the need for an individual to perform such duties.

In the instant case, the Petitioner describes itself as a two-employee boutique design company established in 2009. It does not disclose its gross or net annual income, but instead noted “privately held” on the Form I-129, Petition for a Nonimmigrant Worker. The company appears to consist of [REDACTED] founder and also the “chief designer” of the company, and [REDACTED] a “senior-level” designer whom the Petitioner states is employed in a similar or the same capacity as the proffered “chief creative designer” position. The Petitioner seeks to employ the Beneficiary in a “chief creative designer” position to join these two employees. Thus, the record reflects that the Petitioner’s proposed staffing (if the instant petition were approved) would consist of three total employees, all of whom would purportedly be employed in a “chief” or “senior-level” designer position.

The Petitioner, however, has not sufficiently demonstrated how it would support this proposed staffing structure, i.e., how it would support the Beneficiary’s employment as the claimed “chief creative designer.” For example, the Petitioner did not submit evidence that it employs any subordinate staff members who would perform the actual day-to-day operations of the company. In addition, the Petitioner does not submit evidence, such as a business plan which outlines a proposed expansion of the Petitioner’s enterprise or financial documentation, demonstrating that sufficient

H-1B caliber works exists for the Beneficiary. As the Petitioner employs relatively few people, without further evidence, it has not established how the Beneficiary would be relieved from performing non-qualifying duties. It is reasonable to assume that the size of an employer's business has or could have an impact on the duties of a particular position. See *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v. Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). The size of a petitioner may be considered as a component of the nature of the petitioner's business, as the size impacts upon the duties of a particular position.

Furthermore, it is important to note that the Petitioner modified its description of the proffered duties in response to the Director's RFE and again on appeal by adding the additional job duty of "[c]ollect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting garment designs." The Petitioner stated that the Beneficiary would spend an unidentified portion of 20% of her time on this particular job duty. The Petitioner did not explain how this additional duty is consistent with its initially listed duties. This expansion to the description of duties raises further questions regarding the true nature of the proffered position.²

Nevertheless, the Petitioner's addition of this particular job duty is significant, in that the new job duty is virtually identical to one of the core duties of "Market Research Analysts and Marketing Specialists" as listed in Occupational Information Network (O*NET) for this occupational category.³ Moreover, the Petitioner also indicated that the Beneficiary would "participate in fashion shows to represent the firm and to seek market information in order to stay ahead of the competition to maintain and promote the reputation of the [Petitioner's] brand name." The fact that up to 20% of the Beneficiary's time could be devoted to duties specifically related to marketing raises further questions regarding the true nature of the position, particularly since the record does not establish that the Petitioner currently has any staff devoted to such a function.

It appears that the proffered position encompasses elements of both fashion design and market research. It is noted that, where a petitioner seeks to employ a beneficiary in two distinct occupations, the petitioner should file two separate petitions, requesting concurrent, part-time employment for each occupation. Additionally, the petitioner would need to ensure that it separately meets all requirements relevant to each occupation and the payment of wages commensurate with the higher paying occupation.⁴ In this matter, the prevailing wage for "Market Research Analysts

² When responding to an RFE or on appeal, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, its associated job responsibilities, or other salient aspects of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978).

³ For more information, see O*NET Details Report for the occupation "Market Research Analysts and Marketing Specialists," <http://www.onetonline.org/link/details/13-1161.00> (last visited Aug. 17, 2016).

⁴ See generally 8 C.F.R. § 214.2(h); U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NP_WHC_Guidance_Revised_11_2009.pdf.

(b)(6)

Matter of S-P-F-D-, Inc.

and Marketing Specialists” at a Level I wage is higher, at \$23.94 per hour, than the prevailing wage for “Fashion Designers,” which is \$20.82 per hour.⁵ According to guidance from DOL, if the Petitioner believed the position encompassed the duties of both a fashion designer and a market research analyst or marketing specialist, as appears to be the case here, it should have chosen the relevant occupational code for the highest paying occupation, in this case “Market Research Analysts and Marketing Specialists.”⁶

Finally, the Petitioner emphasizes the position’s complexity, specialization, and uniqueness as opposed to other fashion designer positions. Although we reviewed the Petitioner’s statements regarding the proffered position and its business operations, we find that relative specialization and complexity have not been sufficiently developed by the Petitioner as an aspect of the proffered position. The Petitioner submitted press releases featuring its company and its chief executive, [REDACTED] indicating that [REDACTED] has won several awards for her designs internationally. The Petitioner also asserts that [REDACTED] has transformed the Petitioner into a high-end boutique store. Based on these assertions, the Petitioner concludes that the proffered position is specialized and complex based on the nature of the petitioning company and requires a specific skill set to be able to oversee its clothing line and ensure continued success of the Petitioner’s brand.

As previously discussed, there is insufficient documentation, such as a business plan or financial reports, to demonstrate that the Petitioner’s business is indeed expanding and has sufficient specialty occupation work for the Beneficiary as a chief creative designer. Moreover, on the LCA submitted in support of the H-1B petition, the Petitioner designated the proffered position as a Level I wage. As previously noted, a Level I wage is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation.⁷ The Petitioner’s selection of the Level I wage level further undermines the Petitioner’s assertion that the Beneficiary would be employed as its “chief creative designer.”

⁵ For more information regarding the wages for “Market Research Analysts and Marketing Specialists” – SOC 13-1161, in the [REDACTED] CA MSA for the period 7/2014 – 6/2015, see <http://www.flcdatcenter.com/OesQuickResults.aspx?year=15&source=1> (last visited Aug. 17, 2016).

⁶ Specifically, DOL’s “Prevailing Wage Determination Policy Guidance” states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer’s job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification. . . . If the employer’s job opportunity has worker requirements described in a combination of O*NET occupations, the SWA should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer’s job offer is for an engineer-pilot, the SWA shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NP_WHC_Guidance_Revised_11_2009.pdf.

⁷ See *id.*

Matter of S-P-F-D-, Inc.

For the reasons set forth above, we find that the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation. The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-P-F-D, Inc.*, ID# 17731 (AAO Aug. 18, 2016)