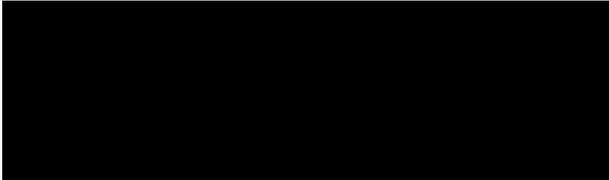


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FILE: EAC 02 169 52396 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter was reopened and denied again by the director. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an art gallery. It seeks to employ the beneficiary as a custom framer and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the proffered position does not qualify as a specialty occupation.

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.

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

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

Citizenship and Immigration Services (CIS) 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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response thereto; (4) the director's decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is an art gallery, with three employees and gross annual income of \$100,000, that stages exhibitions, sells artwork, and does custom framing. It seeks to employ the beneficiary as a custom framer to design frames for individual paintings. As described by the petitioner in a letter accompanying its amended petition, the duties of the proffered position are as follows:

[The beneficiary] will read publications, attend showings, and consult with clients to establish design concepts for frames. He will also evaluate design ideas based on factors such as appealing appearance, characteristics of the art work, and client specifications. He will also integrate findings and concepts and sketch design ideas. He will present design to client and discuss the need for modification and change or justify the design. He also may prepare illustrations of the frame, as well as prepare or coordinate preparation of working drawings from sketches and design specifications.

The petitioner stated that the beneficiary was qualified for the job by virtue of his four-year course of study at the Fine Arts School of the Central University of Ecuador, culminating in a fine arts degree with specialization in sculpture and engraving-printmaking on August 5, 1998, as well as his subsequent work experience as an art curator and custom framer.

The director determined that the proffered position did not meet the statutory and regulatory requirements of a specialty occupation. The director cited the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, which indicated that fine artists do not necessarily require a baccalaureate degree in a specific specialty for entry into a particular position in the field. Letters in the record from an art critic, an art professor at New Jersey City University, and the executive director of the Center for Cuban Studies failed to demonstrate that it was standard industry practice among gallery owners to require a custom framer to have a baccalaureate degree in a specific specialty. The record also did not show that the petitioner had previously employed degreed individuals in the proffered position.

On appeal the petitioner submitted additional statements from the director of the art gallery and the beneficiary, as well as a newspaper clipping about the gallery.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO finds that the proffered position fits within the *Handbook's* occupational description of artists and related workers. As for the training and educational requirements of the occupation, they are described as follows in the *Handbook*, 2004-05 edition, at 240-41:

Training requirements for artists vary by specialty. Although formal training is not strictly necessary for fine artists, it is very difficult to become skilled enough to make a living without some training. Many colleges and universities offer programs leading to the Bachelor in Fine Arts (BFA) and Master in Fine Arts (MFA) degrees

Independent schools of art and design also offer postsecondary studio training in the fine arts leading to an Associate in Art or Bachelor in Fine Arts degree. Typically, these programs focus more intensively on studio work than do the academic programs in a university setting

Evidence of appropriate talent and skill, displayed in an artist's portfolio, is an important factor used by art directors, clients, and others in deciding whether to hire an individual or to contract out work Assembling a successful portfolio requires skills usually developed in a bachelor's degree program or through other postsecondary training in art or visual communications.

Thus, the *Handbook* indicates that a baccalaureate or higher degree in fine arts is not a mandatory credential for entry into a custom framing position. An associate's degree in art may be sufficient for some employers, according to the *Handbook*, and a quality portfolio demonstrating an artist's skill and experience may compensate for the lack of any formal degree. Accordingly, the proffered position does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate or higher degree in a specific specialty, or its equivalent, is not the normal minimum requirement for entry into the position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes the letters from three individuals in the art field, previously discussed by the director, which the petitioner cites as evidence of an industry standard requiring a baccalaureate degree in art for custom framing positions. None of the letters is from an art gallery like the petitioner, the AAO notes, and none of the letters explains why the position could not be performed by an individual with an associate's degree in fine arts, or an individual without a degree who is artistically skilled and has experience in the field of custom framing. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion is not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO concludes the letters in the record fail to establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), there is no evidence in the record that the petitioner previously hired a custom framer with a specialty degree in fine arts. Therefore, the petitioner cannot show that it normally requires a specialty degree or its

equivalent for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties are so specialized and complex that they require a depth of knowledge usually associated with the attainment of a baccalaureate degree in fine arts or a related specialty. As far as the record shows, the duties of the custom framer position at issue in this case do not exceed those normally encountered in the occupational field, which do not require baccalaureate level knowledge.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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