

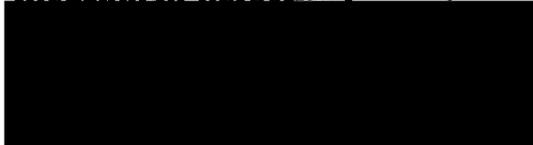


DA

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
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File: EAC-99-157-51806

Office: Vermont Service Center

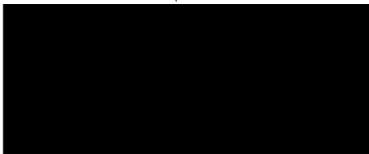
Date: OCT 07 2002

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)

IN BEHALF OF PETITIONER:



**PUBLIC COPY**

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a business engaged in the purchase and sale of antiquities and related art with two employees and a stated gross annual income just in excess of \$1 million. It seeks to employ the beneficiary as a curator and manager for a period of three years. The director determined the petitioner had not established that the offered position is a specialty occupation.

On appeal, counsel argued that the Service had erred in denying the petition because it had failed to consider evidence contained in the record that reflects that the proffered position is a specialty occupation.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not established that the proffered position is a specialty occupation because it had not demonstrated that a baccalaureate degree in a specialized area was required for employment in this position.

On motion, counsel reiterates his argument that the proffered position is a specialty occupation. Counsel asserts that the offered job is analogous to a curator in a small museum. Counsel contends that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), recognizes that a bachelor's degree in a discipline related to the museum's specialty or museum studies is the minimum degree requirement for employment as a curator in a small museum. Counsel also argues that the Service did not correctly assess evidence contained in the record that reflects the industry standard for similar positions is at least a bachelor's degree in an area related to the museum's specialty or museum studies.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

an occupation which 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 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.

Counsel's statements on motion are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter which accompanied the initial I-129 petition, the petitioner's vice president described the duties of the beneficiary in the offered position as follows:

...the acquisition and sale of antiquities and related art; directing and coordinating all corporate activities in connection with the acquisition and sale of antiquities on a worldwide basis; overseeing and administering financial matters, including negotiating terms of acquisitions and sales; directing activities regarding the transportation, storage and safekeeping of the inventory; conducting research, valuation, and historical surveys of the significance of antiquities and ancient art; conducting research projects for specific targeted acquisitions; interviewing and hiring support personnel as necessary; managing support personnel as necessary; coordinating business activities worldwide; and attending industry conferences with a focus on the acquisition and sales of specific items.

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.

The Handbook, 2002-2003 edition, at pages 184-186, provides the following description of the job duties for the position of curator:

*Curators* oversee collections in museums, zoos, aquariums, botanical gardens, nature centers and historic sites. They acquire items through purchase, gifts, field exploration, inter-museum exchanges, or, in the case of some plants and animals, reproduction. Curators also plan and prepare exhibits. In natural history museums, curators collect and observe specimens in their natural habitat. Their work involves describing and classifying species, while specially trained collection managers and technicians provide hands-on care of natural history collections. Most curators use computer databases to catalogue and organize their collections. Many also use the Internet to make information available to other curators and the public. Increasingly, curators are expected to participate in grant writing and fund raising to support their projects.

Most curators specialize in a field, such as botany, art, paleontology, or history. Those working in large institutions may be highly specialized. A large natural history museum, for example, would employ specialists in birds, fishes, insects, and mollusks. Some curators maintain the collection, others do research, and others perform administrative tasks. Registrars, for example, keep track of and move objects in the collection. In small institutions, with only one or a few curators, one curator may be responsible for multiple tasks, from maintaining collections to directing the affairs of museums.

It is noted that certain elements of the job description of a curator are similar to the duties of the proffered position listed above. The fact that the Handbook recognizes that a bachelor's degree in a discipline related to the museum's or similar institution's specialty or museum studies is the minimum degree requirement for employment as a curator in a small museum or similar institution is similarly acknowledged. However, counsel's assertion that the offered job is analogous to that of a curator in a small museum cannot be accepted. The overriding and most distinguishable difference between the positions is the fact that curators collect, maintain, and exhibit items of cultural, historic, scientific, and artistic significance for academic research and the education and entertainment of the general public, while the duties of the proffered position are focused on the commercial transaction of works of art between private individuals and organizations. Regardless of the size of the museum, the position of curator does not generally involve the subsequent sale

of any item acquired for addition to the inventory of collections retained by the institution. It is determined that the offered position, which primarily involves the acquisition and sale of antiquities and ancient art, rather than the collection and maintenance of such items, is not a curator position as defined by the DOL.

Counsel argues that the proffered position is similar to the position of an art appraiser, and that this position has a specific vocational preparation (SVP) code of 8 in the DOL's Dictionary of Occupational Titles (DOT). Counsel asserts that an SVP level of 8 reflects a requirement of at least a baccalaureate degree in a specialized field for employment in the position of art appraiser. However, the primary duties of the proffered position are the acquisition and sale of antiquities and ancient art and not the appraisal of works of art for the purpose of determining value. Furthermore, a reference in the DOT, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook. The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

In these proceedings, the duties of the position are dispositive and not the job title. The offered position combines the duties of a general manager with those of a marketing manager. The Handbook at pages 86-89, finds no requirement of a baccalaureate or higher degree in a specialized area for employment in a top executive position such as a general manager. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

The Handbook at pages 26-29 also finds no requirement of a baccalaureate degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions. Some employers prefer degrees in business administration but

bachelor's degrees in various liberal arts fields are also acceptable. Here again, certain personal qualities and participation in company training programs are often considered as significant as the beneficiary's specific educational background. Most marketing, advertising, and public relations management positions are filled by promoting experienced staff or related professional or technical personnel, such as sales representatives, purchasing agents, buyers, product or brand specialists, advertising specialists, promotion specialists, and public relations specialists. Thus, it is concluded that the petitioner has not demonstrated that a baccalaureate degree in a specific specialty is required for employment in the offered position.

Counsel argues that the Service is being too reliant upon the Handbook in determining the degree requirement for employment in the proffered position and cites the holding reached in Matter of X, 3 Immigr. Rptr., B2-9 (Nov 1985), in support of this argument. However, the precedential value of this decision is limited in that this decision involved an immigrant petition to accord the beneficiary sixth preference classification, rather than a nonimmigrant visa petition as in the current proceedings. Additionally, the holding in Matter of X addressed only the Service's over-reliance upon the Handbook in imposing a specific degree requirement upon a particular position and did not address the issue of whether the proffered position is a specialty occupation. The present case can be further distinguished from the circumstances presented in Matter of X, in that the petitioner in this case is a for profit art gallery, while the petitioner in Matter of X was a non-profit art gallery. Furthermore, it must be noted that as in the current proceedings, the court specifically found that the proffered position in Matter of X was not that of a museum curator.

The record contains two letters signed by R. Seth Bright, vice president of Antiquities and Islamic Art at Sotheby's auction house in New York and G. Max Bernheimer, vice president for Antiquities at Christie's auction house in New York, respectively. Both Mr. Bright and Mr. Bernheimer indicate that they have reviewed the duties of the offered job and conclude that employment in the position of curator and manager for the petitioner requires a baccalaureate degree in art history or a related discipline. While the opinions expressed by Mr. Bright and Mr. Bernheimer are noted, their conclusions appear to be solely based on the title of the position, rather than an examination of the business activities engaged in by the petitioner as a for profit private art gallery.

In addition, counsel submits several pages of job advertisements for several curator positions recently being offered by museums or like institutions on various Internet web-sites. However, as discussed above, the proffered position cannot be considered as that of a curator because the petitioner is not a museum or similar

institution and the duties of the position are focused on the commercial transaction of works of art between private individuals and organizations. Furthermore, the job advertisements reflect that these positions require at least a baccalaureate degree in a wide range of academic backgrounds, rather than a bachelor's degree in a specialized and related area. Therefore, it cannot be concluded that the evidence demonstrates that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions.

The petitioner has not submitted any evidence to show that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position.

As noted above, an analysis of the specific duties of the offered position in conjunction with the petitioner's business operations demonstrates that the proffered position combines the duties of a general manager or executive with those of a marketing manager. The Handbook does not provide any indication that a baccalaureate degree in a specialized area is required for employment as either a general manager or marketing manager. Consequently, the petitioner has failed to establish that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act. 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The previous decision dated April 4, 2001, by the Associate Commissioner dismissing the appeal is affirmed.