

**PUBLIC COPY**

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

U.S. Department of Homeland Security  
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
CIS, 10, 2<sup>nd</sup> Mass, 3/F  
425 I Street, N.W.  
Washington, D.C. 20536

FEB 26 2004

FILE: WAC-02-081-51127 OFFICE: CALIFORNIA SERVICE CENTER

DATE:

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:

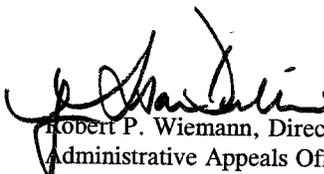
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is an importer/exporter and retailer of Chinese ware and giftware that employs 78 persons and has a gross annual income of \$3,494,345. It seeks to employ the beneficiary as a commercial designer. The director denied the petition because the petitioner failed to establish that (1) the proffered position qualified as a specialty occupation; (2) the beneficiary is qualified to work in the proffered position; and (3) it had obtained a properly endorsed Labor Condition Application (LCA).

On appeal, the petitioner submits a brief and previously submitted evidence. The petitioner states, in part, that the district director's decision is contrary to the evidence and is inconsistent with regulations and authorities.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in 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.

The term "specialty occupation" is further 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.

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 letter accompanying the I-129 petition stated that the beneficiary will: create graphic designs for ornamentation, illustration, advertising, and placement on ceramics and packaging; apply knowledge about ceramic materials and traditional, period, and contemporary Oriental design styles and motifs; review market trends and customer preferences; and evaluate design ideas based on appearance, materials, market behavior, and client specifications. The letter claimed that the position requires a bachelor of fine arts in ceramics.

On March 6, 2002, the director requested a detailed description of the proffered position and an explanation of why a candidate must possess a bachelor's degree or its equivalent in the occupational field.

In response, the petitioner submitted a letter, dated March 26, 2002, stating that it sought to expand by employing the beneficiary to design store displays, banners, posters, and other promotional material. The letter claimed that the petitioner's policy is for a candidate to possess a college degree, particularly in fine arts; the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), finds that a bachelor of arts or a bachelor of applied arts degree is the minimum requirement for entry into the position; the petitioner intends to design an original line of products; and the duties involving porcelain ware require a candidate to possess a bachelor's of arts or an equivalent degree.

On May 8, 2002, the director denied the petition, finding that the position did not qualify as a specialty occupation. Citing the 2000-2001 edition of the *Handbook*, the director stated that the proffered position is similar to a visual artist, and that candidates in graphic arts gain employment or freelance work through their portfolio. The director stated that, in theory, a

candidate with a good portfolio, and no training or experience, could succeed in graphic arts; however, in reality, assembling a portfolio requires skills developed in a post secondary art program, such as a bachelor's degree in graphic arts or applied art. The *Handbook* states that many types and levels of training and education are available in this occupation; nevertheless, the director stated that the proffered position is not of a complexity and scope requiring professional skills. Next, the director addressed the beneficiary's qualifications. Noting that her degree is in Chinese literature, the director questioned the degree's relationship to the proffered position. The director, therefore, found that the beneficiary was not qualified for the proffered position. Finally, the director stated that the record did not contain an approved labor condition application.

On appeal, the petitioner alleges that the director's decision is contrary to the evidence and inconsistent with regulations and authorities. The petitioner claims that the evidence in the record proves that a college degree, particularly in the fine arts, is the prerequisite for entry into the position; and that the record also contains the beneficiary's bachelor's of fine arts degree in ceramics, and the labor condition application.

The petitioner claims that it satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the submitted evidence demonstrates that a college degree in the fine arts is the prerequisite for entry into the position. The petitioner maintains that this design position is of a complexity and scope demanding expertise and training that cannot be gained through ordinary on-the-job training. According to the petitioner, creativity is pivotal to design occupations and the position requires a strong sense of color, an eye for detail, a sense of balance and proportion, sensitivity to beauty, and knowledge about ceramic materials, ornamentation, design styles and motifs, and market conditions. This knowledge, the petitioner states, is acquired through a college education and that, although it is possible that a good portfolio may be the deciding factor in obtaining employment, the *Handbook* indicates formal preparation in design is important.

In determining whether a position is a specialty occupation, Citizenship and Immigration Services (CIS) looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation. The *Handbook* is routinely consulted in determining whether a baccalaureate degree or higher is the minimum for entry into the position. Here, the *Handbook* reveals that the major duties of the proffered position are performed by designers. With respect to training, qualifications, and

advancement, the *Handbook* states that a bachelor's degree is required for most entry-level design positions, except for floral design and visual merchandising.

Thus, according to the *Handbook*, the proffered position would require the Bachelor of Fine Arts degree for entry into the occupation.

With respect to the beneficiary's qualifications, the director had stated that the submitted documents fail to establish that the beneficiary is qualified to perform the duties of the proffered position because the beneficiary possesses a degree in Chinese literature, a degree unrelated to the proffered position. The director's statement is erroneous because the record contains the beneficiary's Bachelor of Fine Arts degree in ceramics, issued in May 2001, by Maine College of Art, Portland, Maine, along with transcripts.

The director erred when he stated that the record does not contain an approved labor condition application. Along with the I-129 petition, the petitioner had submitted a certified labor condition application (ETA Case Number T-01323-01145) for a commercial designer, with the certification date of November 19, 2001.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.