

identifying info deleted to
prevent unauthorized
invasion of personal privacy

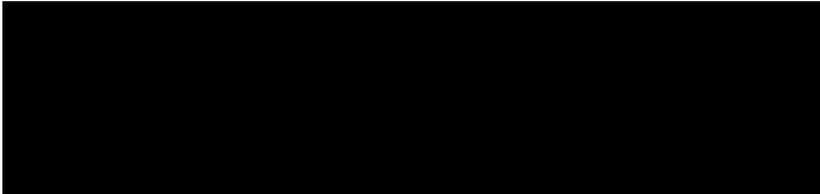
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

DA
APR 05 2005

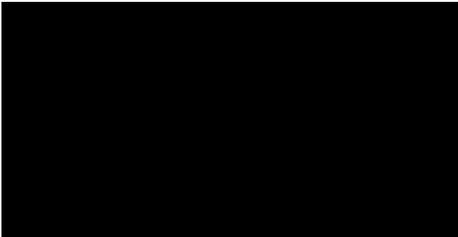


FILE: WAC 03 215 53362 Office: CALIFORNIA SERVICE CENTER Date:

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 be denied.

The petitioner is a manufacturer and retailer of frames and art that seeks to employ the beneficiary as a commercial fine artist. The petitioner, therefore, endeavors to classify the beneficiary 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a commercial fine artist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail painting a variety of original subject matters, such as landscapes, portraits, still-life, and abstracts using watercolors, oils, acrylics, tempera, and other paint medium; conceive and develop ideas for painting based on assignment, personality interests, and knowledge of painting methods and techniques; applying color medium to canvas and other surfaces using brushes, pallet knives, and various other artist tools and equipment; integrating and developing visual elements to produce desired effects; and coat finished painting with varnish or other preservatives. The petitioner stated a bachelor's degree in fine arts is required for this position.

The director determined that the proffered position was not a specialty occupation. The director found that the duties of the proffered position are performed by an artist, and that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) explains that a baccalaureate level of training is not the normal, industry-wide minimum requirement for entry into the occupation. The director noted the submitted information does not indicate that the petitioner normally requires applicants for the position to possess baccalaureate or higher-level degrees in the field. Finally, the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field. The director determined the evidence of record is not persuasive to show that the job offered could not be performed by an experienced individual whose educational training falls short of a baccalaureate degree.

On appeal, the petitioner believes its previous counsel "failed our Company miserably in the initial petition and the responses to [CIS's] request for evidence by not submitting competent objective evidence from established industry experts that the offered position of commercial fine artist is one that requires, at a minimum, a baccalaureate degree or higher in fine art." According to the petitioner, due to the wide variety of styles and mediums required for the offered position, a fine art bachelor's degree is its minimum requirement for this position. The petitioner contends that a self-taught or associate degreed artist simply does not have the training, techniques or discipline to be able to create the large variety of high quality fine art that its customers demand in a timely and cost effective manner. The petitioner submits on appeal several letters from various "experts" that the petitioner asserts are familiar with the level of education needed for a person to fill a commercial fine artist position.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement 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. Factors often considered by CIS when determining these criteria 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 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining whether a position qualifies as a specialty occupation, 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 as required by the Act.

In the denial, the director stated that the duties of the proffered position reflect the duties of an artist as listed in the *Handbook*. A thorough review of the *Handbook* discloses that the duties of the proffered position are performed by artists. Artists create art to communicate ideas thoughts or feelings. They use a variety of methods – painting, sculpting, or illustration – and an assortment of materials, including oils, watercolors, acrylics, pastels, pencils, pen and ink, plaster, clay, and computers. Fine artists, including painters, sculptors and illustrators create original artwork, using a variety of media and techniques.

The *Handbook* describes the training and other qualifications required for an artist, in part, as follows:

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 degree programs leading to the Bachelor of Fine Arts (BFA) and Master in Fine Arts (MFA) degrees. Coursework usually includes core subjects, such as English, social science, and natural science, in addition to art history and studio art.

Independent schools of art and design also offer postsecondary studio training in fine arts leading to an Associate in Art (AA) or Bachelor of Fine Arts (BFA) degree. Typically, these programs focus more intensively on studio work than the academic programs in a university setting. Formal educational programs in art also provide training in computer techniques. Computers are used widely in visual arts, and knowledge and training in them are critical for many jobs in these fields.

The petitioner fails to establish the first criterion because the *Handbook* states training requirements for artists vary by specialty and formal training is not strictly necessary for fine artists, although the *Handbook* indicates it is very difficult to become skilled enough to make a living without some training. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations – the petitioner submitted several letters from various “experts” in the field. The petitioner submitted letters from a gallery owner, a design company owner, a corporate interior designer for a hotel and resort chain, a publisher of decorative fine arts prints, and the acting Chair of Art from a university. All of the authors indicate that they have reviewed the position description and the beneficiary’s work products and they state that they believe that a baccalaureate degree in art is normally the minimum requirement for a person to be considered for this type of full-time commercial fine artist position. However, these letters do not attest that such firms “routinely employ and recruit only degreed individuals” See *Shanti*. 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. 1988).

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the proffered position is performed by an artist, a position which does require a bachelor's degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner stated that this is a newly created position and that it normally buys art from various sources.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. The petitioner states:

[d]ue to a wide variety of styles and mediums required for the offered commercial fine artist position, a fine arts degree is a minimum requirement of our Company for this position. A self-taught or associate degreed artist simply does not have the training, technique or discipline to be able to create the large variety of high quality fine art that our customers demand in a timely and cost effective manner.

The petitioner's description does not establish that the nature of the duties is so specialized and complex or that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not provided sufficient evidence to establish that a self-taught artist or an artist with an associate degree would not have the ability to perform the described duties. Once again, the *Handbook* reveals that the proffered position is performed by an artist, an occupation not requiring a bachelor's degree in a specific specialty.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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 appeal is dismissed. The petition is denied.