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U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 014 53780 Office: TEXAS SERVICE CENTER Date: JUN 7 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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.

Marie Johnson

For 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 supermarket that seeks to employ the beneficiary as an 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 previously submitted evidence.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 an artist. Evidence of the beneficiary's duties includes: the Form I-129; the [redacted] accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties such as painting a variety of subjects - landscapes, portraits, and abstracts - using watercolors, oils, acrylics, tempera, or other paint medium in accordance with customer specifications; applying color medium to canvas or other surfaces using brushes, pallet knives, and various other tools and equipment; and integrating and developing visual elements such as line, space, mass, color, and perspective to produce desired effects. The petitioner stated that a candidate must possess a bachelor's degree in the arts or a closely related field.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). [redacted] he director stated that the training of an artist varies by specialty. After considering the evidence, the director was not persuaded that the beneficiary would perform duties requiring a bachelor's degree in a precise and specific course of study that related directly and closely to the proffered position.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. According to counsel, the submitted expert opinion of [redacted] in part, that the theoretical and practical application of an advanced and highly specialized body of knowledge in the field or art or a related field is required to perform the duties of an artist. Counsel avers that the DOL reports that a fine arts teacher requires a bachelor's degree and that the proffered position is similar to this 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.

First, the AAO 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 in a specific specialty 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 in a specific specialty. 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 [redacted]

Counsel relies upon the opinion letter fro[redacted] nformation in the *Handbook* to claim that the petitioner establishes that the proffered position is a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO finds that counsel's reliance on this evidence is misplaced. 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. The AAO routinely consults the *Handbook* as a resource to describe the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation.

The AAO finds that the director correctly determined that the *Handbook* reports that the duties of proffered position are performed by an artist, and that the position as described by the petitioner would not require a bachelor's degree in a specific specialty. The *Handbook* states that fine artists, including painters, sculptors, and illustrators create original artwork, using a variety of media and techniques. The *Handbook*, furthermore, mentions that fine artists typically display their work in museums, commercial art galleries, corporate collections, and private homes. Some of their artwork may be commissioned (done on request from clients), but most is sold by the artist or through private art galleries or dealers.

According to the *Handbook*, artists held about 149,000 jobs in 2002; more than half were self-employed and of the artists who were not self-employed, many worked in advertising and related services; newspaper, periodical, book, and software publishers; motion picture and video industries; specialized design services; and computer systems design and related services. Some self-employed artists offered their services to advertising agencies, design firms, publishing houses, and other businesses on a contract or freelance basis.

The *Handbook* reports that training requirements for artists vary by specialty. Although formal training is not strictly necessary for fine artists, it is 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.

The AAO finds that the proffered position would not require a bachelor's degree in light of the petitioner's job description and the *Handbook's* statement that training requirements for artists vary by specialty and that a bachelor's degree is not strictly necessary for a position as a fine artist. [redacted], the petitioner describes itself as a supermarket with four employees and a newly opened art shop. The AAO finds that, given that the petitioner's industry, the duties of the proffered position do not rise to the level of a fine artist whose work is typically displayed in [redacted] and private home. Nor would most of the beneficiary's work be sold through a private art gallery or dealer nor would it be commissioned on request from a client. Consequently, the AAO finds that a baccalaureate or higher degree or its equivalent in a specific specialty would not be the normal minimum requirement for entry into the proffered position.

Counsel contends that the alleged expert opinion from [redacted] that the proffered position is a specialty occupation. The AAO finds that the opinion letter is relevant, particularly because

[redacted]he duties of the proffered position and why she opines they might relate to certain coursework. Nonetheless, the letter's value is diminished becau[redacted] independent corroborating evidence to substantiate her opinions. [redacted] For example, [redacted]

> the position of [a]rtist requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of [a]rt, or a related field, which requires the attainment of a[t] least a [b]achelor's degree or its equivalent as the minimum requirement for entry into the occupation.

Yet, no referenced resource is mentioned by [redacted] support this assertion.

The submitted evidence is insufficient to establish the second criterion - that a bachelor's degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. The AAO has already considered the *Handbook's* information as it pertains to the immediate petition, and has discussed the deficiency in [redacted] opinion letter.

There is no evidence in the record to demonstrate that the petitioner normally requires a degree or its equivalent in a specific specialty for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

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 in a specific specialty. No evidence establishes this criterion. Once again, the AAO has discussed the deficiency [redacted] opinion letter and has explained that the *Handbook* reveals that a bachelor's degree is not required for a position as a fine artist.

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.