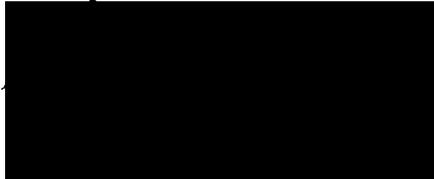




U.S. Citizenship
and Immigration
Services

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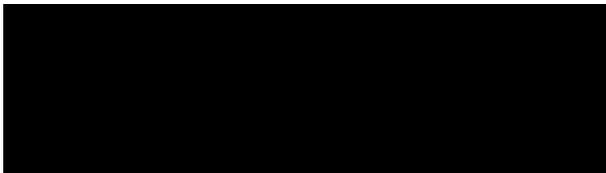
D2

FILE: SRC 03 066 53245 Office: TEXAS SERVICE CENTER Date: NOV 09 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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 decorative arts company. In order to employ the petitioner as a painter, the petitioner 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 on the basis that the petitioner had failed to establish that the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the evidence of record establishes that the proffered position meets at least three of the specialty-occupation qualifying criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel's brief separately argues that the petitioner has satisfied the following sections of 8 C.F.R. § 214.2(h)(4)(iii)(A): section 1, by establishing that the position normally requires a baccalaureate degree; the first alternative criterion of section 2, by establishing that a baccalaureate degree is a common requirement for companies employing artists; and section 4, by establishing that 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.

To support her arguments on appeal, counsel submits 24 exhibits (lettered A through X), including copies of: (1) a printout of the section on Artists and Related Workers from the Internet version of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*; (2) the Details Report for Painters and Illustrators at the DOL's *Occupational Information Network (O*NET)*; (3) the *O*NET OnLine Help* discussion of the Job Zones code that comprises part of its Detail Reports on occupations; (4) the material at the petitioner's Internet site; (5) Internet biographic information on 15 artists, submitted as evidence of these artists' educational credentials; (6) two Internet job vacancy announcements, and (7) Internet information about art-related studies at four universities.

As will be discussed below, the AAO finds that the director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B, and counsel's submissions on appeal, namely: her June 23, 2004 cover letter and her brief in the form of a June 23, 2004 letter of response to the director's decision, including exhibits counsel tabbed A through X.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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." (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The Form I-129 (Petition for Nonimmigrant Worker) describes the proposed duties as "painter/artist," and neither counsel nor the petitioner disclose the specific duties that the work would entail.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, and, accordingly, considered the evidence of record in the light of the relevant part of the 2004-2005 edition of the *Handbook*, which is the section "Artists and related Workers," at pages 239-242. According to the *Handbook's* discussion of artists, a bachelor's degree, or its equivalent, in a specific specialty is not a normal requirement for entry into the artist occupation. One of the "Significant Points" at the opening of this section is: "Artists usually develop their skills through a bachelor's degree program or other postsecondary training in art or design." The *Handbook's* subsection on "Training, Other Qualifications, and Advancement" include these statements indicating that a bachelor's degree level of specialized education is not normally a minimum requirement for entry into the artist occupation:

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. Course work 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 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. The National Association of Schools of Art and Design accredits more than 200 postsecondary institutions with programs in art and design; most award a degree in art.

Contrary to counsel's view, the *O*NET* section on painters and illustrators is not evidence that such positions normally require a bachelor's degree level of education in a specific specialty. The *O*NET* is not designed to assess the specialty occupation status of either occupations or particular positions within them. Rather, the *O*NET* and its Job Zone and Specific Vocational Preparation (SVP) ratings are meant to indicate only the total number of years of vocational preparation required for a particular position. They do not describe how those years are to be divided among training, formal education, and experience, and they do not specify the particular type of degree, if any, that a position would require. These facts are evident in the *O*NET OnLine Help* discussion of Job Zone 4, which, counsel notes, has been assigned to painters and illustrators:

Job Zone Four: Considerable Preparation Needed

Overall Experience	A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.
Job Training	Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.
Job Zone Examples	Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, human resource managers, computer programmers, teachers, chemists, and police detectives.
SVP Range	(7.0 to < 8.0)
Education	Most of these occupations require a four - year bachelor's degree, but some do not.

The *O*NET OnLine Help* discussion of SVP codes includes these statements:

Specific Vocational Preparation is a component of Worker Characteristics information found in the *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991).

Specific Vocational Preparation, as defined in Appendix C of the *Dictionary of Occupational Titles*, is the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

According to the *Handbook* (employment subsection, page 240), “[a]rtists held about 149,000 jobs in 2002.” Counsel provides Internet information on the academic background of less than twenty artists. The record does not include any authoritative endorsement of the petitioner’s information on this small group as representative of the normal academic background of artists in general, or of artists hired as painters for decorative arts firms like the petitioner.

Counsel presents two Internet job vacancy advertisements from other employers as evidence that “[b]ecause of the intense competition in the field and technical knowledge necessary for the positions, employers require bachelor’s degrees from their employees to ensure a complete background of training and understanding of the necessary skills.” The two advertisements are too few to support counsel’s proposition. Also, the record does not establish the relevance of those positions (a Fisher-Price product-design staff artist and a graphics-production artist in the imprintable sportswear industry) and the proffered position, a painter for a

decorative arts firm. Accordingly, the advertisements do not support the proposition for which they were presented. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The fact that universities provide art and art-related baccalaureate and master's degrees is not evidence that such degrees are required for positions such as the one proffered here.

As the evidence of record does not establish that the proffered position is one that normally requires at least a bachelor's degree, or its equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied the first of the two alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative criterion assigns specialty occupation status to a proffered position that requires at least a bachelor's degree in a specific specialty that is commonly required by employers in the petitioner's industry that are similar to the petitioner when they hire for positions which are parallel to one proffered by the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that its proffered position is any type for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, the record before the director did not include any submissions from a professional association or from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty. For reasons already discussed, the evidentiary weight of the Internet information on some artists' educational credentials is negligible. The number of artists on which information is provided is too small to establish an industry-wide recruiting and hiring standard. Further, the information is not endorsed by any authority on the petitioner's industry as representative of educational requirements for the type of position proffered here. The petitioner has not demonstrated that the artists addressed in the Internet information are engaged in positions that are substantially similar, or parallel, to the one proffered here. The two job vacancy advertisements are also too few to establish an industry-wide standard. Further, the petitioner has not established that the jobs advertised are parallel to the one proffered here.

The record does not include specific details about the job functions upon which the petitioner relies for specialty occupation status. The job and duty descriptions in the record convey no meaningful information about the specific work that would engage the beneficiary, or the knowledge, skills, and competencies that the

beneficiary would apply. Rather, the proffered position is presented at a generalized level, that is, as a painter who would perform "painter/artist" duties for a decorative arts firm. This is insufficient evidence to establish the position or its duties as especially complex, specialized, or unique. Accordingly, the director was correct in finding that the petitioner had not satisfied either the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (which provides that "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") or the provision at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) (for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty).

Finally, as the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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.