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FILE: LIN 04 800 53978 Office: NEBRASKA SERVICE CENTER Date: NOV 28 2006

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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 an import/export business. It seeks to employ the beneficiary as a buyer and producer of fine art. Accordingly, 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).

On August 23, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. On appeal, counsel for the petitioner asserts that the position requires detailed knowledge of fine arts, which can only be obtained through bachelor-degree level education, or its equivalent and thus, qualifies as a professional position.

The record contains: (1) the Form I-129 filed September 26, 2004 with supporting documentation; (2) the director's February 10, 2005 request for evidence (RFE); (3) counsel's May 5, 2005 response to the director's RFE with documentation; (4) the director's August 23, 2005 denial decision; and, (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

In a statement appended to the Form I-129, the petitioner states that the position entails identifying and negotiating the purchase of fine art from U.S. sources for resale in the Asian market and producing photographic fine art for sale in the Asian market.

In a May 5, 2005 response to the director's RFE, counsel for the petitioner provided the duties for the position of fine arts procurement/developmental director as:

Coordinates activities involved with identifying, acquiring, developing, and producing Fine Art products for Asian market. Confers with artists and vendors to obtain products. Coordinates price, availability, and delivery schedule. Selects products for purchase by testing, observing, or examining items. Estimates values according to knowledge of market price. Determines method of procurement, such as direct purchase or bid. Broad knowledge of Fine Arts and Asian Fine Arts Market required. Ability to discover, identify, and produce fine art product based upon knowledge of Asian Fine Arts market.

Counsel asserted that the duties of the position are specialized and complex and that "the position requires a thorough and subtle knowledge of Fine Art, as well as a comprehensive knowledge of the market for North American Fine Art, in Korea and other parts of Asia."

Counsel noted that the beneficiary would spend his time on various duties of the position as follows:

- Researching and monitoring trends in Asian Fine Art market (5% of time)
- Procuring Asian clients and negotiating sales (35% of time)
- Procuring Fine Art from North American sources (including negotiating purchases) (45% of time)
- Monitoring availability of North American Fine Art objects (5% of time)
- Business travel (4% of time)
- Coordinating International Sales and shipments (6% of time)

Counsel also submitted two job announcements to support the contention that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for the position and that a degree requirement is common in parallel positions. One job announcement from a recruiting organization listed a position in corporate fine arts sales and noted the educational requirement as a bachelor's degree, while the second job announcement advertised a cook's tools buyer position with Williams-Sonoma, Inc. requiring a bachelor of arts or a bachelor of science degree. Counsel also provided an excerpt from the Department of Labor's *Occupational Outlook Handbook (Handbook)* on advertising, marketing, promotion, public relations, and sales managers and an excerpt from the *Dictionary of Occupational Titles (DOT)* on the occupation of "buyer."

On August 23, 2005, the director denied the petition determining that the *Handbook* did not report that a bachelor's degree is required for the position of "sales manager" and that the job advertisements submitted did not establish that a degree or its equivalent is normally the minimum requirement for entry into the proffered position. The director determined that one of the job announcements advertised a position that was not comparable to the proffered position and that the second job announcement failed to establish that the organization advertising is similar to the petitioning company. The director noted that the petitioner had not submitted evidence to establish its normal hiring practices for the proffered position and that the petitioner had not established that the position meets any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director concluded that the petitioner had failed to establish that the position is a specialty occupation.

On appeal, counsel for the petitioner asserts that the proffered position is unique and requires specialized knowledge in several disciplines, including knowledge of fine arts and marketing art products in Asia. Counsel contends that the job is essentially a market analyst for art products that would sell well in Japan and Korea. Counsel disagrees with the director's analysis of the job announcements submitted and claims that buying specialized goods, such as fine art or cook's tools, requires specialized knowledge of the resale market for those goods. Counsel also cites *Young China Daily v Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) for the proposition that the size of an employer bears no rational relationship to its need for a professional. Counsel avers that the director misinterprets the *Handbook's* educational requirements for positions similar to the proffered position and that the director's rigid adherence to the *Handbook* does not take into account the changing nature of the field in question. Counsel also references *Unico American Corp. v. Watson*, CV No. 896958 (C.D. Cal. Mar. 19, 1991) to question the director's second-guessing of the petitioner's needs in regard to the proffered position. Counsel concludes by referencing a number of unpublished decisions.

The AAO does not find counsel's assertions persuasive. The AAO does not agree with the director or counsel's analysis of the proffered position. To determine whether a particular job qualifies as a specialty occupation, CIS does not 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 routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The AAO finds that the duties of the proffered position relate most closely to that of a buyer and a retail salesperson. The *Handbook* reports: "Wholesale and retail buyers purchase goods for resale," and "[b]uyers purchases largely determine which products their establishment will sell. Therefore, it is essential that they have the ability to predict what will appeal to consumers." Counsel's description, including "confer[ring] with artists and vendors to obtain products," "[s]elect[ing] products for purchase," "[e]stimat[ing] values according to knowledge of market price," "[d]etermin[ing] method of procurement," and "identifying, acquiring, developing, and producing Fine Art products for Asian market" are all examples of the duties of a buyer. The *Handbook* reports that sales personnel "assist customers in finding what they are looking for and try to interest them in buying the merchandise," and that "[f]or some sales jobs, particularly those involving expensive and complex items, retail salespersons need special knowledge or skills." Counsel's description of the proffered position including the beneficiary's 35 percent of time spent "Procuring Asian clients and negotiating sales" are examples of duties relating to the sale of fine art.

Regarding the educational requirements for the occupation of a buyer, the *Handbook* reports:

Qualified persons may begin as trainees, purchasing clerks, expeditors, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesaling and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.

Educational requirements tend to vary with the size of the organization. Large stores and distributors prefer applicants who have completed a bachelor's degree program with a business emphasis.

The *Handbook* reports that there are no formal education requirements for individuals working as sales representatives, although depending on the type of product sold, employees may be given additional specialized training. The petitioner's general description of the proffered position and the nature of the petitioner's business do not demonstrate that the proffered position itself requires the services of an individual who has a baccalaureate or higher degree or its equivalent in a specific discipline. Counsel's contention on appeal that: "the job is essentially a market analyst for art products that would sell well in Japan and Korea," is not substantiated in the record. 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 Obaigbena*, 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 AAO acknowledges counsel's assertion that the director misinterpreted the *Handbook's* educational requirements for the position of sales manager and that the director failed to consider the changing nature of the field. However, the AAO routinely uses the *Handbook's* generalized descriptions that define a range of duties performed within specific occupations to aid in understanding the nature of each position. In this matter, the petitioner has provided a general description of the duties of a buyer and sales representative of high-end art. There is nothing in the description that elevates the position to one that would require a

minimum of a bachelor's degree or its equivalent. Regarding the *Handbook's* discussion of employer's preference, counsel should note that employer preference is not synonymous with the "normally required" language of the criterion. Moreover, although the *Handbook* indicates that large stores and distributors prefer applicants who have completed a bachelor's degree program with a business emphasis, the *Handbook* recognizes that most employers use a combination of methods to employ buyers, including in-house training and promotion. Regarding sales representatives, the *Handbook* recognizes that some retail salespersons need special knowledge or skills but does not report that a bachelor's degree or its equivalent is the normal minimum requirement for such a position. The petitioner has not given sufficient details about the complexity of the duties of the proffered position to allow the conclusion that the successful applicant must have a minimum of a bachelor's degree or its equivalent. The AAO recognizes that the petitioner may rely on this particular beneficiary's experience in the art field, however the beneficiary's qualifications as an artist do not render the proffered position one that requires a minimum of a bachelor's degree. The petitioner has not demonstrated that a baccalaureate in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the proffered position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. The AAO has considered the two job announcements submitted and determines that the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. Going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)). The petitioner has not provided evidence that its business is similar to Williams and Sonoma, Inc. or to the second unidentified business. In addition, the job description for the corporate fine art sales person provides a very brief, generic job description and the Williams and Sonoma advertisement provides a lengthy detailed description of the job duties. Neither of these two descriptions corresponds to the job description of the proffered position. Thus, the record does not demonstrate that the proffered position is a parallel position. The record is insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. The AAO is not persuaded that the nature of the general duties outlined for the proposed position is more specialized and complex than that of a typical buyer and seller of high-end art or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. In this matter, the petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO normally reviews the petitioner's past employment practices, as

well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The record does not contain evidence that the petitioner has employed anyone in the proffered position prior to offering the position to the beneficiary. In this matter, the petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel asserts that the proffered position is unique and requires specialized knowledge in several disciplines, including knowledge of fine arts and marketing art products in Asia. However, a vague reference to the responsibilities of a buyer and a seller with the assertion that the products bought and sold are "unique" do not establish that the position is also unique. The petitioner must establish how the beneficiary will perform specialized and complex tasks in relation to the petitioner's specific business. Further, the petitioner must establish that the degree of the successful applicant is in one or more specific recognized disciplines. The petitioner has not provided evidence that the tasks associated with the proffered position require the application of specialized or complex knowledge associated with the attainment of a bachelor's or higher degree in a specific discipline. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that counsel on appeal references several unpublished matters to support his assertion that the proffered position is a specialty occupation. However, counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. In addition, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO also notes counsel's citation to *Young China Daily v Chappell*. The AAO agrees that the size of the petitioner's operation and the type of the petitioner's industry do not affect the need or lack of a need for a professional. Rather, the actual duties the incumbent of the proffered position will perform for the petitioner are the determining factors. Here, the petitioner has not sufficiently described the daily tasks of the position; has not provided detail regarding the utilization of the beneficiary's services in relation to the petitioner's business; and has not explained how only a degreed individual in a specific discipline can perform the tasks of the position. The AAO also acknowledges counsel's reference to *Unico American Corp. v. Watson*, and suggestion that the director is second-guessing the petitioner's requirements. The AAO finds that in this matter, the record does not contain sufficient detail regarding the petitioner's business or the daily tasks of the proffered position to second-guess the petitioner's requirements in this matter.

Beyond the decision of the director, although the petitioner has not established that the proffered position is a specialty occupation, the petitioner has also failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner has provided an educational evaluation report showing that the beneficiary's education in the Republic of Korea is equivalent to the completion of two years of undergraduate study in photography at an accredited community college or university in the United States. The petitioner has also provided a professional work experience evaluation report for immigration purposes from a credentials evaluation company. The author of the work experience evaluation report claims that Florida Metropolitan University is an accredited university that grants credit based on an individual's education, training and/or work

experience and that the author has the authority to grant college-level credit. However, the record does not contain independent evidence of the evaluator's authority to grant college-level credit. The petitioner must provide independent evidence, in the form of a letter from a dean or provost that verifies the evaluator's authority to grant college-level credit in a specialty. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). A credentials evaluation service may evaluate educational credentials only. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

The AAO finds that the petitioner has not provided evidence that the beneficiary's work experience coupled with his education is sufficient to establish that he is qualified to perform the duties of the specialty occupation. The record in this matter does not contain evidence of the beneficiary's work experience for evaluation. The AAO notes that the evaluator of the beneficiary's professional work experience states that he has reviewed the beneficiary's work experience letters and a detailed curriculum vitae, but the record of proceeding does not include these documents. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner has not provided documentary evidence establishing that the beneficiary is eligible to perform the duties of a specialty occupation. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.