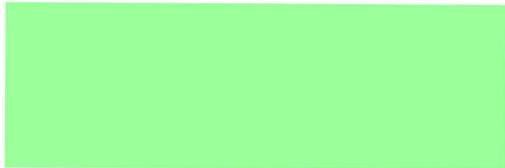
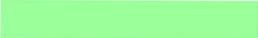


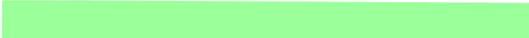
(b)(6)



U.S. Citizenship  
and Immigration  
Services

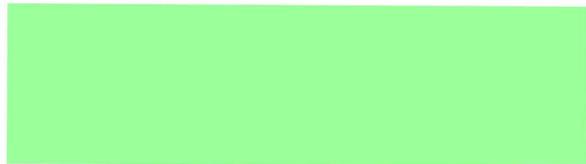


DATE: **JUL 16 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,



Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the instant 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.

On the Form I-129 visa petition, the petitioner describes itself as an "Interior and Exterior Murals/Graphic Design" firm. In order to employ the beneficiary in what it designates as a Principal Muralist position, the petitioner seeks to classify him 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The issue before the AAO is whether the petitioner has demonstrated that the proffered position qualifies as 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS 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 occupations. These professions, for which petitioners have regularly been

able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a Principal Muralist position, and that it corresponds to Standard Occupational Classification (SOC) code and title 27-1013, Fine Artists, Including Painters, Sculptors, and Illustrators from the Occupational Information Network (O\*NET). The LCA further states that the proffered position is a Level II position.

Although the petitioner's president and a credentials evaluator have asserted that the beneficiary received a bachelor of fine arts in graphic design at [REDACTED] in 1977, no diploma or transcripts are in the record to corroborate that assertion. The evaluator stated, however, that the beneficiary's foreign degree is equivalent to a U.S. bachelor's degree in graphic design.

The visa petition states that the duties of the proffered position are to "Design and paint interior and exterior mural walls." Counsel also submitted a letter, dated March 18, 2012, from the petitioner's president. That letter contains no further description of the duties of the proffered position and did not indicate whether or not the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

On June 22, 2012, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The director outlined the specific evidence to be submitted.

In response, counsel provided, *inter alia*, (1) four vacancy announcements, (2) four letters from people attesting that the beneficiary had painted murals for them, (3) pictures of some of the beneficiary's work, and (4) a letter, dated August 5, 2012, from the petitioner's president. In his letter, the petitioner's president provided the following description of the duties of the proffered position:

The *Principal Muralist* will work closely with the customer and see the project through from the design phase to complete implementation. The muralist will be responsible for gathering the project requirements and preparing design proposals for the customer.

When the proposal has been accepted, the muralist will coordinate the project implementation requirements with the customer, and determine the need for specific equipment and materials at the site.

The muralist will then manage all aspects of the project and see it through to completion, which can take weeks, and in some cases months.

The end result will be a creative and highly regarded work of art, demonstrating the artist's exceptional attention to detail, considerable skill and artistic flair.

The petitioner's president also stated that the proffered position requires a bachelor's degree in fine arts.

The director denied the petition on November 24, 2012, finding, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserted that the evidence submitted demonstrates that the proffered position qualifies as a specialty occupation position. Counsel also observed that visa petitions the petitioner previously filed for the beneficiary were approved.

The AAO notes, preliminarily, that in his March 18, 2012 letter, the petitioner's president did not indicate that the proffered position has any educational requirement. Subsequently, in his August 5, 2012 letter, he stated that the position requires a bachelor's degree in fine arts.

"Fine Arts" include painting, sculpture, architecture, music and poetry. Pursuant to some definitions, drama, dance, and photography are also included within the term "Fine Arts." However broadly or narrowly defined, the term "Fine Arts" includes a wide array of subjects and does not, per se, constitute a specific specialty. Therefore, an educational requirement that may be satisfied by a degree in any of the fine arts would not typically be considered a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent, and a position with so general an educational requirement would not typically be considered a specialty occupation position.

In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty" requirement of section 214(i)(1)(B) of the Act. In such a case, the required

"body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as philosophy and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," the AAO does not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). As just stated, this also includes even seemingly disparate specialties provided the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Absent evidence to the contrary, all of the fields of fine arts are not considered closely related specialties, and the petitioner fails to establish how these fields are directly related to the duties and responsibilities of the proffered position. Accordingly, as such evidence fails to establish, and the petitioner has not even alleged, that a minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent exists for entry into the occupation, the record does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion. This is sufficient reason, in itself, to find that the proffered position does not qualify as a specialty occupation, to dismiss the instant appeal, and to deny the visa petition. The director's decision must therefore be affirmed and the petition denied on this basis alone.

Nevertheless, for the purpose of performing a comprehensive analysis of whether the proffered position qualifies as a specialty occupation, the AAO turns next to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

The AAO will first address the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular

position. The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.

The petitioner claims in the LCA that the proffered position SOC code and title 27-1013. Fine Artists, Including Painters, Sculptors, and Illustrators from O\*NET. The AAO reviewed the chapter of the *Handbook* (2012-2013 edition) entitled "Craft and Fine Artists," including the sections regarding the typical duties and requirements for this occupational category. The *Handbook* states the following with regard to the duties of craft and fine artists, which classification includes fine artists, including painters, sculptors, and illustrators:

### **What Craft and Fine Artists Do**

Craft and fine artists use a variety of materials and techniques to create art for sale and exhibition. Craft artists create handmade objects, such as pottery, glassware, textiles or other objects that are designed to be functional. Fine artists, including painters, sculptors, and illustrators, create original works of art for their aesthetic value, rather than a functional one.

### **Duties**

Craft and fine artists typically do the following:

- Use techniques such as knitting, weaving, glass blowing, painting, drawing, or sculpting
- Develop creative ideas or new methods for making art
- Create sketches, templates, or models to guide their work
- Select which materials to use on the basis of color, texture, strength, and other qualities
- Process materials, often by shaping, joining, or cutting
- Use visual elements, such as composition, color, space, and perspective, to produce desired artistic effects
- Develop portfolios highlighting their artistic styles and abilities to show to gallery owners and others interested in their work

Artists create objects that are beautiful or thought-provoking. They often strive to communicate ideas or feelings through their art.

Craft artists make a wide variety of objects, mostly by hand, to sell in their own studios, online, in stores, or at arts-and-crafts shows. Some craft artists display their works in galleries and museums.

Craft artists work with many different materials, including ceramics, glass, textiles, wood, metal, and paper, to create unique pieces of art, such as pottery, quilts, stained

glass, furniture, jewelry, and clothing. Many craft artists also use fine-art techniques—for example, painting, sketching, and printing—to add finishing touches to their products.

Fine artists typically display their work in museums, commercial or non-profit art galleries, corporate collections, and private homes. Some of their artwork may be commissioned (requested by a client), but most is sold by the artist or through private art galleries or dealers. The gallery and the artist decide in advance how much of the sale proceeds each will keep.

Some craft and fine artists spend much time and effort selling their artwork to potential customers or clients and building a reputation. However, only the most successful artists are able to support themselves solely through the sale of their works. Many artists have at least one other job to support their craft or art careers.

Some artists work in museums or art galleries as arts directors or as curators, planning and setting up exhibits. Others teach craft or art classes or conduct workshops in schools or in their own studios. For more information on workers who teach art classes, see the profiles on kindergarten and elementary school teachers, middle school teachers, high school teachers, postsecondary teachers, and self-enrichment teachers.

Craft and fine artists specialize in one or more types of art. The following are examples of types of craft and fine artists:

**Cartoonists** draw political, advertising, comic, and sports cartoons. Some cartoonists work with others who create the idea or story and write captions. Some create plots and write captions themselves. Most cartoonists have comic, critical, or dramatic talents in addition to drawing skills.

**Ceramic artists** shape, form, and mold artworks out of clay, often using a potter's wheel and other tools. They glaze and fire pieces in kilns, which are special furnaces that dry and harden the clay.

**Fiber artists** use fabric, yarn, or other natural and synthetic fibers to weave, knit, crochet, or sew textile art. They may use a loom to weave fabric, needles to knit or crochet yarn, or a sewing machine to join pieces of fabric for quilts or other handicrafts.

**Fine art painters** paint landscapes, portraits, and other subjects in a variety of styles, ranging from realistic to abstract. They may use one or more media, such as watercolors, oil paints, or acrylics.

**Furniture makers** cut, sand, join, and finish wood and other materials to make handcrafted furniture. For more information about other workers who assemble wood furniture, see the profile on woodworkers.

**Glass artists** process glass in a variety of ways—such as by blowing, shaping, or joining it—to create artistic pieces. Specific processes used include glassblowing, lampworking, and stained glass. These workers also decorate glass objects, such as by etching or painting.

**Illustrators** create pictures for books, magazines, and other publications, and for commercial products, such as textiles, wrapping paper, stationery, greeting cards, and calendars. Increasingly, illustrators use computers in their work. They might draw in pen and pencil and then scan the image into a computer to be colored in, or use a special pen to draw images directly onto the computer.

**Sketch artists**, a particular type of illustrator, often create likenesses of subjects with pencil, charcoal, or pastels. Sketches are used by law enforcement agencies to help identify suspects, by the news media to show courtroom scenes, and by individual customers for their own enjoyment.

**Jewelry artists** use metals, stones, beads, and other materials to make objects for personal adornment, such as earrings or bracelets. For more information about other workers who create jewelry, see the profile on jewelers and precious stone and metal workers.

**Medical and scientific illustrators** combine drawing skills with knowledge of biology or other sciences. Medical illustrators work with computers or with pen and paper to create images of human anatomy and surgical procedures, as well as three-dimensional models and animations. Scientific illustrators draw animal and plant life, atomic and molecular structures, and geologic and planetary formations. These illustrations are used in medical and scientific publications and in audiovisual presentations for teaching purposes. Some medical and scientific illustrators work for lawyers, producing exhibits for court cases.

**Printmakers** create images on a silk screen, woodblock, lithography stone, metal etching plate, or other type of matrix. The matrix is then inked and transferred to a piece of paper using a printing press or hand press to create the final work of art. Workers who do photoengraving are called printing workers. For more information, see the profile on printing workers.

**Sculptors** design three-dimensional works of art, either by molding and joining materials such as clay, glass, plastic, or metal, or by cutting and carving forms from a block of plaster, wood, or stone. Some sculptors combine various materials to create mixed-media installations. For example, some incorporate light, sound, and motion into their works.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Craft and Fine Artists," <http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-2> (last visited July 8, 2013).

The duties the petitioner's president attributed to the proffered position are consistent with the duties of craft and fine artists as described in the *Handbook*, and more particularly, with the description of

fine art painters. The AAO finds that the proffered position is a craft and fine artist position, and more particularly a fine art painter position, as described in the *Handbook*.

The *Handbook* states the following about the educational requirements of craft and fine artists, including fine art painter positions:

### **How to Become a Craft or Fine Artist**

Formal schooling is not required for craft and fine artists. However, many artists take classes or earn a bachelor's or master's degree in fine arts, which can improve their skills and job prospects.

#### **Education**

Formal schooling is rarely required for craft and fine artists. However, it is difficult to gain adequate artistic skills without some formal education in the fine arts.

Most craft and fine artists have at least a high school diploma. High school classes, such as those in art, shop, or home economics, can teach prospective artists some of the basic skills they will need, such as drawing, woodworking, or sewing.

Many artists pursue postsecondary education and take classes or earn degrees that can improve their skills and job prospects. Many colleges and universities offer bachelor's and master's degrees in fine arts. In addition to studio art and art history, courses may also include core subjects, such as English, social science, and natural science.

Independent schools of art and design also offer postsecondary training, which can lead to a certificate in an art-related specialty or to an associate's, bachelor's, or master's degree in fine arts.

In 2011, the National Association of Schools of Art and Design accredited approximately 300 postsecondary institutions with programs in art and design. Most of these schools award a degree in art.

Medical illustrators must have both a demonstrated artistic ability and a detailed knowledge of living organisms, surgical and medical procedures, and human and animal anatomy. They usually need a bachelor's degree combining art and premedical courses. However, most medical illustrators also choose to get a master's degree in medical illustration. Four accredited schools offer this degree in the United States.

Education gives artists an opportunity to develop a portfolio—a collection of an artist's work that demonstrates his or her styles and abilities. Portfolios are essential

because art directors, clients, and others look at an artist's portfolio when deciding whether to hire the individual or buy his or her work.

Those who want to teach fine arts at public elementary or secondary schools usually must have a teaching certificate in addition to a bachelor's degree. An advanced degree in fine arts or arts administration is usually necessary for management or administrative positions in government or in foundations, or for teaching in colleges and universities. For more information on workers who teach art classes, see the profiles on kindergarten and elementary school teachers, middle school teachers, high school teachers, postsecondary teachers, and self-enrichment teachers.

### **Training**

Craft and fine artists improve their skills through practice and repetition. They can train in several ways other than, or in addition to, attending formal schooling.

Some craft and fine artists learn on the job from more experienced artists. Others attend non-credit classes or workshops or take private lessons, which may be offered in artists' studios or at community colleges, art centers, galleries, museums, or other art-related institutions.

Still other craft and fine artists work closely with another artist on either a formal or informal basis. Formal arrangements may include internships or apprenticeship programs.

### **Advancement**

Artists hired by firms often start with relatively routine work. While doing this work, however, they may observe other artists and practice their own skills.

Craft and fine artists advance professionally as their work circulates and as they establish a reputation for a particular style. Many of the most successful artists continually develop new ideas, and their work often evolves over time.

Many artists do freelance work while continuing to hold a full-time job until they are established as professional artists. Others freelance part time while still in school to develop experience and to build a portfolio of published work.

Freelance artists try to develop a set of clients who regularly contract for work. Some freelance artists are widely recognized for their skill in specialties such as cartooning or children's book illustration. These artists may earn high incomes and can choose the type of work they do.

### Important Qualities

**Artistic ability.** Craft and fine artists create artwork and other objects that are visually appealing or thought-provoking. This usually requires significant skill in one or more art forms.

**Creativity.** Artists must have active imaginations to develop new and original ideas for their work.

**Customer-service skills.** Craft and fine artists, especially those who sell their work themselves, must be good at dealing with customers and potential buyers.

**Interpersonal skills.** Artists often must interact with many people, including co-workers, gallery owners, and the public.

**Manual dexterity.** Most artists work with their hands and must be good at manipulating tools and materials to create their art.

**Sales and marketing skills.** Craft and fine artists must promote themselves and their art to build a reputation and to sell what they have made. They often study the market for their crafts or artwork to increase their understanding of what potential customers might want.

*Id.* at <http://www.bls.gov/ooh/arts-and-design/craft-and-fine-artists.htm#tab-4> (last visited July 8, 2013).

Although the *Handbook* states that many artists take classes or earn a degree, that it is difficult to gain adequate artistic skills without some formal education in the fine arts, and that education can improve artists' skills and prospects and provide them a chance to develop a portfolio, it also explicitly states that formal schooling is not required for craft and fine artists. The *Handbook* provides insufficient support for the proposition that craft and fine artist positions, including fine art painter positions, including the particular position proffered in the instant case, require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Counsel argues that the samples of the beneficiary's work and the letters attesting to his skill at designing and painting murals demonstrate that the proffered position is a specialty occupation position. The samples suggest, and the letters attest, that the beneficiary is a very skilled fine arts painter. They do not suggest, however, that the proffered position requires any formal education at all, let alone a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, the petitioner has designated the proffered position as a Level II position on the submitted Labor Condition Application (LCA), indicating that it is a position for an employee who performs moderately complex tasks that require limited judgment. See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). The classification of the proffered position as a Level II position does not support the assertion that it is a position that cannot be performed without a minimum of a bachelor's degree in a specific specialty

or its equivalent, notwithstanding that the *Handbook* suggests that some craft and fine artist positions do not require such a degree.

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the duties that the petitioner ascribes to the proffered position indicate a need for artistic skills, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As stated earlier, in determining whether there is a common degree requirement, factors often considered by USCIS 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102..

In the instant case, the petitioner has not established that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

The petitioner did submit four vacancy announcements in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations. Specifically, the petitioner submitted the following announcements taken from popular job search websites:

1. An announcement for a Graphic Artist for [REDACTED] a manufacturer of extruded plastic products, to design and develop promotional

- materials for sales support, product packaging, and tradeshows, requiring a bachelor's degree and stating that a bachelor's degree in graphic design is preferred;
2. An announcement for a Graphic Artist II for [REDACTED] an aerospace and defense company stating, "A Bachelor's degree in Digital Media, Fine Arts, Web Development or a related field or equivalent experience is required";
  3. An announcement placed by a staffing company for a Senior 3D Graphic Artist for an unidentified company in an unidentified industry requiring an otherwise unspecified bachelor's degree; and
  4. An announcement for a "(Temporary) Sr Industrial [sic]/Commercial Graphic Artist," also for [REDACTED] and stating "A Bachelor's degree in Digital Media, Fine Arts, Web Development or a related field or equivalent experience is required."

None of the vacancy announcements provided have been shown to be for positions with organizations in the petitioner's industry, and three clearly are not. Further, none of the positions announced are fine art painter positions, and they have not, therefore, been shown to be positions parallel to the proffered position.

Further still, none of those vacancy announcements requires a minimum of a bachelor's degree in a specific specialty or its equivalent.

The first vacancy announcement states that a bachelor's degree in graphic design is preferred. A preference for such a degree is clearly not a minimum requirement.

The second and fourth vacancy announcements state that the position requires either a bachelor's degree in digital media, fine arts, web development, or a related field, or equivalent experience, but provide no indication of the type or amount of experience the hiring authority would consider to be equivalent to such a degree. As such, whether they require a minimum of a bachelor's degree in a specific specialty or its equivalent pursuant to the salient regulations is unclear. *See, e.g.* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The third vacancy announcement requires a bachelor's degree, but gives no indication that a degree in any specific specialty is required, or even preferred.

Further, even if all of the vacancy announcements were for parallel positions with organizations similar to the petitioner and in the petitioner's industry and required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from four announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.<sup>1</sup>

---

<sup>1</sup> Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from these job advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally*

Thus, based upon a complete review of the record, the petitioner has not established that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner. The petitioner has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also has not satisfied the second alternative prong 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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that there no degree is required for such positions. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique that it requires at least a baccalaureate degree in a specific specialty or its equivalent for entry into

---

Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of fine art painter for firms similar to and in the same industry as the petitioner required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly demonstrate that such an educational requirement is common throughout the petitioner's industry among companies similar to the petitioner for parallel positions.

the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone other than the beneficiary to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>2</sup>

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Designing and painting murals have not been shown to be duties so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. In other words, the proposed duties have not been shown to be so much more specialized and complex than the duties of other craft and fine artist positions that the proposed duties are usually associated with at least a bachelor's degree in a specific specialty or its equivalent.

Counsel asserted that the samples of the beneficiary's work and the letters attesting to his skill demonstrate that the proffered position is more specialized and complex than other positions. Whether that is true is unclear, and if it is true, that is insufficient. To satisfy this criterion, the petitioner is obliged to show, not just that the proffered position is more specialized and complex than other positions, but that *the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent*. Counsel has made no argument pertinent to that point.

Yet further, on the accompanying LCA, the petitioner designated the proffered position as a Level II position, indicating that it is a position for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment. *See*

---

<sup>2</sup> While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_Guidance\\_Revised\\_11\\_2009.pdf](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf). Therefore, it is not credible that the position is one with specialized and complex duties, as such a higher-level position would be classified as a Level IV position, requiring a significantly higher prevailing wage.

For all of the reasons discussed, the petitioner has not demonstrated that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent and has not, therefore, satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The record suggests an additional issue that was not addressed in the decision of denial but that, nonetheless, also precludes approval of this visa petition.

The AAO observes that if the petitioner had demonstrated that the proffered position required a minimum of a bachelor's degree in a specific specialty or its equivalent, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate that the beneficiary has a minimum of a bachelor's degree or its equivalent in that specific specialty. *See Matter of Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968).

The evidence in the record includes two items pertinent to the beneficiary's educational qualification: (1) a statement by the petitioner's president, in his March 18, 2012 letter, that the beneficiary has a bachelor's degree in fine arts from [REDACTED] in England, and (2) a statement in an evaluation that the beneficiary received a bachelor of arts degree for having completed a program of study in graphic design at [REDACTED] now [REDACTED] and that the degree can be considered the academic equivalent of a U.S. Bachelor of Fine Arts in Graphic Design.

Absent corroborating evidence, such as the beneficiary's diploma and transcripts, those assertions are insufficient to show that the beneficiary has the degree alleged. The visa petition could not be approved without such additional evidence pertinent to the beneficiary's education.

Pursuant to the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. Because the finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation position is dispositive, the AAO need not further consider the issue of the beneficiary's qualifications.

The AAO recognizes that the petitioner asserts that this visa petition is for a position for which previous H-1B petitions were approved. The director's decision does not indicate whether she reviewed the prior approvals of the previous nonimmigrant petitions filed on behalf of the beneficiary. If the previous nonimmigrant petitions were approved based on the same unsupported assertions and evidentiary deficiencies that are contained in the current record, those approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the instant nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals do not preclude USCIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.