US restricts job options for international STEM students under OPT extension

BY LUBNA KABLY, TNN | UPDATED: APR 21, 2018, 11.08 AM IST

Post a Comment

Several international STEM students hoping to work in the United States (US) for a longer duration suddenly find their wings clipped, owing to an interpretation of employers obligations by US immigration agency. Their training experience can now only be inhouse at the employer's own work site, which will dent opportunities to work for tech or business consultancies.

International students are eligible for a 12 month optional practical training (OPT) under which they can work in the US.

Big Change:
The end of Five-Year Plans: All you need to know

The United States Citizenship and Immigration Services (USCIS), has recently set out extensive explanations on its website as to what constitutes a bonafide employer-employee relationship and on an employer's obligations.

International students are eligible for a 12 month optional practical training (OPT) under which they can work in the US. Those, who have completed their degrees in science, technology, engineering and mathematics (STEM) are eligible to apply for a further OPT extension of 24 months. STEM students under the OPT are often recruited by consulting companies in the technology or business management sectors.

The recent explanations by USCIS apply to the STEM OPT extensions. USCIS has spelled out that such students cannot work at the employer's client sites, which will make it difficult for students to find suitable employers. Going a step further, many students after finishing their OPT under an F-1 visa status obtain an H-1B sponsorship, and if they get an H-1B visa they continue working in the US. Now, even their future prospects could be hampered.

The STEM OPT program has always been a formal training program. Both the student and the employer were required to sign Form I-982 affirming their commitment to the training. However, the rules issued in 2016 did not debar work at a client site. Thus, the recent USCIS interpretation has come as a rude shock.

Social media sites are abuzz with discussions by anxious students who have already obtained an OPT extension and are working at client sites. There appears to be no clarity on whether the new interpretation would also apply to them.

Emily Neumann, an immigration attorney in the US and partner in the law firm of Reddy & Neumann, says: "Immigration practitioners have yet to see any application of this policy to those students already placed at clients sites. However, US Department of Homeland Security (DHS) has recently developed a portal in the SEVIS system, which allows STEM OPT students to directly input information regarding their employment and training progress. I would not be surprised if this information is also used to monitor for compliance. I also anticipate more scrutiny on STEM OPT time during H-1B adjudications for those students that apply for a change of status from F-1 to H-1B." SEVIS is a web-based system for maintaining information on international non-immigrant students in the US.

USCIS in its guidelines relating to 'The employer's training obligations' states that "The training experience must take place onsite at the employer's place of business or worksites to which US Immigration and Customs Enforcement (ICE) has authority to conduct site visits to ensure the OPT requirements are being met. It adds that "The training experience may not take place at the place of business or worksite of the employer's clients or customers because ICE would lack authority to visit such sites."

Adds Neumann, “Via site visits, ICE monitors an employer’s compliance with the STEM OPT rules and requirements. DHS has the ability to deny STEM OPT extensions with employers that DHS determines have failed to comply with the regulations. In addition, failure to comply with the regulatory requirements related to the STEM OPT extension may result in a loss of status for the student.”

Further, employers who permitted those under an OPT program to work remotely will no longer be able to do so. USCIS explains: “The employer may not fulfill its training obligation to provide a structured and guided work-based learning experience by having the student make periodic visits to the employer’s place of business to receive training, while the student is actually working at the place of business or worksite of a client or customer of the employer. For the same reason, online or distance learning arrangements may not be used to fulfill the employer’s training obligation to the student.”

“The personnel who may provide and supervise the training experience may be either employees of the employer, or contractors who the employer has retained to provide services to the employer. They cannot be employees or contractors of the employer’s clients or customers. Again, the employer that signs the Form I-983 must be the same entity that provides the practical training experience to the student, utilizing its own personnel,” adds the USCIS.’

“Whether such a change in interpretation can be accomplished through a simple website update with no advance notice remains to be seen,” says Neumann. The United States is already seeing a drop in the number of international students with fewer student visa applications. Only 47,302 student visas were issued to Indian students during the twelve month period ending September 30, 2017 period as compared to 65,257 visas in the earlier twelve month period. This drop of 27% signifies a lower interest in an education from US universities. Among international students, engineering, maths and computer science degrees are extremely popular. If OPT opportunities narrow down, the incentive to study in the US may drop further.

Reasons for debarring work at client sites:

- The employer that signs Form I-983 must provide the OPT to students
- The training must be provided by the employer’s own personnel
- Site visits by regulatory authorities are not possible at client sites
- If a student is working at an employer’s client site, then the training obligation would not be met
- Online or distance learning arrangements will also not fulfill the employer’s training obligations

In Case You Missed It

Amarnath Yatra 2018
Narendra Modi
Mutual Fund
Mumbai Plane Crash
Rupee
Stock Market
Prasanta Chandra Mahalanobis
Varroc Engineering IPO
Wipro
Vedic Education
Delhi Metro Strike
Engineering College Teacher Job

It may take you more than a lifetime to get a American Green card

BY ET ONLINE | JUN 08, 2018, 03.42 PM IST

Post a Comment

If you are a young Indian graduate with a Silicon Valley dream, you may have to wait more than a lifetime just to achieve that dream.

According to the statistics released by the US Citizenship and Immigration Services (USCIS) there are currently 3,06,601 Indian nationals waiting for a Green card under the employment based preference category, of the total 3,95,025. India is followed by China with 67,031 Chinese nationals waiting for the Green card. This does not include counts of dependent beneficiaries associated with the approved immigrant petitions.

Currently, of the total number of applicants waiting to obtain a legal permanent residence status, three-fourth are Indians. As per the US law only 7% Green cards can be issued to natives of one country in a fiscal year.

This means than an Indian skilled immigrant aiming for the US Green card could be forced to wait for his/her Green card for somewhere between 25 - 92 years, according to GCReforms.

Getting a US visa or a Green card is becoming increasingly difficult since President Donald Trump assumed office. This, however, has not deterred the Indian skilled workers looking to settle in the United States.

Indian-Americans, most of whom are highly skilled and come to the US mainly on H-1B work visas, are the most affected under the current immigration system.

RELATED COMPANIES EXPAND

Silicon

Big Change:
The end of Five-Year Plans: All you need to know

Indian-Americans, most of whom are highly skilled and come to the US mainly on H-1B work visas, are the most affected under the current immigration system.

In Case You Missed It

No work permits for H-1B visa spouses: Donald Trump to scrap Obama-era rule

BY PTI | UPDATED: APR 24, 2018, 05.53 PM IST

Post a Comment

The Trump administration is planning to propose to end allowing spouses of H1-B visa holders to work legally in the US, a top federal agency official has told lawmakers, a move that could have a devastating impact on tens of thousands of Indians.

Big Change:
The end of Five-Year Plans: All you need to know

The move to end the Obama-era rule could have an impact on more than 70,000 H-4 visas holders, who have work permits.

H-4 is issued to the spouse of H-1B visa holders, a significantly large number of whom are high-skilled professionals from India. They had obtained work permits under a special order issued by the previous Obama administration.

Indian-Americans were a major beneficiary of this provision. More than 100,000 H-4 visa holders have been beneficiary of this rule.

A 2015 rule issued by the Obama administration allows work permits for spouses who otherwise could not be employed while H-1B visa holders seek permanent resident status -- a process that can take a decade or longer.

The Trump administration is planning to terminate this provision. A formal communication is expected to be made later this summer, US Citizenship and Immigration Services (USCIS) Director Francis Cissna said in a letter to Senator Chuck Grassley.

"Our plans include proposing regulatory changes to remove H-4 dependent spouses from the class of aliens eligible for employment authorisation, thereby reversing the 2015 final rule that granted such eligibility," Cissna said.

He said such action would comport with the executive order requirement to "propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system ... "

As with other revisions to regulations, the public will have an opportunity to provide feedback during a notice and comment period, Cissna said.

According to a recent study by the Migration Policy Institute, the US has issued employment authorisation documents to more than 71,000 spouses of H-1B visa holders, over 90 per cent of whom are Indians.

"As of June 2017, USCIS had granted 71,287 initial (versus renewal) employment authorisation documents to H-4 spouses," the study which was released last week said.

Of those H-4 spouses with work authorisation as of early 2017, a total of 94 per cent were women, and the vast majority, 93 per cent, were from India, while four per cent were from China, the study said.

In Case You Missed It

Amarnath Yatra 2018
Mutual Fund
Rupee
Prasanta Chandra Mahalanobis
Wipro
Delhi Metro Strike
Narendra Modi
Mumbai Plane Crash
Stock Market
Varroc Engineering IPO
Vedic Education
Engineering College Teacher Job

Congress Proposes $130K Salary Requirement for H1B Visa Holders

PROTECT

MARCH 9, 2018

NICOLE MARTINEZ

Nicole is the Managing Editor of Publications at Orangenius. A veteran arts and culture journalist, her work has appeared in Reuters, VICE, Hyperallergic, Univision, and more.

There have been scores of new regulations handed down since President Trump assumed office, and a new bill governing the H1B employment visa, introduced this week into the House of Representatives, could have sweeping implications for artists and arts business owners. Here's what artists, graphic designers, and arts business owners need to know about the future of work in the United States.

THE H1B VISA AND ITS PROPOSED CHANGES

The United States offers foreign workers a variety of possibilities for finding legal work opportunities in the U.S. Some are permanent work positions, while others are only temporary visas that allow a foreign worker to enter the United States for the purpose of employment. A visa guarantees the recipient employment for a fixed period of time, rather than being considered indefinite. These visas require prospective employers to first file a petition with U.S. Citizenship and Immigration Services before they can apply for a work visa – meaning a potential employee basically has to have an offer from an employer locked down before they can begin work.

The H1B visa is one such visa – defined as a 'specialty occupation' visa, the visa is issued to highly skilled workers who possess a higher education degree and display an extraordinary talent within an industry. The H1B visa is the most common work visa issued in the

RELATED ITEMS

COPYRIGHT ACT

F

FINE ART

IMMIGRATION

INDEPENDENT CONTRACTORS

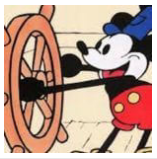
INTERNATIONAL COPYRIGHT

PROTECT

WORK MADE FOR HIRE

FOLLOW US!

POPULAR POSTS



How Mickey Mouse Keeps Changing Copyright Law

29190

October 18, 2017

Download Our Artist Licensing Agreement. It's Free.

28239

June 20, 2017

10 Interview Questions Artists Must Be Able to Answer

17659

November 9, 2017

Crafting Your Artist Business Plan: A Step-by-Step Guide

13146

March 30, 2017

Should I Open a Corporation for My Art Business?

9625

September 10, 2016

These Five Companies Put the Art in Startup

8564 September 14, 2016

United States – it's estimated that more than a million H1B visas are issued per year.

However, the new presidential administration is **seeking to curb the H1B visa** requirements to make it more difficult for companies to hire foreign workers. Proposed by several Republican leaders, the new rules would more than double the minimum salary requirement for H1B workers, if the company is an H1B dependent employer. An employer is considered to be H1B dependent if more than 15 percent of its workforce is working under an H1B visa. Currently, to qualify for an H1B visa, a company must be willing to pay a qualifying worker a minimum salary of $60,000 annually. Under the new regulations, companies would be required to pay a minimum of $130,000 annually.

In addition to being on the floor of the House, there are many that claim President Trump will be signing an executive order to establish these exact policies, thereby bypassing the need for the measure to go to a vote. If it passes, scores of H1B workers will be required to give up their jobs and exit the country immediately.

THE REPERCUSSIONS OF SHIFTING H1B REQUIREMENTS

The vast majority of workers who currently hold H1B visas are technologists, with over 1 million workers coming specifically from India. In fact, tech giants like Google, Microsoft, and Apple employ millions of foreign workers who possess highly skilled knowledge of technological processes. If these companies were required to augment salaries for its employees on H1B visas, it's possible that it would raise the price of our favorite technological gadgets.

Eight Artist in Residence Programs to Launch Your Career

7640

February 17, 2017

How Artists on Social Media Can Grow Their Following

7285 June 19, 2017

Write an Artist Bio to Get Noticed

6866

February 14, 2017

How Does the Art Gallery Business Work?

5503

August 21, 2017


U.S. Department of Justice
Immigration and Naturalization Service

Notice of Action

THE UNITED STATES OF AMERICA

RECEIPT NUMBER WAC-03-231-23456		CASE TYPE I129 PETITION FOR A NONIMMIGRANT WORKER
RECEIPT DATE August 8, 1998	PRIORITY DATE	PETITIONER Syntell SYS INC
NOTICE DATE August 15,1998	PAGE 1 of 1	BENEFICIARY Krishan Kumar Dev

Notice Type: Approval Notice
Class: H1B1
Valid from 01/01/1997 to 12/05/1999

Sample H1B Approval Notice - I797

The above petition and extension of stay have been approved. The status of the named foreign worker(s) in this classification is valid as indicated above. The foregoing may work for the petitioner, but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition. Since this employment authorization stems from the filing of this petition, separate employment authorization documentation is not required. Please contact the INS with any questions about tax withholding.

The petitioner should keep the upper portion of this notice. The lower portion should be given to the worker. He or she should keep the right part with his or her Form I-94, *Arrival-Departure Record*. This should be turned in with the I-94 when departing the U.S. The left part is for his or her records. A person granted an extension of stay who leaves the U.S. must normally obtain a new visa before returning. The left part can be used in applying for the new visa. If a visa is not required, he or she should present it, along with any other required documentation, when applying for reentry in this new classification at a port of entry or pre-flight inspection station. The petitioner may also file Form I-824, *Application for Action on an Approved Application or Petition*, with this office to request that we notify a consulate, port of entry, or pre-flight inspection office of this approval.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Sample H1B Approval Notice - I797

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
CALIFORNIA SERVICE CENTER
P. O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Customer Service Telephone: (800) 375-5283

Form I797A (Rev. 09/07/93)N

Of course, there's a lot more to lose here than cheap iPhones and laptops. A lot of workers who receive H1B visas are also artists – graphic designers, videographers, and writers. As a result, many of these creative jobs may be in jeopardy, especially given the high salary requirements required under the new proposed legislation. Many of these types of jobs already remain vacant because there isn't the right talent available in certain geographical locations or, in some cases, U.S. workers are just too expensive for some companies. Imagine if a company could not afford to hire local workers or local workers are just not available but the company could also no longer afford to hire foreign workers due to the salary requirements. Would these companies be forced to use freelance workers abroad instead of having in-office employees?

Luckily, technological advances, such as video conferencing and screen sharing, have made it a lot easier to hire workers living overseas although having multiple workers living in different locations and time zones can be challenging. The difficulties are more pronounced with young workers, who are still in the learning phase of their careers, often need more training and handholding to develop their skills. Despite being more difficult, many companies would likely take the foreign freelance worker route to reduce overhead, which will require redefining the type of relationship a company has with its workers.

STRUCTURING A WORK RELATIONSHIP WITH FOREIGN CREATIVES

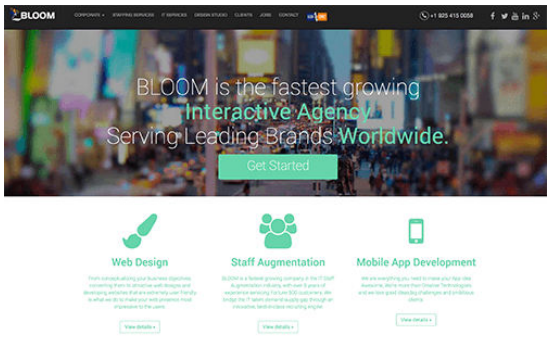
If you're a foreign artist looking for **independent contractor** work or an art business planning on hiring foreign creative workers, you'll need to be careful as to how you structure your working relationship. A U.S. company might want to hire someone in Argentina or

India, or the company may want someone for an out-of-country temporary position that may last a year or 18 months rather than a few short weeks working on a short-term project.

In the U.S., employers must report employee income or freelance payments to the IRS and withhold federal, state and sometimes city taxes. If the worker is an employee, then they also must make contributions to Social Security we well as pay into the state unemployment insurance and state workers' compensation insurance. Most foreign countries have similar laws to those in the U.S. for reporting payroll. Just because those employees are in another country does not alleviate the companies responsible for reporting income to foreign governments. More importantly, just like in the United States, there may be steep fines or even criminal liability for not reporting income.

Managing foreign legal requirements can be difficult, especially for small creative companies that have no presence in the foreign country, such as where a satellite office has a number of employees. Many creative businesses are local, such as advertising agencies or web design companies and not understanding the ramifications of hiring foreign citizens in other countries could have significant ramifications. It is important to check the employment laws before hiring as there are often exceptions. For example, in the UK and Thailand, a company that doesn't have a permanent establishment locally or doesn't have some presence in those countries, can hire and pay local workers without making local withholdings and contributions. The worker will bear the burden of tax and social security filings as if self-employed or a short-term freelance worker. Nonetheless, reporting is still required. Other countries, such as France, allow foreign companies with no local offices to make special "payroll only" registrations where third-party payroll services can pay taxes and social security to the foreign workers without actually having to open up a company in that country.

Another option, especially if these new regulations force local creative businesses to hire several employees or contractors from abroad, is to use offshore staffing services, such as **Bloom**. In this scenario, the hiring company chooses its employees, which Bloom or some other agency would hire. The hiring company pays Bloom for their service and Bloom handle the local payroll and any other legal requirements of the foreign country. Alternatively, a



company could always hire a firm rather than individuals. However, this approach is usually expensive, negating any saving made from hiring abroad.

AN INDEPENDENT CONTRACTOR MUST BE INDEPENDENT

Finally, the company can always just hire independent contractors, however, this would only work for short projects rather than long-term relationships as there is a consensus around the world that if they are performing as employees, then they are employees regardless of how the company classifies them, and so they are subject to the local payroll taxes paid by the company. The independent contractor status is derived by actions, not words. So simply signing an agreement that states that the relationship is an independent contractor relationship won't necessarily be enough to prove as such in a court of law.

In order to avoid these kinds of liabilities, your company will need to properly structure the relationship and adhere to the law of the place in which the independent contractor or employee is located. So if you're a U.S.-based arts business owner contracting a graphic designer in Italy, Italian laws will govern your relationship. While laws do vary from country to country, there are some broad guidelines for properly implementing this kind of relationship, as they do tend to be similar in scope in almost all nation states.

Like the questions discussed above, the following factor will allow you to make a deeper analysis as to whether or not a worker would be considered an independent contractor:

1. Exclusive and independent: Does the independent contractor have other clients, or does his work revolve around this sole foreign client? Does the contractor market their services to the public?

2. Short-term employment: Is the length of the relationship defined as temporary or short-term? Does the relationship get renewed automatically or frequently? You may have an issue if the relationship persists for longer than a certain period of time.
3. Supervision: Do you perform tasks with minimal supervision or direction? Do you have particular rules that you need to adhere and are overseen by the business owner? Do you have to undergo performance evaluations? If so, you may be considered an employee under a court of law.
4. Self-scheduling: Do you set your own schedule, completely autonomous from your employer, or are you required to keep certain hours and log your time? If your hours are set, you may be an employee.
5. Autonomy: Do you decide what you'll work on when? The order in which you perform certain tasks? Or does the employer leave it up to you to determine when you'll complete certain aspects?
6. Business expenses: Does the independent contractor pay their own business expenses and maintain their own equipment? Supplies like the internet, art goods or software that are provided by the business owner may constitute an employee relationship.
7. Extra pay and benefits: Independent contractors should only be paid for the work they're actually doing. Whether they charge by the hour or the task is irrelevant, so long as they don't get extra pay, such as paid time off, bonuses, health or life insurance, and other awards.
8. Business risk: Who ultimately bears the loss of property or personal injury? If an independent contractor manages their own business risks, then its unlikely a court would consider them an employee of a business.
9. Taxes and social security: Does the independent contractor pay their own federal income and social security taxes? This is often a vital issue in most countries.
10. Business cards, email and other identifiable titles: Does the independent contractor recognize themselves as their own entity? Or do they use a company email that belongs to their

employer? Is the contractor part of the business's organizational structure?

Once all of these questions have been determined, a court will decide whether a contractor is independent or an employee of the business. If you want to avoid any issues, then the wise thing to do would be to consider all of these steps carefully when outlining your independent contractor agreement.

WORK FOR HIRE ARRANGEMENTS AS AN INDEPENDENT CONTRACTOR

If hiring workers as independent contractors, a company must also consider the copyright of the creative work being supplied. One would think that if you hire someone to create work for you, that you are then the owner of that work. After all, you decided what you needed, and you paid for it. Unfortunately, that is not the case Unless the Independent contractor agreement is structured properly, the buyer may only be purchasing limited rights to the use of the work in a limited capacity, not the entire copyright.

Generally speaking, a creator of an artistic work owns the copyright in a work. As the owner of a copyright, a creator has the exclusive power to license, benefit from, and share the creative work, and so a buyer merely receives a license, not the copyright. In an employee-employer relationship, the entire copyright is owned by the employer. However, this is not true of an independent contractor relationship unless the agreement between the buyer and Independent contractor is a work-for-hire relationship.

H1B Visas are handled by the US Citizen and Immigration Service and enforced by homeland security.

A **work-for-hire** relationship exists when a creator has been hired expressly by an employer to create a work – and even though the production of the work is technically the creator's intellectual property, the employer becomes the owner of the end product. As such, this would mean that the benefits inherent to

ownership of a copyright would transfer to the creator's employer, and the creator would forfeit the right to claim copyright ownership of that particular work.

But defining the employer relationship is often difficult to do. Strictly speaking, a person who receives a salary and has a specific contract with a company is considered an employee. But many graphic designers, videographers, and other creative professionals tend to work on a freelance basis for multiple companies, rather than having a fixed employment contract with any one company.

In order to determine **whether you retain the copyright** in your own work as an artist, or whether you will retain the copyright in the work as an art business, a court will consider the questions prompted in our analysis of an independent contractor. Whether you work on your time and with autonomy will be critical in determining whether a work for hire relationship exists between an artist and a client.

In order for **a client may retain the copyright** over the work he hired a freelance graphic designer to create, certain conditions must exist. Those include:

1. A written agreement signed by both parties;
2. that specifically states that the work is a "work-made-for-hire;"
3. and, the work must be one of these nine types:

a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, material for a test, or an atlas.

Since graphic art design and videography can be considered a 'compilation' under copyright law, foreign-based graphic designers and artists who are hired to do work for U.S. companies will have to be careful in the negotiation phase of the contract if they don't wish to give up the rights to their work. Businesses, likewise, have a lot to both lose and gain here: on the one hand, you could structure your arrangement as a work-for-hire agreement and gain ownership over the contractor's work. However, doing so risks a situation in which a court might consider your relationship with the contractor as an employee-employer relationship – which could leave you liable to pay their back taxes and other benefits.

HOW TO STRUCTURE AN INDEPENDENT CONTRACTOR AGREEMENT

Just because you have an existing independent contractor agreement doesn't mean a court of law will view it as such. Instead, you'll need to be doubly sure that the agreement that you've laid out **explicitly states the type of relationship** you have, which should be followed by a relationship that follows the best practices outlined above. Similarly, your contract should be free of any non-compete clauses (meaning the contractor will be free to engage in similar activities with businesses in your sector), scheduled work hours, performance evaluations and any other provision that seems like it belongs in an employment agreement.

You should also consult the local laws of the country from which you are hiring your contractor so that you can be sure of the proper language required to maintain or transfer copyright ownership as well as taking into consideration the laws of the country in which the contractor is located, incorporating similar provisions into your agreement. For example, if Italian law requires freelancers to have their own permanent tax account, your agreement should state that your Italian independent contractor has his own permanent tax account. Similarly, the agreement should outline that Italian laws will govern your relationship since the independent contractor will be bound to adhere to those laws.

In addition, your contract should have some safeguards in place to ensure that any issues that might arise with your foreign independent contractor. Contractual indemnities that stipulate who will cover certain losses, hold-harmless provisions that eliminate any potential liabilities on your behalf, and remedies that could kick in if a court does, in fact, conclude that an employee-employer relationship exists would all be beneficial clauses to include in your independent contractor agreement.

In our next installment, we'll cover tax obligations, corporate setups, and SEC filing obligations, plus any other issues you may encounter when hiring foreign independent contractors in lieu of utilizing a person holding an H1B visa.

VIEW COMMENTS (1)

MORE IN PROTECT

Artrepreneur
Artists to Watch
Sections
Work
Market
Money
Protect
Meet
Play
Brands
Orangenius
Art Law Journal
ART360
About
Contact Us
Privacy
Terms