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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

FILE: WAC 02 252 52066

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 04 2005

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, Director
Administrative Appeals Office

DISCUSSION: The service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a church that seeks to employ the beneficiary as a music teacher-director for a future church-based music academy. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) Form I-290B and counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a music program teacher for the church's music program and for one-on-one instruction for students from the congregation. Evidence of the beneficiary's duties includes: the Form I-129 petition; the petitioner's August 1, 2002 letter in support of the petition; and the petitioner's August 25, 2003 response to the director's request for evidence. According to this evidence, the beneficiary's job duties would entail a number of activities, including teaching and coordinating the church's music classes for elementary and secondary grade levels; teaching music theory, sight-reading and composition to students in classes and in instrumental and vocal after-school tutorials; preparing daily lessons; evaluating student skills and talents and the successes of program-sponsored musical events; setting goals for the church's music training program; demonstrating instrumental and vocal methods; and setting up performance opportunities for students. The petitioner indicated that a qualified candidate for the job would have at least a bachelor's degree in "music/piano or related discipline."

The director found that the proffered position was not a specialty occupation. Under the job title "music director," the director, citing the Department of Labor's *Occupational Outlook Handbook (Handbook)*, found that a baccalaureate degree or its equivalent in a specific specialty is not a "normal, industry-wide minimum requirement for entry into the occupation." The director found further that the petitioner failed to meet any of the four criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel takes issue with the director's ruling, which based its finding that only public school system and university-level music teachers and directors require a four-year music or music education degree on the *Handbook's* statement that musicians who do not meet public school music education requirements may teach in private schools, recreation associations and elsewhere. Counsel cites AAO decisions to the contrary and argues that "only a person with the required educational background would be able to draw on his or her educational training and understanding of specific and fundamental concepts, theories and models" to teach and improve training methods.

Upon a review of the record, the AAO has determined that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

In examining whether the petitioner has established the claimed proffered position is a specialty occupation, the AAO turns first to the criteria for making such a determination, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In these proceedings, the duties of the position are dispositive and not the job title. The *Handbook* finds that a bachelor's in music is not uniformly required for a music teacher-director position. The *Handbook* states, "Formal training may be obtained through private study with an accomplished musician, in a college or university music program, or in a music conservatory.... Music directors, composers, conductors and arrangers need considerable related work experience or advanced training in these subjects." With respect to music teachers at private schools, the *Handbook* indicates that musicians "who do not meet public school music education requirements may teach in private schools and recreation associations or instruct individual students in private sessions." Thus, a bachelor's degree is not the minimum requirement for entry into the proffered position.

Under the second criterion, counsel states that only someone with a bachelor's degree in music or music education would qualify to teach students at the church. However, counsel's personal observations do not constitute evidence in these proceedings. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel has submitted no evidence in the form of letters from parallel organizations that resemble the size and scope of the petitioner's organization. Nor does the record include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Thus, the petitioner has not established that a degree requirement is common in the industry.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states nothing about the petitioner's seven existing employees or whether any are part of a music program or hold degrees. The record contains nothing to show that a music school or a music education program exists despite the petitioner's unsupported statements in its letter accompanying the Form I-129 petition. The record, thus, contains no evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. The evidence does not show that the duties of the proffered position are any more specialized and complex than is typical for a music director or administrator or that it requires the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.