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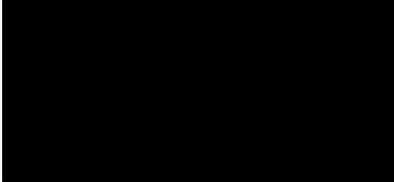
FILE: WAC 03 027 52128 Office: CALIFORNIA SERVICE CENTER Date: MAY 17 2005

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 director of 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 director. The petitioner, therefore, 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 and previously submitted evidence.

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.

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; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a music director. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning, directing, and coordinating the congregation's musical activities; conducting the choir; playing the organ; and selecting vocal and instrumental music. The petitioner stated that the programs are in the Armenian language and that "there is an emphasis on original ethnic music as well as traditional ethnic music and hymns." The petitioner further stated that the beneficiary qualifies for the proposed position because he holds the equivalent to a bachelor of arts degree in music and has relevant experience.

The director determined that the proffered position was not a specialty occupation. According to the director, the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the duties of the proffered position are performed by music directors, which is an occupation that does not require a baccalaureate degree in a specific specialty. The director stated that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field, and that the evidence of record is not persuasive in showing that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel emphasizes that CIS already approved an H-1B petition submitted on behalf of the beneficiary by the petitioner. Counsel contends that under the *Handbook* a music director is a specialty occupation. According to counsel, the petitioner's membership is mostly Armenian, its programs are in the Armenian language, and Armenian traditions and teachings are preserved in its services, including classic and folkloric Armenian music. Counsel states that the director should have issued a request for evidence in order to obtain clarifying information about the proposed position.

Upon review of the record, 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.

Counsel noted that CIS approved other petition that had been previously filed on behalf of the beneficiary by the petitioner. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval 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. 1988). It would be absurd to suggest that CIS 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).

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 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 approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Counsel states that the director should have issued a request for evidence to obtain clarifying information about the proposed position. CIS is required to issue a request for evidence when initial evidence of eligibility is missing from the initial submission. If the evidence submitted does not fully establish eligibility, or raises questions regarding eligibility, the issuance of the request for evidence is discretionary. 8 C.F.R. § 103.2(b)(8). The Act states that the petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Thus, it is incumbent upon the petitioner to submit sufficient evidence to establish that the proposed position is a specialty occupation.

The AAO next considers the criteria 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 determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely refers to the *Handbook* for the duties of particular occupations and the education, training, and experience normally required to enter into and advance within the occupations.

Counsel asserts that the *Handbook* reveals that the proposed position is a specialty occupation. This is not persuasive. The *Handbook* discloses that the proposed position's duties are encompassed within the occupational classification entitled "musicians, singers, and related workers." A music director conducts, directs, plans, and leads instrumental or vocal performances by musical groups, such as orchestras, choirs, and glee clubs. They audition and select musicians and singers and lead choirs and glee clubs. Musicians play instruments such as the flute and clarinet. Arrangers transcribe and adapt musical compositions to a particular

style for choral groups, individuals, orchestras, or bands. These are the duties that the beneficiary will perform.

According to the *Handbook*, employers do not require a baccalaureate degree for these occupations. The *Handbook* indicates:

Musicians need extensive and prolonged training to acquire the necessary skills, knowledge, and ability to interpret music. . . . Formal training may be obtained through private study with an accomplished musician, in a college or university music program, or in a music conservatory. . . . The National Association of Schools of Music accredits nearly 600 college-level programs in music. Courses typically include musical theory, music interpretation, composition, conducting, and performance in a particular instrument or in voice. Music directors, composers, conductors, and arrangers need considerable related work experience or advanced training in these subjects.

Based on the above excerpt from the *Handbook*, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the particular position, music director.

No evidence has been submitted to satisfy the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a specific degree requirement is common to the industry in parallel positions among similar organizations or show that the proposed position is so complex or unique that it can be performed only by an individual with a degree. Again, the duties of the proposed position are performed by music directors, musicians, and arrangers, which the *Handbook* reveals are occupations that do not require a baccalaureate degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. Here, the petitioner states that it normally requires a baccalaureate degree and points to the prior approval notice issued on behalf of the beneficiary. This evidence is not convincing. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already discussed, the duties of the proffered position are performed by music directors, musicians, and arrangers, which the *Handbook* reveals are occupations that do not require a baccalaureate degree. The AAO notes that no evidence supports the petitioner's claim that it normally requires a bachelor's degree for the proposed position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. According to counsel, the petitioner's membership is mostly Armenian, its programs are in the Armenian language, and Armenian traditions and teachings are preserved in its services, including classic and folkloric Armenia music. However, no evidence substantiates how the classic and folkloric music is specialized and complex. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, based on the *Handbook's* information, the duties of the proposed position are performed by music conductors, musicians, and arrangers, which are occupations that do not require a bachelor's degree.

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.