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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC-99-245-50356 Office: Vermont Service Center

Date 20 NOV 2001

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a musical theater with fifteen employees and a gross annual income of \$500,000. It seeks to employ the beneficiary as an actress/soloist for three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director denied the petition because the record contained no evidence that the proffered position required a bachelor's degree. On appeal, counsel argues in part that musicians who specialize in opera require more specialized and extensive training which "usually results in a baccalaureate degree as a matter of formal evaluation."

Counsel's argument is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. The petitioner described the duties of the offered position as follows:

Sings as soloist or member of vocal ensemble: Interprets music, using knowledge of harmony, melody, and voice production to present characterization or to achieve individual style of vocal delivery. Sings, following printed text and musical notation, or memorizes score. May sing with musical accompaniment. May watch for directions and cues. May be known according to vocal range as soprano. May specialize in one type of music, such as musicals.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in music. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at pages 258 and 259 finds no requirement of a baccalaureate or higher degree for employment as an actress/singer. Musicians need extensive and prolonged training which may be obtained in a variety of ways, including private study with an accomplished musician, in a college or university music program, in a music conservatory, or through practice with a group.

Counsel contends that the emphasis on training for opera singers and soloists in the Handbook is not in conflict with the requirements of a specialty occupation which include highly specialized training and attainment of a bachelor's degree in this specialty. Counsel further contends that the extensive training necessary for opera singers requires a college program which "usually results in a baccalaureate degree as a matter of formal evaluation." However, counsel has not provided any evidence to corroborate his contention.

Alexander Zhurbin, the Artistic Director of the Russian American Musical Theater, states in his letter dated October 18, 1999, that the theater has in the past employed many soloists, all of whom were graduates of schools of music in possession of a Bachelor's

degree in music. Mr. Zhurbin further states the proffered position requires:

"a person who has studied and obtained knowledge of vocal, harmony, solfeggio, stage action and performance, rhetoric, music literature, etc. Adequate proof of such knowledge is usually presented in the form of a Bachelor's degree in music. It is unknown to me that a person who would act as a soloist in a musical theater would not be a graduate of a school of music and not in possession of a Bachelor's degree in music."

Mr. Zhurbin provided the evaluation of the foreign education credentials of a former actress/soloist at the Russian American Musical Theater, Lyudmila Fesenko, as evidence that the theater has in the past employed actress/soloists with the equivalent of a Bachelor's degree in music. Raisa Kaminsky, the person who performed the evaluation, found that Lyudmila Fesenko has the equivalent of a U.S. Bachelor of Arts Degree in Theatrical Art and U.S. Bachelor of Arts Degree in Music. However, the petitioner has not submitted any evidence to establish that it has, in the past, required that all actress/soloists hired to perform at the Russian American Musical Theater possess at least a bachelor's degree in music.

The petitioner also submitted a letter from an individual who identifies himself as a professional soloist in possession of a Bachelor's degree in Art from a school of music in the former Soviet Union. This individual indicates that he has performed as a soloist for the Metropolitan Opera in the 1997-1998 season and asserts that "All other soloists performing on stage I have known in my life have been graduates of schools of music in possession of a Bachelor's degree in Art." Counsel argues that this affidavit alone is sufficient evidence that a bachelor's degree or its equivalent is normally the minimum requirement for soloists at other musical theaters. Counsel also made reference to three other individuals who graduated from the St. Petersburg Conservatory with "at least a bachelor's degree in music" and went on to become "world-famous singers." However, neither counsel nor the petitioner has submitted any independent evidence to corroborate the assertion that other musical theaters normally require that actresses/soloists be in possession of at least a bachelor's degree.

Finally, neither counsel nor the petitioner has submitted any evidence to establish that the beneficiary's proposed duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it

is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.