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U.S. Department of Justice

Immigration and Naturalization Service

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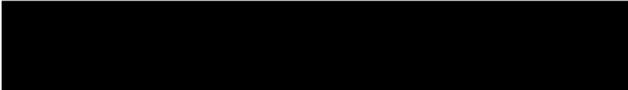
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN 02 086 53488 Office: NEBRASKA SERVICE CENTER Date:

9 DEC 2002

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 that 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 that 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 that 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is described as a not-for-profit ethnic Korean Catholic Church established in Des Plaines, Illinois, in 1984. It has two employees and a gross annual income of \$609,048. It seeks to temporarily employ the beneficiary as a music director for a period of three years. The director determined that the petitioner had not established that the position offered to the beneficiary was a specialty occupation.

On appeal, counsel asserts that the position offered to the beneficiary is 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.

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 field 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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation.

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.

In the original H-1B petition received by the Service on January 15, 2002, the petitioner described the beneficiary's position as follows:

[The petitioner} has historically had a complex music program. This Mission has a policy of hiring individuals with baccalaureate or higher degrees in music for the position of music directors. Previous music directors and piano accompanists have all had bachelor's degree training with extensive experience as musicians. . . . They have had exceptional skills in teaching voice and training in instruments use in a sacred worship setting.

Music director directs all choirs and orchestras of the church. This church has two adult choirs, praise teams, and orchestras (adult and youth). The director is expected to choose music for four Sunday services, five weekday services and praise teams and to teach the congregation through planned training and education. The director will direct choirs and orchestras in practice and rehearsal for services and will train members of the choirs and orchestras to develop their skills as group and individually. In addition, the director will plan and have a special annual music night for the congregation and community at large. This church's intent is to further develop the music programs to incorporate the talent of youth members (both vocally and instrumentally), developing a concert series, and most importantly to utilize the services of an individual who can compose, arrange, and transpose music to enrich the all-encompassing music program.

The petitioner also submitted a list of four previous or current employees with bachelor degrees in music from South Korean universities. In addition, the petitioner submitted an educational equivalency evaluation on the beneficiary's foreign education credentials. Additional exhibits contained a 1994 Administrative Appeals Office (AAO) decision concerning a piano teacher/choir and music director, as well as a copy of Full Gospel Portland Church v. Thornburgh 730 F. Supp. 441 (D.D.C. 1988) a 1988 court decision in which the beneficiary was a Korean accompanist, choir director

and piano teacher. Both decisions found beneficiaries eligible for specialty occupation classification. Finally, the petitioner submitted three job vacancy announcements taken from the Internet. All three were for music director positions in three churches in the United States. One position vacancy was from Illinois, while the other two were from New Jersey.

On January 16, 2002, the director asked for additional information with regard to the instant petition. In particular, the director requested more evidence on the four criteria listed in 8 C.F.R. 214.2(h)(4)(iii)(A) to qualify the music director position as a specialty occupation. Evidence requested included a complete detailed description of the duties to be performed by the beneficiary indicating the percentage of time spent in various duties, a copy of the specific job advertisement used by the petitioner, and job descriptions and diplomas for the other employees who have held the music director position in the past.

In response, the petitioner submitted a more extensive description of the music director position that listed the percentages of time to be spent in the various duties, as outlined below:

- 1) Instruct, supervise, and conduct choirs, praise teams, and orchestras at practice, rehearsal and performance to achieve desired effects, such as tonal and harmony balance, dynamics, rhythm, tempo, and shading, utilizing knowledge of conducting techniques and music theory (35%).

Specifically, [the beneficiary] will be responsible for preparing the choirs and accompanying musical instrument players to perform in services. It will be [the beneficiary's] responsibility to provide instruction that will maximize the talents of each member, and produce music appropriate for worship. In order to do this, she will teach her choir members of music, voice, and performance that will improve their individual efforts, as well as their effect as a group. Instruction in such nuances of musical performance as dynamics, rhythm, tempo, shading, and tonal and harmonic balance will teach them how to make subtle adjusts toward a great effect.

- 2) Plan, organize and direct all music programs including:

- a) select music suitable for religious services in consultation with leaders of congregation (10%) and
- b) Create variations of traditional music or original compositions for services. (25%)

In addition to training the choirs, praise teams, and orchestras, [the beneficiary] will plan, organize, and direct all music programs. She will confer with other

leaders of the church congregation and compose music programs to suit the theme, mood, and schedules of weekly, holiday, or special occasion services. The programs will feature music ranging from traditional full-length songs o modified or original compositions to certain parts of the service. She will also modify the music selections to suit her choir. Such details as the quantity of members and the level of their skill will influence the final score of the music selections.

3. Develop a music program to incorporate the talent of youth members (both vocally and instrumentally), developing a concert series (20%).

4. Plan and have a special annual music night for the congregation and community at large. (10%)

With regard to job descriptions and diplomas for previous or current employees hired as music directors or accompanists, the petitioner submitted the same description as that provided in the beneficiary's petition and stated that it could not provide the diplomas as persons who had served as music directors in the past no longer resided in Chicago and could not be contacted. In addition, the petitioner stated that there was no specific job advertisement for the music director position in the instant petition. The petitioner also submitted a letter from Dr. Jeff Todd Titon, a professor of music at Brown University.

Dr. Titon examined the job duties of the beneficiary and her credentials. He also stated the following in his letter:

I believe that it is a general practice within the field of musical direction to hire a music director, with substantive responsibility in the design of musical programs and conception and management of musical presentations, who possesses a bachelor's level educational and/or professional background in music, or a related field.

On February 20, 2002, the director denied the petition stating that the petitioner had failed to establish any of the four criteria listed in the regulations. The director primarily drew attention to the lack of documentation to establish that the petitioner's previous employees in the music director position had held bachelor's degrees. The Director also noted that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) did not state that a bachelor's degree is a requirement for a musician/music director position.

On appeal, counsel submits diplomas with documentation on two persons that the petitioner claimed were previous employees. A diploma with additional documentation for Ji-seung Kang was submitted. The petitioner described her as the church piano accompanist from January 1998 to December 1999. This individual

was not listed on the original documentation on previous employees submitted by the petitioner. The second diploma was for Gemma Cho. The petitioner described her as a church organist from 1991 to 1994 on both the original petition and appeal materials.

Upon review of the record, the petitioner has established that the industry norm for the position of music director within a church is, at a minimum, a bachelor's degree in music. All three vacancy announcements submitted with the original petition appear to describe parallel positions although in different religious denominations. All three require either a bachelor's or master's degree in music as a prerequisite for the music director position.

In addition, the fourth criterion for qualifying a position as specialty occupation appears to be met. The DOL Occupational Outlook Handbook (Handbook), 2002-2003 edition, clearly states on page 132: "Music directors, composers, conductors, and arrangers need considerable related work experience or advanced training in these subjects." The phrase "these subjects" refers to coursework in musical theory, music interpretation, composition, conducting and performance in a particular instrument or voice. To the extent that the specific duties of the petitioner involve these same areas usually acquired by advanced training, the knowledge required to perform these duties is usually associated with having a baccalaureate or higher degree. Accordingly the petitioner has established two of the four regulatory criteria used to identify positions as specialty occupations.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.