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Immigration and Naturalization Service

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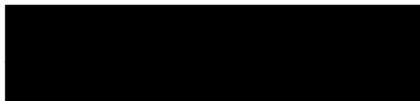


File: SRC 01 266 50844

Office: TEXAS SERVICE CENTER

Date: AUG 05 2003

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:



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, Texas Service Center, and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a South Carolina Episcopal church established in 1724. It has five employees and a gross annual income of \$550,000. 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 submits further documentation with regard to the industry standard for entry into the position of music director.

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.

According to 8 C.F.R. 214.2(h)(4)(ii), a "specialty occupation" is:

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.

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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the original H-1B petition received by the Bureau on September 10, 2001, the petitioner described the beneficiary's position as follows:

[The beneficiary] is being offered temporary employment as the Director of Music for the Church. In this capacity, [the beneficiary] will be responsible for selecting and editing all music and song utilized in the Church services and ceremonies. She will also be responsible for supervising and training the choir. As chief organist, she will also be responsible for leading the musical portion of the religious services. As chief musical officer of the congregation, she will play an integral role in the day-to-day operations of the Church and its religious functions.

Additionally, as Director of Music, [the beneficiary] will be responsible for developing the music education program for students in the religious school and will teach in the school on a regular basis.

The petitioner also submitted a copy of a transcript for coursework for a Master of Music program at McGill University in Montreal, Canada. On the second page of the transcript is a notation "M Mus Granted Winter 1985." The petitioner did not submit a diploma or an educational equivalency document for the record. The petitioner submitted a copy of the beneficiary's birth certificate from New Zealand and a copy of one page of the beneficiary's New Zealand passport.

On September 13, 2001, the director asked for additional information with regard to the instant petition. In particular, the director requested more evidence to establish that the position of music director was a specialty occupation. Evidence requested included an explanation of what the hiring criteria had been for previous musical directors, in particular whether all had held bachelor's degrees and in what field. In addition, the director requested that the petitioner submit additional evidence that a bachelor's degree is required in order to perform the duties of a music director.

In response, the petitioner submitted a letter that stated the two previous music directors both had a bachelor's degree in music or music studies and both ultimately had left the church's employment to pursue master's degrees. In addition the petitioner stated that

the woman who held the position after the two directors mentioned previously had had a master's degree in music. The petitioner provided no documentation to substantiate these assertions. With regard to why a bachelor's degree would be a minimum requirement for entry into the proffered position, counsel stated that the church "preferred a person with multiple degrees and with experience in leading Christian music programs and that the position required a person of high skill level and talent, as well as leadership ability."

Counsel also submitted the following statement from [REDACTED] Parish Administrator:

The director of music ministries holds the position second only to the Priest and works hand in hand with him/her in leadership and visionary responsibilities. The position requires the ability to develop a long-term program to coincide with the long-term vision of the Priest. The position is very different from that of an "organist" due to these far-reaching responsibilities.

A degreed and experienced person is needed to serve as a true "Director of Music Ministries"; i.e. music selection, music orchestration, music instruction, music performance, music direction, recruitment, leadership, administration, budget management and Christian education in the field of music. . . a teacher must be certified and qualified academically as well as professionally in order to perform these duties and produce the results required of the position.

On February 20, 2002, the director denied the petition stating that the petitioner had failed to establish that the position of music director is an occupation that requires theoretical and practical application of a body of highly specialized knowledge. The director stated that the beneficiary's principal duties were leading the music portion of the religious services and not that of teaching music in the religious school.

On appeal, counsel submits the following evidence:

- Resumes of [REDACTED] and an unidentified individual both of whom are identified by counsel as the petitioner's former employees or previous directors of music.
- A newsletter article written by the petitioner's immediate past music director that stated she had a master's degree in church music and hymnody and described in some detail the petitioner's three adult choirs.
- A list of job vacancies for part-time and full-time

organists, directors of music, and/or director of music ministries as advertised in the American Guild of Organists (AGO) publication.

- Three job listings for minister of music positions as found on the Internet website of the American Guild of Organists organization.
- A typewritten copy of the text of the Internet and of the newspaper advertisement utilized by the petitioner to solicit candidates for the proffered position.

The typewritten text states the following with regard to the proffered position:

Full-time organist-director of music ministries for growing 500-member Episcopal congregation with vibrant Christ-centered corporate worship. Two Sunday services (one blended), festival services, and a Wednesday evening contemporary worship (prayer & praise). A multiple choir program includes 2 adult choirs (one traditional, one contemporary), 2 graded children's choirs, 2 hand bell choirs (adult and junior) with rehearsals weekday evenings.

The candidate must have the ability to "lift up" a singing congregation through exceptional hymn and service playing. He/she must be proficient in conducting and training choirs and possess the organizational and leadership skills necessary to interface with a dynamic ministry team. Candidate should possess a post-graduate Degree in Organ Performance, Sacred/Church Music, or related area. Two manual, 24 rank, custom-built J.W. Walker organ (Nov. 1999), three octaves of hand bells. Competitive salary and benefits based on education and experience.

Upon review of the record, some of counsel's materials submitted on appeal are not found to be probative and are given little weight in this proceeding. For example, the resumes of the two individuals that the counsel claims are former music directors do not list their employment with the petitioner. In addition, counsel does not submit their diplomas to establish their educational credentials nor does he provide any proof of their employment by the church, such as pay stubs or employment contracts. With regard to the text of the petitioner's advertisement for the proffered position, the document submitted by counsel can only be given minimal probative weight. A copy of the actual announcement, either on the Internet or in the AGO publication, would have been more probative with regard to regulatory criterion previously identified in 8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

In addition, contrary to counsel's assertions, not all of the

churches advertising music positions specifically identify required educational requirements, much less a requirement for a bachelor's degree in music.

A Federal case examined a petition involving a Korean accompanist, choir director, and piano teacher. In *Full Gospel Portland Church v. Thornburgh* 730 F. Supp. 441 (D.D.C. 1988), the court stated: "such [church music] programs typically hire music professionals, even though they do not ordinarily acquire any sort of accreditation." *Id* at 7. While the petitioner in *Full Gospel Portland* was found to be a professional under regulatory standards utilized at the time, the record in the instant petition does not provide enough detail with regard to the duties of the proffered position to establish that the reasoning in *Full Gospel Portland Church* could be persuasive in the instant petition.

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)

The Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

The basic duties of music directors as outlined in the 2002-2003 edition of the *Handbook* on page 131 are as follows:

Music directors conduct, direct, plan, and lead instrumental or vocal performances by musical groups, such as orchestras, choirs, and glee clubs. . . . Choral directors lead choirs and glee clubs sometimes working with a band or orchestra conductor. Directors audition and select singers and lead them at rehearsals and performances to achieve harmony, rhythm, tempo, shading and other desired musical effects.

The Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, 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 *Handbook* does not indicate that employers of music directors require a bachelor's degree for entry into the proffered position, it does

not appear that a bachelor's degree is the minimum requirement for entry into the music director field. Accordingly, the evidence does not support a finding that a baccalaureate, higher degree or their equivalent is normally the minimum requirement for entry into the proffered position.

II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)

A. Degree Requirement is Common to the Industry

Factors often considered by the Bureau when determining the industry standard include: whether the Department of Labor's (DOL) *Occupation Outlook Handbook (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." *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook's* conclusions about a degree requirement for a music director position were discussed in the previous section, and shall not be repeated here. On appeal, the petitioner submits excerpts from the American Guild of Organists job listing publication both for nationwide job openings and for job openings in the southeastern region of the United States. As previously stated, not all the job advertisements in these publications required a baccalaureate degree in music or related fields. In addition, the petitioner submitted no documentation that any professional music association had made a bachelor's degree a requirement for entry into the field, nor had it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals."

Accordingly the petitioner has not established that the degree requirement is common in parallel music director positions among similar religious organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner submitted only limited documentation that the position of music director within the petitioner's church would involve duties seen as either so unique or complex that only an individual with a degree in a specific specialty could perform them. For example, the initial petition was devoid of any detailed description of the beneficiary's duties with regard to

the number of choirs she would lead, or the types of ceremonies and programs that she would be working with. Although the petitioner on appeal submitted a typewritten account of the text for its position vacancy announcement that provides more details on the numbers of choirs, this evidence does not establish this criteria for two reasons. First, the typewritten text was submitted after the initial filing of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Michelin Tire Corporation*, 17 I&N Dec. 248,249 (Reg.Comm.1978). Additionally, as noted previously, the actual vacancy announcement ad or Internet ad would also have provided more probative weight to this document. Second, this description does not indicate how much time the beneficiary would be spending in accompanying choirs or services, as opposed to arranging music or teaching music in the church school. Without more persuasive evidence, the petitioner has not established the complexity or uniqueness of the proffered position.

III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)

When submitting information in response to the director's request for additional evidence, counsel noted that two previous directors of music ministries held a bachelor's degree in music or music studies; however, the petitioner provided no documentation to support this assertion. On appeal, the petitioner submits two resumes, and a newsletter article written by a previous director of music. As noted previously, neither resume contains any information on the actual employment of either individual by the petitioner. In addition, the newsletter article by itself is not sufficient evidence to establish that the petitioner normally requires a degree or its equivalent in a specific specialty for its music director position. Without more probative documentation, the petitioner has not provided sufficient documentary evidence to establish that it has normally required a baccalaureate degree for its music director position.

IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)

To date the petitioner has placed some information on the record with regard to the duties in the proffered position. The initial petition identified some generic duties, such as "selecting and editing all music and song" and developing and teaching the music education program in the church's school, without providing any detailed information on the specialized nature of the position. In response to the director's request for further information, the petitioner submitted a statement from James Beard, Parish Administrator, that stated: "The director of music ministries position holds the position second only to the Priest and [the

director of music ministries] works hand in hand with him/her in leadership and visionary responsibilities." The statement also pointed out the position was different from that of an organist. This statement provided no further explanation as to the specialized or complex nature of these duties. As noted previously, the job vacancy announcement submitted on appeal adds more detail to the prospective duties with its list of number of choirs and performances; however, this evidence was submitted following the filing of the petition, so it is given no weight in this proceeding. In addition, the additional information on the music director's role contains no information on any of the teaching duties that were mentioned in the initial petition. Without further documentary evidence to clarify the nature of the duties of the proffered position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

The petitioner has failed to establish that any of the four criteria 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.

Beyond the decision of the director, the petitioner has not fulfilled all the documentary requirements outlined in the regulations to establish that the beneficiary is qualified to perform the duties of the position.

Pursuant to 8 C.F.R. § 214.2(h) (4) (iii) (C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through

progressively responsible positions directly related to the specialty.

Upon review of the record, and pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), the petitioner has not submitted an educational equivalency document that establishes that the beneficiary's undergraduate and post graduate foreign studies in music are the equivalent of a U.S. bachelor of music degree or higher. In addition, while the petitioner submitted the beneficiary's transcript from McGill University, the beneficiary's diploma from this university program is considered much more probative evidence in this proceeding. As the appeal will be dismissed on other grounds, this issue will not be discussed further.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.