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U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER

Date: 4/11/07

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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
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 nonprofit organization that seeks to employ the beneficiary as a church conductor/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 on the ground that the beneficiary was ineligible for classification as an alien employed in a specialty occupation. On appeal, counsel contends that the petitioner has established that the proffered position qualifies as 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.

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 church conductor/director. Evidence of the beneficiary's duties includes, in part: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning, organizing, and directing the church music mission ministry group; planning activities involving music; providing new hymns, music, and arrangements for choir and instrumental groups; designing, organizing, and planning how to educate the choir, church members, and music mission ministry group through religious music; giving vocal lessons to soloists and members; leading songs and hymns during worship; and playing an instrument during worship. The petitioner stated that a candidate must possess a bachelor's degree in church music.

The director stated that the proffered position's duties related to a traditional religious function defined at 8 C.F.R. § 214.2(r). The director further stated that there is insufficient evidence to demonstrate that the duties of the proffered position are the normal and customary requirements of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(i)(A)(I) which defines the term "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and the 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.

On appeal, counsel contends that the petitioner has established that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A), and counsel submits previously submitted evidence. Counsel claims that establishing and implementing a music program for a religious organization requires a degree in a music-related field. According to counsel, the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

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.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(I) 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 Department of Labor's (DOL) (*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.Min. 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 often consults the *Handbook* to determine the educational and training requirements for certain occupations.

A careful examination of the *Handbook* discloses that the duties of the proffered position are performed by music directors, conductors, and composers. Music directors conduct, direct, plan, and lead instrumental or vocal performances by musical groups, such as choirs and glee clubs. Conductors lead instrumental music groups, such as symphony orchestras, dance bands, show bands, and various popular ensembles. These leaders audition and select musicians, choose the music most appropriate for their talents and abilities, and direct rehearsals and performances. Choral directors lead choirs and glee clubs, sometimes working with a band or an orchestra conductor. Composers create original music.

According to the *Handbook*, 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, and conductors need considerable related work experience or advanced training in these subjects. Because employers accept candidates with either work experience or advanced training in certain courses for these positions, the petitioner fails to establish the first criterion: that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the proffered position.

The second criterion requires that the petitioner establish that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The petitioner's March 28, 2003 letter stated that the bachelor's degree requirement is common to the industry in parallel positions. In the letter, the petitioner listed the names and degrees held by three persons who are employed as church conductor/directors with religious organizations. Nonetheless, this is insufficient to establish the second criterion. The petitioner failed to submit supporting documentary evidence that would substantiate that the three individuals possess bachelor's degrees in music, the positions are parallel, and the organizations are similar in size and scope to the petitioner. Simply going on the record is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, three persons employed as church conductor/directors with religious organizations is woefully inadequate to establish an industry-wide standard.

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. In the March 28, 2003 letter, the petitioner provided the names of two prior employees who held degrees in music and were employed as church conductor/directors.

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 employment requirements, then any alien with a bachelor's degree could be brought into the United States to 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 previously discussed, the *Handbook* reveals that the duties of the proffered position are performed by music directors, composers, and conductors, positions that do not require a bachelor's degree in a specific specialty.

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. As previously discussed, the duties of the proffered position are performed by music directors, composers, and conductors. Consequently, the nature of the specific duties is not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher 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 AAO wishes to note that the director correctly determined that the proffered position's duties related to a religious occupation as set forth at 8 C.F.R. § 214.2(r).

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.

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.