

**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services

Identifying information should  
prevent disclosure of unwarranted  
invasion of personal privacy

DZ

DEC 01 2004

FILE: WAC 02 216 51980

Office: CALIFORNIA SERVICE CENTER Date:

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 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 teacher for a future church-based music academy. The petitioner 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.

Section 214(i)(1) of the Immigration and Nationality Act (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; (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 teacher for the church orchestra and one-on-one instruction for students presumably drawn from the congregation. Evidence of the beneficiary's duties includes: the Form I-129 petition; the petitioner's June 18, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary's job duties would entail a number of activities, including providing music courses for "evangelic outreach"; setting up a music school curriculum and course of study at a "music academy"; instructing individual students in music theory and the playing of orchestral instruments; and arranging music for the petitioner's religious services. The petitioner indicated that a qualified candidate for the job would have at least a bachelor's degree in music or its equivalent.

The director found that the proffered position was not a specialty occupation because the job was misclassified as a music teaching position; rather, he stated, the job is that of music director. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2000-2001 edition, the director noted that the minimum entry requirement was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to meet any of the four criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel counters that the proffered position is indeed that of music teacher on a par with "primary and secondary public school music teachers," and not, as the director indicated, a music director or orchestra conductor position, neither of which, according to the *Handbook*, requires a four-year music degree or involves significant amounts of teaching. Counsel equates the music teacher position proffered with that of a public school music teaching position because teachers, and in particular, music teachers, are "members of the professions, and are therefore in a specialty occupation." Finally, the petitioner's support letter asserts the position would utilize "knowledge of music theory, composition and practice to plan, develop and implement our music instruction and evaluation programs."

Upon review of the record, the AAO had determined that 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.

In this case, the petitioner stated in its June 18, 2002 letter in support of the Form I-129 petition, that, "[a]s part of our evangelic outreach to our congregants, we offer a series of Sunday School courses, including music courses." The petition states that the petitioner has three "current" employees and a gross annual income of \$260,000 and would employ the beneficiary as a 30-hour-a-week music teacher for \$17 an hour or an annual salary of about \$27,000.

The director requested that the petitioner submit evidence of a degree as the usual minimum for the position; of the degree requirement being common to the industry in parallel positions among similar organizations, or the position being unique or so complex that it can only be performed by one with such a degree; of the petitioner's normal practice of requiring a degree or its equivalent for the position; or of the nature of the duties being so specialized and complex that the knowledge required is usually associated with the attainment of a baccalaureate

or higher degree. In response, the petitioner submitted letters from two churches testifying to their own full-time music education programs, and it also submitted a proposed curriculum and teaching schedule.

The record does not contain sufficient evidence to establish that the petitioner seeks to hire an alien “who is coming temporarily to the United States to perform services.” 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), 8 C.F.R. § 214.2(h)(1)(ii)(B). For example, the record contains no church board minutes, no business plan, no church records that indicate the church is of a size and makeup that can bear the cost of hiring a music teacher for 30 hours a week and create a music academy for the duration of three years. There are no church bulletins announcing the program, no lists of enrolled music students, and there is no budgetary proposal indicating how much the petitioner intends to spend on the beneficiary and on a new music academy. Simply going on 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).

In examining whether the petitioner has established the claimed proffered position is a specialty occupation, the AAO turns first to the criteria for making such a determination, 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 these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a music teacher and music director or music executive who would organize and launch a new music academy. According to the *Handbook*, the employment of an executive, or administrative services manager does not require a baccalaureate or higher degree in a specialized area such as music. The *Handbook* provides: “In small organizations experience may be the only requirement needed to enter a position as office manager.” Nor does the *Handbook* find that a bachelor’s in music is required for a music director position. The *Handbook* states, “Formal training may be obtained through private study with an accomplished musician, in a college or university music program, or in a music conservatory.... Music directors, composers, conductors and arrangers need considerable related work experience or advanced training in these subjects.” With respect to music teachers at private schools, the *Handbook* indicates that “[m]usicians who do not meet public school music education requirements may teach in private schools and recreation associations or instruct individual students in private sessions.” Thus, a bachelor’s degree is not the minimum requirement for entry into the proffered position.

Under the second criterion, counsel states that only someone with a bachelor’s degree in music or music education would qualify to teach students at the church. However, counsel’s personal observations do not constitute evidence in these proceedings. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of*

*Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). While the position would combine the duties of a music director or choral conductor with the duties of a private music teacher, the petitioner has not established that a degree requirement is common in the industry.

The petitioner submitted letters from other Korean churches and from the Los Angeles Unified School District for elementary school music teachers. These are not evidence, however, that the churches describing their own music education programs are similar in size or mission to that of the petitioner, or that the advertised public school positions are parallel to the one the petitioner wants to establish. The other churches state that a full-time music teacher both directs a church music program and teaches children in music. However, neither compares the relative size and age of the two congregations with that of the petitioner, nor does either church give its program history. By comparison, the record contains no evidence that the petitioner's music education program is even in existence. The petitioner's evidence of the job duties of the music teacher position in the Los Angeles Unified School District does not parallel the duties of an unlicensed music teacher, director and administrator for a church music program and its related music school. Thus, the evidence of the parallel positions has little relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states nothing about the petitioner's three existing employees or whether any are part of a music program or hold degrees. The record contains nothing to show that a music school or a music education program exists despite the petitioner's unsupported statements in its letter accompanying the Form I-129 petition. The record, thus, contains no evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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 evidence does not show that the duties of the proffered position are any more specialized and complex than is typical for a music director or administrator or that it requires the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.