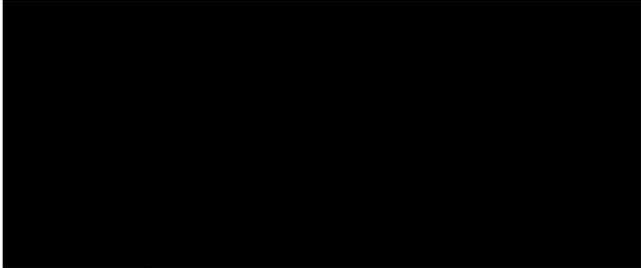




U.S. Citizenship
and Immigration
Services

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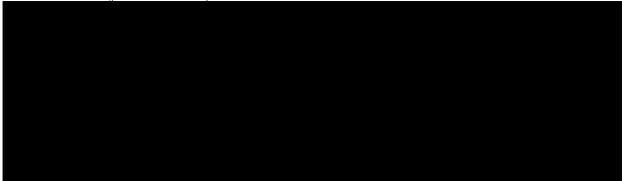


FILE: LIN 03 249 52175 Office: NEBRASKA SERVICE CENTER Date: OCT 08 2004

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:



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

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The service center director 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 choir director. 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 the petitioner's statement and other documentation.

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 choir director. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's August 19, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: conducting and leading the adult church choir; auditioning, selecting, and training members; selecting music; developing a long range music program plan; developing the music program budget; and supervising the maintenance of the music library and equipment. Although not explicitly specified, the petitioner appears to indicate that a qualified candidate for the job would possess a bachelor's degree in music or a related field.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position of music director was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner states that the proffered position is complex, as it includes not only musical duties, but religious leadership duties as well. According to the petitioner, the *Dictionary of Occupational Titles (DOT)* indicates that the proffered position is professional; thus, the petitioner asserts that the position should be considered to be a specialty occupation. The petitioner also contends that a bachelor's degree is an industry standard requirement, and the petitioner has normally required its choir directors to hold a bachelor's degree in music. As the petitioner raises issues relating to the second and third criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO will analyze the facts within this context.

The petitioner requests an oral argument before the AAO. However, pursuant to the regulation at 8 C.F.R. § 103.3(b)(1), the petitioner must explain why oral argument is necessary. In this case, the record does not provide any reasons why the case must be heard in oral argument, or why the appeal cannot be addressed with sufficient thoroughness in writing. Therefore, pursuant to 8 C.F.R. § 103.3(b)(2), the AAO denies oral argument in this case.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As the director noted in his decision, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for the proffered position. Furthermore, the petitioner's reference to information from the *DOT* is not persuasive. The *DOT's* SVP rating, which, in the case of a choral director is eight, does not indicate that a particular occupation requires the attainment of a

baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating merely indicates the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, nor does it specify the particular type of degree, if any, that a position would require.

Regarding parallel positions in the petitioner's industry, the petitioner submitted letters of support from four local church officials, the Director of Missions for the Oakland County Baptist Association, an official from the Southern Baptist Convention, and the dean of the school of church music and worship at the Southern Baptist Theological Seminary. These letters indicate that many churches prefer to hire choir directors who possess bachelor's degrees in music, but they do not state that it is a minimum entry requirement. In fact, a choir director mentioned in one of the church letters was apparently about to obtain a bachelor's degree in German, not music. A preference for a certain degree within the petitioner's industry does not mean there is a standard minimum entry requirement.

The petitioner states that the duties of the instant position are so complex, that only an individual with a bachelor's degree can perform them. The record contains no documentation to support this contention, however. Simply going on record without supporting documentary evidence 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). The evidence on the record does not show why an individual who does not possess a bachelor's degree in music would be unable to perform the duties 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)(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. The petitioner states that several of its former choir directors held bachelor's degrees in music. The record contains copies of diplomas for two of these individuals with bachelor's degrees in music. The AAO notes that the pastor of the petitioning church has held the position of choir director since 1995, although he does not possess a bachelor's degree in music. The petitioner writes that the pastor has been unable to fulfill all the duties of the position, due to his lack of the required degree. The record does not indicate which duties the pastor could not perform or the degree to which the choir has been functioning given the lack of a director with a bachelor's degree in music. The fact that the choir has apparently continued to perform for almost a decade under the direction of an individual without a bachelor's degree in music indicates that a degree may be preferable, but is not a minimum requirement for the job.

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 an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* At 388. The record does not establish the standard described at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The evidence on the record does not demonstrate any of the other two criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.

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.