



U.S. Citizenship
and Immigration
Services

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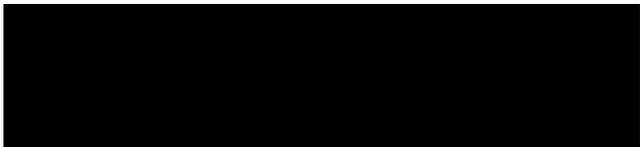


FILE: WAC 02 200 50973 Office: CALIFORNIA SERVICE CENTER Date: OCT 08 2002

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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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 nightclub and producer of Middle Eastern concerts and cultural events that seeks to employ the beneficiary as a music director/conductor. 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 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 music director/conductor. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's May 30, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to the May 30, 2002 letter, the beneficiary would perform duties that entail: planning and directing activities of personnel for various musical productions; issuing assignments and reviewing work of staff in such areas as scoring and arranging; conducting auditions and selecting vocal and instrumental talent for music shows; directing musical groups in rehearsals and performances to achieve desired effects such as total and harmonic balance, dynamics, rhythms, tempos and shading; and utilizing his knowledge of conducting techniques, music theory and harmony, range and characteristics of instruments and talents of individual performers. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in music composition.

The director found that the proffered position was not a specialty occupation because the job is not a music director/conductor; it is a position as a musician. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further 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 of music director/conductor is a specialty occupation, and the director erred in determining that the position was that of a musician.

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 turns first to the criteria 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.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. 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 director found that the position was most like that of a musician. The AAO disagrees with the director, as the duties of the proffered position essentially parallel those of a music director as detailed in the *Handbook*. The director's comments on the issue are withdrawn.

The duties of the proffered position are almost exactly like those described in the *Handbook* for music directors, and provide little additional information. The petitioner has not provided enough corroborating detail to establish that the beneficiary would actually be working as a music director/conductor. By describing the position in almost exactly the same terms as used in the *Handbook*, the petitioner indicated that it will tender a specialty occupation to the beneficiary. Nevertheless, the record is devoid of contracts, flyers, photos, news clippings, schedules of events, a description of staff to be supervised, employee records or other objective indicia that there will be concerts and cultural activities to be directed as described in the petition. The petitioner submits a supporting letter but no details to show how its business would specifically use a music director/conductor or what the beneficiary would do in that position. Thus, the petitioner has not proved that this position is a specialty occupation.

Regarding parallel positions in the petitioner's industry, counsel submits an opinion letter from a professor of ethnomusicology, which states that an individual would need to have a bachelor's degree in order to perform the duties of a musical director/conductor. The duties discussed in the letter are much broader than the duties described by the petitioner. The AAO agrees that the position of music director/conductor could be a specialty occupation. The letter does not speak to the specific position, or support the petitioner's claim that the position as described exists. The letter, therefore, has little probative value. The record 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. The petitioner has never hired someone for this position in the past and, as such, is not in a position to meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As noted above, the position description lacks detail about how the beneficiary would perform this position; 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).

While the director based his decision on faulty grounds, that the position is most like a musician rather than a musical director, the AAO concurs with the outcome that the petitioner has not proven that it is offering a position in a specialty occupation.

The AAO notes further that an H-1B alien must be coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case, the petitioning entity states that it is a nightclub and concert promoter, but provides no evidence to establish its claims. 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). Based on this lack of evidence, the petitioner has failed to establish that it will be able to employ the beneficiary as a musical director/conductor, and that the beneficiary will be coming to perform services in a specialty occupation, in accordance with Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b).

As related in the discussion above, the petitioner has failed to establish that the beneficiary will be coming to the United States to perform services in 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.