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FILE: SRC 04 246 51102 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



MAY 30 2006

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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
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 church that seeks to employ the beneficiary as a minister of music. 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a statement and refers to previously submitted evidence.

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 minister of music. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: directing musical programs under the immediate supervision of the church's pastor; instructing adults and children in proper vocal techniques and music performance; conducting church choirs and other musical ensembles in the presentation of religious music for all seasons; performing moderately complex duties to audition and select choir members and other musicians; selecting and adapting music to suite the liturgical season and requirements of religious services, with the advice and consent of the pastor; assisting the pastor in deciding on musical works for purchase; transcribing musical compositions and melodic lines to adapt them or create a particular style required by the pastor; and playing the organ or piano during services and instructing adults and children in church organ and piano performance. The petitioner stated that a qualified candidate for the job would possess a bachelor's degree in music or theology.

The director determined that the proffered position was not a specialty occupation. According to the director, the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the duties of the proffered position are performed by music directors, which is an occupation that does not require a baccalaureate degree in a specific specialty. The director stated that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupational field, and that the evidence of record is not persuasive in showing that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that all ministers of the Presbyterian Church, and all professionals at the petitioner's church have degrees in religion, theology or a closely related area.

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.Minn. 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 routinely refers to the *Handbook* for the duties of particular occupations and the education, training, and experience normally required to enter into and advance within the occupations.

Counsel asserts that the *Handbook* reveals that the proposed position is a specialty occupation. This is not persuasive. The *Handbook* discloses that the proposed position's duties are encompassed within the occupational classification entitled "musicians, singers, and related workers." Music directors conduct, direct, plan, and lead instrumental or vocal performances by musical groups, such as orchestras, choirs, and glee clubs. They audition and select musicians and singers and lead choirs and glee clubs. Musicians play instruments such as the flute and clarinet. Arrangers transcribe and adapt musical compositions to a particular style for choral groups, individuals, orchestras, or bands. These are the duties that the beneficiary will perform.

According to the *Handbook*, employers normally do not require a baccalaureate degree for these occupations. The *Handbook* indicates:

Musicians need extensive and prolonged training to acquire the necessary skills, knowledge, and ability to interpret music. . . . Formal training may be obtained through private study with an accomplished musician, in a college or university music program, or in a music conservatory. . . . 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, conductors, and arrangers need considerable related work experience or advanced training in these subjects.

Based on the above excerpt from the *Handbook*, a baccalaureate or higher degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the particular position, music director.

In response to the director's request for evidence, the petitioner shifted its focus from the position as a music director to the position as a minister. The evidence presented regarding [REDACTED] requirements for its ministers is not persuasive. While the petitioner calls the proffered position Minister of Music, there is no evidence that the duties of the position are those typically required of ministers within the [REDACTED]. In addition, there is no evidence that the beneficiary would be ordained as a minister.

To determine whether the petitioner can establish that its position meets the second criterion – 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 in the

specific specialty – the AAO finds that no evidence has been submitted to satisfy the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). As interpreted by CIS, the second criterion requires a petitioner to establish that a degree in a specific specialty directly related to the proffered position is common to its industry. As indicated above, the *Handbook* does not establish that a degree in a specific field is required to perform the duties of a music director. Thus, the *Handbook* does not provide evidence of a specific degree as an industry norm. The petitioner provided no evidence to establish that the proffered position is so complex or unique that it can be performed only by an individual with a bachelor's degree in the specific specialty. The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. Here, the petitioner states that it normally requires a baccalaureate degree for all of its professional positions. The petitioner provides no evidence to support this statement. 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 (5<sup>th</sup> 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed 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 already discussed, the duties of the proffered position are performed by music directors, musicians, and arrangers, which the *Handbook* reveals are occupations that do not require a baccalaureate degree. The AAO notes that no evidence supports the petitioner's claim that it normally requires a bachelor's degree for the proposed position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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. Based on the *Handbook's* information, the duties of the proposed position are performed by music conductors, musicians, and arrangers, which are occupations that do not require a bachelor's degree.

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<sup>1</sup> 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.

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.