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U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 03 044 54215 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2005

IN RE: Petitioner: [redacted]
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:

[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, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 recording studio. It seeks to hire the beneficiary as a recording engineer. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation. On appeal, counsel submits a brief, with previously-submitted and new evidence.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the request for evidence; (3) the director's denial letter; and (4) Form I-290B, with attached brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary's services as a recording engineer. Evidence of the beneficiary's duties includes: the Form I-129, with an October 31, 2002 support letter from the petitioner; and the petitioner's August 13, 2003 response to the director's request for evidence.

In its response to the director, the petitioner provided a detailed description of the duties of the proffered position, which require the beneficiary to:

- Acquire studio recording equipment after evaluating studio needs and considering costs, availability, performance, compatibility with previously acquired equipment, and the significance of improving sound results.

- Inspect and direct maintenance of the equipment, including the layout design of electrical circuitry; integration of new studio components, mixer replacements, all wiring and set-ups and sound; the establishment of test procedures and testing of equipment; troubleshooting and recommendations regarding preventive and corrective systems updates;

- Train and direct assistant engineers to interpret readings and indicator lights on main studio consoles;

- Establish operating standards and procedures for equipment to obtain required clarity and special effects; and

- Plan, direct and coordinate recording, scheduling recording sequences, selecting equipment and reviewing productions to ensure objectives are attained.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director found the duties of the proffered position to correspond to those of broadcast and sound engineering technicians and radio operators, as described in the 2002-2003 edition of the *Handbook*. He further concluded that the position failed to qualify as a specialty occupation under any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), noting that the occupation did not impose a baccalaureate or higher degree, or its equivalent, as a minimum requirement for entry into the profession. Following its own review of the 2004-2005 edition of the *Handbook*, the AAO also concludes that the duties of the proffered position are closely aligned to those professions listed under the occupation of broadcast and sound engineering technicians and radio operators.

> Broadcast and sound engineering technicians and radio operators set up, operate and maintain a wide variety of electrical and electronic equipment involved in almost any radio or television broadcast, concern, play, musical recording, television show, or movie....
>
> Sound engineering technicians operate machines and equipment to record, synchronize, mix, or reproduce music, voices, or sound effects in recording studios, sporting arenas, theater productions, or movie and video productions.
>
> Technicians also work in program production. Recording engineers operate and maintain video and sound recording equipment. They may operate equipment designed to produce special effects....
>
> The transition to digital recording, editing and broadcasting has greatly changed the work of broadcast and sound engineering technicians and radio operators.... This transition has forced technicians to learn computer networking and software skills.

These highly technical jobs do not, however, require those seeking to enter the occupation to have a baccalaureate or higher degree requirement. As stated by the *Handbook*:

> The best way to prepare for a broadcast and sound engineering technician job is to obtain technical school, community college, or college training in electronics, computer networking, or broadcast technology....

The petitioner in its response to the director's request for evidence contended that the proffered position of recording engineer is the equivalent of an engineer in charge or chief engineer with an SVP rating of 8, as described in the Department of Labor's *Dictionary of Occupational Titles (DOT),* and that the SVP rating given these comparable job titles indicates the complexity of its own position. On appeal, counsel asserts that the director erred in determining the proffered position to be that of a recording engineer technician, referencing both the *DOT's* discussion of the positions of engineer in charge and chief engineer, and the *Handbook's* discussion of the occupation of engineer as evidence that a bachelor's degree is the minimum entry-level requirement for the proffered position.

The AAO does not, however, rely on the *DOT* for information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. While the Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net),* neither is a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Further, an SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position requires. As a result, the AAO is not persuaded by a claim that the proffered position, even if equivalent to the position of a chief engineer as described in the *DOT*, is a specialty occupation simply because the Department of Labor has awarded it a specific SVP rating.

Further, the AAO notes that the *DOT* does not provide the only discussion of the educational requirements for the position of chief engineer. The AAO finds that the 2004-2005 edition of the *Handbook* deals with the positions of chief engineers, transmission engineers, broadcast field supervisors -- all of whom have supervisory responsibilities -- within its description of broadcast and sound engineering technicians and radio operators. It does not identify a degree requirement for the position of a chief engineer, stating, instead, that technicians can become chief engineers based on experience. Only chief engineers at large television stations are singled out as needing a college degree in engineering.

On appeal, counsel also asserts that the proffered position of recording engineer falls under the general occupational title of engineer as described in the *Handbook*, the DOL publication on which the AAO does rely to determine the educational requirements for entry-level positions within an occupation. However, as already discussed, CIS does not classify positions as specialty occupations based on the title given a proffered

position, but, instead, considers the specific duties of the position, as described by the petitioner, in order to determine if it meets the requirements set forth in statute and regulation.

In the instant case, the title of recording engineer does not bring the proffered position within the general occupational title of engineer. As described in the 2004-2005 edition of the *Handbook,* the occupation of engineer has a significantly different focus from that of the position described by the petitioner.

> Engineers apply the theories and principles of science and mathematics to research and develop economical solutions to technical problems. Their work is the link between perceived social needs and commercial applications. Engineers design products, machinery to build those products, plants in which those products are made, and the systems that ensure the quality of the products and the efficiency of the workforce and manufacturing process. Engineers design, plan, and supervise the construction of buildings, highways, and transit systems. They develop and implement improved ways to extract, process, and use raw materials, such as petroleum and natural gas. They develop new materials that both improve the performance of products and take advantage of advances in technology. They harness the power of the sun, the Earth, atoms, and electricity for use in supplying the Nation's power needs, and create millions of products using power. They analyze the impact of the products they develop or the systems they design on the environment and on people using them. Engineering knowledge is applied to improving many things, including the quality of healthcare, the safety of food products, and the operation of financial systems.

The description of the job duties provided by the petitioner in response to the director's request for evidence, while they may require significant technical expertise, clearly do not reflect the research and development focus that characterizes the field of engineering. Therefore, despite counsel's assertions that the proffered position is that of an engineer, the AAO finds no reason to conclude that the position is other than that of a sound engineering technician, a profession where job candidates are advised to seek training but a bachelor's or higher degree, or its equivalent, is not a requirement for employment. As a result, the AAO finds that the proffered position of recording engineer, as described by the petitioner, does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

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 has reviewed the July 30, 2003 letter submitted by Hola Music Group, a competitor of the petitioner; an Internet job description of a sound engineer submitted by the petitioner; and counsel's statements regarding the previous H-1B petition approved for the beneficiary at another recording studio.

The AAO has considered the letter submitted by [redacted] stating that it requires entry-level recording engineers to have, at a minimum, bachelor's degrees in sound or recording engineering, and asserting that the bachelor's degree requirement it imposes is standard within its industry. While the AAO finds the statements made by [redacted] to be relevant to this proceeding, it finds them inadequate to meet

the burden of proof under the second criterion. First, although Hola Music states that it requires a bachelor's degree in sound or recording engineering, it provides no information that would allow the AAO to determine whether its business operations are similar to that of the petitioner or if the specific duties of its position of recording engineer are parallel to those of the proffered position. Further, Hola Music's assertion that its bachelor's degree requirement for recording engineers is an industry standard is unpersuasive. The statements of a single recording company, in the absence of any documentation that would give weight to its opinion, is insufficient proof of an industry norm. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in this proceeding. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg.Comm. 1972).

The AAO has also reviewed the Internet job description provided by the petitioner in its response to the director's request for evidence. The job announcement does not, however, support the petitioner's contention that the industry imposes a bachelor's degree as an entry-level requirement. Instead, it states:

> There are a few different routes into audio engineering. As well as a straightforward audio engineering degree, an electronics degree or a music degree can be equally effective.
>
> Additionally, there are colleges which offer tailored courses at NVQ or BTEC level in audio engineering for a specific field, such as recording studios or radio, which will give you the necessary skills to work in that area.

Clearly, the position description indicates there are avenues to gaining entry into the field of recording engineer, other than obtaining a bachelor's degree in sound engineering as maintained by the petitioner. Further, the above discussion of possible useful degrees for those seeking careers as recording engineers does not indicate that these degrees must be at the baccalaureate level. As a result, the AAO will discount this portion of the evidence submitted by the petitioner in its efforts to meet the requirements of the second criterion.

On appeal, counsel also responds to the requirements of the second criterion, noting that CIS previously approved an H-1B visa for the beneficiary as a recording engineer at another studio, and that the director's denial of the instant petition is, therefore, contradictory. The AAO first notes that there is no evidence to indicate that the operations of the other recording studio or the duties of the position at that studio are parallel to the petitioner's business or proffered position. However, even if that were to be the case, the fact that CIS previously approved a petition for a similar position is not persuasive in establishing that the industry normally imposes a degree requirement, nor is it a basis for approving this petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)*(3)* and *(4)*: the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, in the instant case, the petitioner has provided no documentation concerning its previous employment of recording engineers. The AAO, therefore, turns to consideration of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has reviewed the duties of the proffered position, as described by the petitioner in its response to the director's request for evidence and by counsel on appeal.

In response to the director's request for evidence, the petitioner asserted that recording has become a sophisticated and complex venture because the technology used in the music business has become so advanced. It stated the position required a bachelor's degree in sound engineering because:

- the duties of the position required specialized and complex knowledge; and
- the position would involve numerous complex responsibilities such as management of a studio and detailed knowledge of analog and digital tracking and editing.

The petitioner further stated that the required level of computer and engineering skills demonstrated that the position was professional in nature and that its specialized skills could only be acquired through university studios and practical work experience.

On appeal, counsel responds to the director's finding that the proffered position failed to meet the requirements of the fourth criterion, stating that a recording engineer must interpret the theoretical and practical principles of mathematics, physics, and audio to fulfill the duties of the position, and that a lack of professional knowledge and critical interpretation of these tasks would be "fatal for the studio." The AAO notes both the petitioner's and counsel's statements regarding the complexity of the proffered position and the importance of the position in the successful operation of a recording studio. However, a review of the specific duties of the proffered position, as described by the petitioner in its response to the director's request for evidence, does not lead the AAO to conclude that they involve greater specialization or complexity than those performed by sound engineering technicians, as described in the *Handbook*. While the *Handbook* acknowledges the complex and highly technical nature of the jobs performed by sound engineering technicians, it clearly indicates that the minimum requirement for entry into the position is not a baccalaureate or higher degree, or its equivalent, as required for classification as a specialty occupation. As a result, the AAO concludes that the petitioner has failed to meet the requirements of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, 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.