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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 03 092 52861 Office: CALIFORNIA SERVICE CENTER Date: JAN 18 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.

for Michael T. Kelly
Robert P. Wiemann, Director
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 an academy that seeks to employ the beneficiary as an audio visual specialist. 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 brief.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 an audio visual specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company 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 designing and setting up audio, video, and related computer and electronic equipment for classroom instruction; training and supporting teachers in the use of the equipment for classroom instruction and presentations; designing and producing audio video training materials in computer and DVD-based formats for academic subjects; producing, editing, and presenting audio video materials for special events, performances, parent-teacher conferences, and after-school activities. The petitioner elaborated on the job duties in its response to the request for evidence. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in media/broadcast production or a related field.

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*) describes the duties of the proffered position as performed by broadcast and sound engineering technicians and radio operations, occupations that do not require a bachelor's degree. The director stated that none of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) were established by the petitioner.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that the beneficiary's duties are not tasks performed by a general equipment technician or operator given that the duties require theoretical and practical application of a body of highly specialized knowledge in audio and video engineering. Counsel explains that the selection and tuning of audio video equipment requires analysis of the equipment and its relationship to the sonic/lighting nature of the physical premises, theoretical knowledge about sound/light qualities, technical knowledge about recording and reproduction technologies and their compatibility, and knowledge about mixing down vocal sources to produce tapes, CDs, and DVDs. According to counsel, the beneficiary must possess theoretical knowledge in principles of light and sound, visual composition, media production, audio video engineering, and analog and digital technologies. Counsel emphasizes that the proffered position involves technical analysis and engineering design, which require a bachelor's degree. Counsel reports that in the past the petitioner required a bachelor's degree for the proffered position, and maintains that the degree requirement is common in parallel positions.

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 first considers 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)).

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 consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the *Handbook* discloses that the director correctly concluded that the duties of the proffered position are within the occupational classification of "broadcast and sound engineering technicians and radio operations," and that the occupations within this classification do not require a bachelor's degree. The *Handbook* indicates:

> 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, concert, play, musical recording, television show, or movie. With such a range of work, there are many specialized occupations within the field.
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> *Audio and video equipment technicians* set up and operate audio and video equipment, including microphones, sound speakers, video screens, projectors, video monitors, recording equipment, connecting wires and cables, sound and mixing boards, and related electronic equipment for concerts, sports events, meetings and conventions, presentations, and news conferences. They may also set up and operate associated spotlights and other custom lighting systems.
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> *Broadcast technicians* set up, operate, and maintain equipment that regulates the signal strength, clarity, and range of sounds and colors of radio or television broadcasts. They also operate control panels to select the source of the material. Technicians may switch from one camera or studio to another, from film to live programming, or from network to local programming.
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> *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.

Since the *Handbook* states that positions within the occupational classification of broadcast and sound engineering technicians and radio operations do not require a bachelor's degree, the petitioner cannot

establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, audio visual specialist.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel points to job postings. Yet, the postings do not establish the second criterion for a number of reasons. Either the organizations in the postings are in a different industry from the petitioner or the postings do not disclose the nature of the organizations. UJA Federation of New York is a non-profit dedicated to caring for those in need, strengthening Jewish Peoplehood, and fostering Jewish Renaissance in New York, Israel, and throughout the world. United Parcel Service (UPS) is in the delivery business. The nature of [redacted] and [redacted] is not revealed in the posting. Furthermore, the educational qualifications in the UPS posting differ significantly from the proffered position. The petitioner requires a bachelor's degree or its equivalent in media/broadcast production or a related field, whereas UPS requires a bachelor's degree in communications, journalism, English, PR, or telecommunications. Finally, given that the job duties of [redacted] teletraining producer entail guiding program development such as course selection, course material review, and performance measurement, the job duties are inconsistent with those of the proffered position. Based on these reasons, the petitioner cannot establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* discloses that the duties of the proffered position fall within the occupational classification of "broadcast and sound engineering technicians and radio operations," and that the jobs within this classification do not require a bachelor's degree.

Counsel's claim that the petitioner has a past practice of requiring a degree or its equivalent for the position is not convincing. Although the petitioner's March 27, 2003 letter stated that [redacted] a holder of a bachelor's degree, has been employed as the director of the Mass Media Department, the petitioner failed to indicate that M[redacted] degree is in a specific specialty. Furthermore, 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 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-

[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.

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 encompassed within the occupational classification of "broadcast and sound engineering technicians and radio operations," and that occupations within this classification do not require a bachelor's degree. Accordingly, the petitioner cannot establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that it normally requires a degree or its equivalent for the position.

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. The petitioner's February 12, 2003 letter stated that the beneficiary's duties:

> call for not only expert technical skills in setting up and operating audio video equipment, but all in-depth theoretical knowledge in sound, visual composition, media production, and the compatibility of various audio video recording/reproduction technologies.

As already discussed, the beneficiary's duties are performed by positions within the occupational classification of broadcast and sound engineering technicians and radio operations. Like the proffered position, these occupations would require the technical skills and knowledge as described in the February 12, 2003 letter. Again, because positions within the occupational classification of broadcast and sound engineering technicians and radio operations do not require a bachelor's degree, the petitioner cannot 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.

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.