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FILE: LIN 04 225 50586 Office: NEBRASKA SERVICE CENTER Date: **SEP 06 2006**

IN RE: Petitioner:
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:



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 Methodist church that seeks to employ the beneficiary as a music director. 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. Counsel submitted a timely 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) the 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) the 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. 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 the petitioner's undated letter that accompanied the Form I-129 petition, the beneficiary would perform duties that entail: planning and coordinating music and choir for traditional church holidays; teaching and directing children's and adult's choir; and teaching basic musical instrumentation. The petitioner's response to the request for evidence elaborated on the proposed duties. The petitioner seeks to continue the employment of the beneficiary who holds a bachelor's degree in music with a major in music education from a foreign institution.

The director stated that the proposed position resembles a music director as that occupation is described in the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* discloses that this occupation does not require a bachelor's degree. The director found the submitted job advertisement unpersuasive in establishing the offered position as a specialty occupation. According to the director, the petitioner did not establish a clear hiring pattern of requiring a four-year degree in the same discipline for the offered position. The petitioner did not document the previous employment of any previous music director, the director stated. The director concluded that the petitioner did not establish that the nature and complexity of its congregation's musical activities would require the music director to use "the theoretical and practical application of a body of highly specialized knowledge." The director stated that he was not required to approve the instant petition simply because of the approval of a similar petition filed by the petitioner on behalf of the beneficiary.

On appeal, counsel states that the submitted job advertisements show that churches seeking to employ music director positions require a college degree. Counsel contends that the petitioner normally requires a baccalaureate degree for the position and she submits evidence of a contract entered into between the petitioner and the prior employee who served as the music director, and the person's resume. Counsel also submits the resumes of applicants who applied for the position offered to the beneficiary.

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.

Counsel noted that CIS approved a similar petition that had been previously filed on behalf of the beneficiary by the petitioner. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Next, the AAO 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

The director correctly found that the proposed duties mirror those of a music director as that occupation is depicted in the *Handbook*. The *Handbook* describes a music director as follows:

Music directors conduct, direct, plan, and lead instrumental or vocal performances by musical groups, such as orchestras, choirs, and glee clubs. *Conductors* lead instrumental music groups, such as symphony orchestras, dance bands, show bands, and various popular ensembles. These leaders audition and select musicians, choose the music most appropriate for their talents and abilities, and direct rehearsals and performances. Choral directors lead choirs and glee clubs, sometimes working with a band or an orchestra conductor. Directors audition and select singers and lead them at rehearsals and performances to achieve harmony, rhythm, tempo, shading, and other desired musical effects.

The *Handbook* indicates that employers do not require a music director to possess a bachelor's degree in a specific specialty. It states:

Musicians need extensive and prolonged training and practice to acquire the necessary skills, knowledge, and ability to interpret music at a professional level. Like other artists, musicians and singers continually strive to stretch themselves—exploring different forms of 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. For university or conservatory study, an audition generally is necessary. The National Association of Schools of Music accredits more than 600 college-level programs in music. Courses typically include music 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.

Many colleges, universities, and music conservatories grant bachelor's or higher degrees in music. A master's or doctoral degree usually is required to teach advanced music courses in colleges and universities; a bachelor's degree may be sufficient to teach basic courses. A degree in music education qualifies graduates for a State certificate to teach music in public elementary or secondary schools. Musicians who do not meet public school music education requirements may teach in private schools and recreation associations or instruct individual students in private sessions.

Musicians must be knowledgeable about a broad range of musical styles but keenly aware of the form that interests them most. Having a broader range of interest, knowledge, and training can help expand employment opportunities and musical abilities. Voice training and private instrumental lessons, taken especially when the individual is young, also help develop technique and enhance one's performance.

The AAO's conclusion, based on the evidence of record and the *Handbook's* information, is that the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits job advertisements to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The job advertisement from United Methodist Church of Geneva indicates a requirement of a baccalaureate degree in the music field for a director of music position; the St. Mark's Episcopal Church advertisement seeks a music minister/organist with a bachelor's degree in music; and the First United Methodist Church of Bensenville states that the "ideal candidate(s) will possess a BA in [m]usic or equivalent experience." The AAO finds job advertisements from three churches are not a sufficient representative sample of the petitioner's industry; they are therefore inadequate to demonstrate an industry-wide requirement of a baccalaureate degree in music for a music director position. Further, the United Methodist Church of Geneva is a 500 member congregation and is dissimilar in size to the petitioner, a 180 member congregation. Thus, these advertisements do not establish that a degree requirement is common

to the industry in parallel positions among similar organizations. Consequently, the evidence of record fails to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. The *Handbook* reveals that the proposed position parallels that of a music director, which is an occupation that does not require a baccalaureate degree in a specific discipline such as music. The evidence of record does not show the offered position as having a complexity or uniqueness that would require a baccalaureate degree in music or a related field.

To establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner must show that it normally requires a degree or its equivalent for the position. Counsel submits resumes of applicants submitted in 1999 for the proposed position, and the resume of its prior music director and the contractual agreement entered into with that music director to establish this criterion. The petitioner did not submit evidence indicating the length of service provided by [REDACTED] the prior music director, although the contractual agreement between the petitioner and [REDACTED] was entered into in 1986. Thus, the AAO finds that the evidence of record is not sufficient to establish a historical pattern of normally requiring a degree for the offered position. As such, the petitioner fails to establish this criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must 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 evidence of record does not show that the nature of the proposed duties has a specialization and complexity that requires the knowledge associated with the attainment of a baccalaureate degree in music. Moreover, the position that is presented here corresponds to the *Handbook's* description of a music director, and the *Handbook* discloses that a music director is not required to possess a baccalaureate degree in music. Accordingly, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 on this ground.

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.