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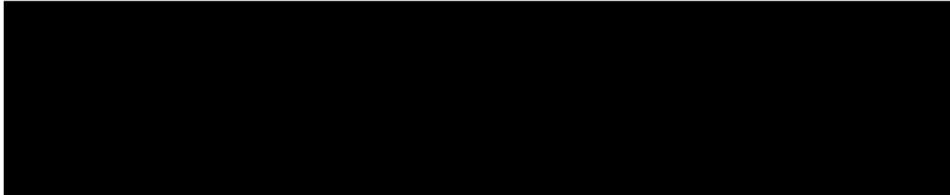


FILE: SRC 04 058 52719 Office: TEXAS SERVICE CENTER Date: AUG 14 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner provides music instruction and education. It seeks to employ the beneficiary as a piano teacher and recitalist. 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. The AAO affirmed the director's findings.

The director denied the petition because the petitioner had not demonstrated that a specialty occupation is available for the beneficiary.

In its April 25, 2005 decision, the AAO concurred with the director's finding that the petitioner had not demonstrated that a specialty occupation is available for the beneficiary.

On motion, counsel cites a district court decision and an unpublished AAO decision to state that music instructor and parish music director positions qualify as specialty occupations. Counsel also contends that the petitioner would not petition for a piano instructor and recitalist if it had no students to instruct. Counsel submits a letter from the petitioner's president who also contends that the petitioner would not petition for a piano instructor and recitalist if it did not need one.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's intent to deny; (3) counsel's response to the director's intent to deny; (4) the director's denial letter; (5) Form I-290B, with counsel's brief; (6) the AAO's decision to dismiss the appeal; and (7) the petitioner's motion to reopen. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 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.

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 seeks the beneficiary's services as a piano instructor and recitalist. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's December 20, 2003 letter in support of the petition; and counsel's January 7, 2004 response to the director's notice of intent to deny. As stated by the petitioner, the proposed duties are as follows:

Instruct individuals to play the piano in a private tutoring setting and organize and conduct recitals. Evaluate students' interests, aptitudes, temperament, and individual characteristics to determine suitability for studying piano. Play the piano to demonstrate musical scales, tones, and rhythm. Instruct students in music theory, harmony, score, sight-reading, composition, and music appreciation. Critique performances to identify errors and reinforce correct techniques. Meet with parents of student to resolve problems.

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 Department of Labor's (DOL) *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. Although a review of the *Handbook*, 2006-07 edition, finds that the occupation of a music teacher, in some instances, may qualify as a specialty occupation, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a private music teacher job.

In its *Handbook*, under the category of Musicians, Singers, and Related Workers, the DOL states as follows:

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.

In this case, the petitioner is a private, unaccredited music school with one employee and a projected gross annual income of \$100,000. Although the petitioner's president asserts on motion that the petitioner has private piano students as well as piano students at a parochial school, a church, a dance and music studio, and two school districts, he does not provide any evidence in support of these assertions, such as letters from official representatives of the schools where the music instruction is to take place. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, the petitioner is not a public school or a university, but a private school; the *Handbook* does not indicate that a baccalaureate degree or higher degree is normally the minimum requirement for entry into the position of piano teacher at a non-public school. Counsel also asks on motion: "Why would [the petitioner] petition for a Piano Instructor and Recitalist if it had no students to instruct?" However, counsel again fails to provide documentary evidence to substantiate petitioner's number of students, if any. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel previously submitted a study conducted by SDR Educational Consultants to show that the position of piano instructor/recitalist is a specialty occupation. The focus of the study is a listing of accredited U.S. university institutions that award baccalaureate-level degrees in the field of music. The AAO cannot assume, however, that the training that the baccalaureate programs provide is solely related to the alleged complexity of the proffered position. The study rendered by the consultant reveals nothing about the proffered position and the actual work that the beneficiary would perform within the context of this particular petitioner's business. The author does not discuss the petitioner's particular business operations or relate her personal observations of those operations or of the work that the beneficiary would perform. Thus, the AAO cannot determine from this study that the proffered position is a specialty occupation. The petitioner has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, counsel references a district court decision and a prior AAO decision. A review of the prior AAO decision reflects that the petitioner was a church and the proffered position the church's music director. The proposed duties entailed planning and directing the activities of the music department personnel, providing piano and other music instruction, directing recitals, conducting musicians and the choir, and selecting music suitable for religious services. The petitioner has not demonstrated that the responsibility for the music teacher and recitalist depicted in the record is parallel to the responsibility associated with the music director described in the prior AAO decision. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The AAO also notes counsel's reference to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1998). The beneficiary in the cited decision was the church accompanist, choir director, and piano teacher. Again, the petitioner has not demonstrated that the responsibility for the music teacher and recitalist depicted in the record is parallel to the responsibility associated with the music director described in the district court decision. Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent only to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. Thus, the petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. As counsel does not address this issue on motion, it will not be discussed further. The evidence of record does not establish 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. Again, the petitioner's general description the duties of the proffered position cannot establish that the proffered position's duties are 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 previously observed, the description of the petitioner's proffered position is insufficient to establish that the proposed duties correspond to a position that is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not provided evidence that the position as described would require the beneficiary to perform specialized or complex tasks beyond that of a typical private piano teacher. There is insufficient information in the record to demonstrate that the beneficiary's duties as they relate to the petitioner's specific business operations would require knowledge associated with the attainment of a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 previous decision of the AAO, dated April 25, 2005, is affirmed. The petition is denied.