



U.S. Citizenship
and Immigration
Services

APR 12 2010
VERMONT SERVICE CENTER
MONTPELIER, VT

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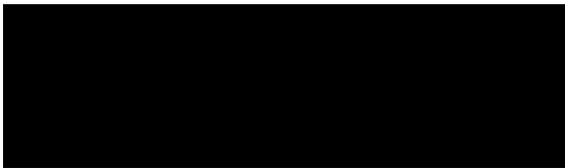
FILE: EAC 03 183 54149 Office: VERMONT SERVICE CENTER

Date: APR 12 2010

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:



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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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

Cc: [Redacted]

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The attorney of record in this petition is Christopher W. Drinan of the Law Office of John K. Dvorak, P.C., who filed a Notice of Entry of Appearance (Form G-28) with the petition. The appeal was filed by Thomas V. Massucci, Esq. without the required Notice of Entry of Appearance. All representations will be considered, but the AAO's decision on the appeal will be sent to Christopher W. Drinan, the attorney of record. A copy will be sent to Thomas Massucci.

The petitioner provides a variety of audio and visual engineering, recording, and production services. It seeks to employ the beneficiary as a digital audio engineer and to classify her 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 on the ground that the record failed to establish that the proffered position qualifies as a specialty occupation.

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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and accompanying documentation the petitioner described itself as an employee-owned business founded in 1973, with over 450 employees, that provides products and services in a wide range of technical disciplines including film, video and audio production, military systems engineering, computer software, and military/corporate war-gaming. The petitioner indicated that it was seeking to employ the beneficiary as a digital audio engineer to work in its audio restoration division. According to counsel the minimum educational qualification for the position is a bachelor's degree in audio engineering, music production, or the equivalent. The record indicates that the beneficiary graduated from the Berklee College of Music in Boston on December 20, 2002 with a professional diploma in music synthesis. The director of the petitioner's audio restoration division also submitted a letter stating that the beneficiary's diploma qualified her to perform the duties of the job. In response to the RFE the petitioner submitted additional documentation which was primarily designed to show that other companies hiring audio engineers required baccalaureate degrees for the position.

The director determined that the proffered position did not meet any of the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director found that the digital audio engineer position fit within the occupational category of broadcast and sound engineering technicians, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and that information in the *Handbook* did not substantiate the petitioner's assertion that a baccalaureate degree in a related field was required for entry into such positions. The petitioner submitted job postings for audio engineer positions by other employers which, as the director noted, did not show that a baccalaureate or higher degree was common to the industry in parallel positions. In addition, the petitioner submitted website information on a company similar to the petitioner which included biographies of its mastering engineers indicating that a majority of those individuals did not have a baccalaureate degree in a specific job-related specialty. Though requested to submit evidence of the educational credentials of any individuals currently or previously employed in the proffered position, the petitioner did not submit any evidence of this nature. Nor did the record establish, in the director's view, that the duties of the proffered position were so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

On appeal the petitioner asserts that the director erred in categorizing the proffered position under the *Handbook's* occupational entry for broadcast and sound engineering technicians. The petitioner contends that the position does not fall under that occupational category because it requires not only technical expertise and training in audio engineering, but also advanced musical knowledge and training, as well as specialized knowledge of music production and engineering. A more accurate title for the position would

be music and audio restoration expert, the petitioner explains, which is not a recognized occupational category in the *Handbook*. While acknowledging that some of the duties of the proffered position are reflected in the *Handbook*'s description of broadcast and sound engineering technicians, insofar as both use applied technology, the petitioner asserts that a degree in music is also required for the position, as well as advanced understanding of musical style and content. According to the petitioner, the duties of the position are so specialized and complex that baccalaureate level knowledge is required to perform them, thereby qualifying the position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The beneficiary's education at Berklee College of Music and diploma in music synthesis, the petitioner asserts, qualify her to perform the services of the specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook*, *supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*'s occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

In describing the broad occupational field of "broadcast and sound engineering technicians and radio operators," the *Handbook* states the following:

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.

Handbook, 2004-05 edition, at 258. The specialized occupations most similar to the proffered position in this case are described as follows:

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, such as the illusions of a bolt of lightning or a police siren. *Sound mixers* or *rerecording mixers* produce the soundtrack of a movie or television program. After filming or recording is complete, they may use a process called "dubbing" to insert sounds.

Id. at 259. As for the education and training required, the *Handbook* indicates broadly that:

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

Audio and video equipment technicians generally need a high school diploma. Many recent entrants have a community college degree or various other forms of postsecondary degrees, although that is not always a requirement. They may substitute on-the-job training for formal education requirements

Id. at 260. Thus, it is clear from the *Handbook* that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a sound engineering technician position. It is possible to enter the occupation with a combination of high school, technical school and/or a sub-baccalaureate level of college education, or to simply learn the skills of the trade through on-the-job experience. Accordingly, a sound engineering technician or recording engineer does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner argues that the musical knowledge, training, and engineering know-how required by the proffered position makes it more than a sound engineering technician or recording engineer as described in the *Handbook*. On appeal the petitioner has submitted an excerpt from a company brochure (Exhibit 1) and a letter from its president and CEO to Boston University describing the company's audio restoration capabilities (Exhibit 2), and two undated, unsigned statements on company letterhead, one describing the new audio restoration group, headed by the former chairman of the music production and engineering department at the Berklee School of Music (Exhibit 3), and the other describing the duties of the position proffered to the beneficiary (Exhibit 4). As described in Exhibits 3 and 4:

[The petitioner], a \$65 million/year company, will be capitalizing on its 30+ year history of excellence in audio analysis and production Although much of the work of audio restoration relies on a vast array of technology and specialized equipment, the essence of the work depends on the training, initiative and subjective judgment of the engineers performing the work. In recent years, a number of existing institutions of higher education have added music technology programs to their course offerings. An additional number of "trade schools" have emerged Ultimately the success of any enterprise in this rapidly expanding area of technology demands that prospective employers evaluate a combination of educational preparation and the unique personal combination of a production engineer to strike a delicate balance between art and science

[The beneficiary] will have a wide variety of responsibilities in her position as an audio restoration engineer She will evaluate the condition and appropriate reclamation techniques for the client's media. In the case of discs this could include the meticulous and compound sensitive cleaning of discs, repairs of cracks or breaks, microscopic inspection of groove wear and selection of reproduction cartridge and tracking settings. With recorded tape, binding and compounds will be inspected for presence and degree of moisture content, a common problem with older recordings. The correct heating interval and vacuum setting must be calculated and the tape desiccated in this manner. Some of the audio reclamation process takes place while the recording is still in the analog format. This requires the use of analog equalizers, compressors, limiters and expanders.

Once the restored analog recording can be played it is transferred into the digital domain using dedicated computer and software systems. Significant technical education and hours of hands-on experience are required to master the full capabilities of these systems. Digital signal processing techniques are powerful tools for editing and improving the sonic qualities of a recording. There are, however, several platforms and operating systems and a large number of "plug-ins" or software additions that must be learned and a feel created for their suitability. When the original program is spoken word, an inherent sense of phrasing, timing and vocal timbre is necessary to insure that any manipulation remains invisible. In the case of [a] musical program, considerable musical training and experience is needed to guarantee seamless transitions rhythmically during the editing process, a trained ear for pitch and appropriate tonal characteristics of all instruments, and in the case of edits needed to mask missing material or un-repairable program, an interpretive and confident interpretation and understanding of the musical style and content is necessary to a satisfactory outcome.

The foregoing documentation does not indicate that a baccalaureate degree in a specific specialty is a minimum requirement for the proffered position. According to Exhibit 3, "trade schools" are one educational vehicle for learning music technology. Exhibit 3 also discusses an employer's need to weigh an individual's combination of educational preparation and production engineering experience in evaluating suitability for a position as audio restoration engineer. This language does not establish that the position requires a degree in a specific specialty. After describing the duties of the position, of which music restoration is a part, Exhibit 4 states that considerable music training and experience is needed. That language does not establish that a baccalaureate degree in a music-related specialty is required for the position, since music training and experience is acquired in a variety of ways. The AAO also notes that Exhibits 3 and 4 are both undated and unsigned, and the petitioner has not identified their author. Thus, it is impossible to determine whether the descriptions of the petitioner's audio restoration activities and the duties of the proffered position were written by an authorized representative of the company. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972). For the reasons discussed above, the record does not establish that a baccalaureate or higher degree in a specific specialty is the normal minimum requirement for entry into the position. Accordingly, the position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, the petitioner has submitted no further evidence on appeal, and the record does not establish, that a degree requirement is common to the industry in parallel positions among similar organizations. Nor does the record establish that the proffered position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty. Accordingly, the position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, there is no evidence in the record that the petitioner normally requires a bachelor's degree in a specific specialty for the proffered position, as

required to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In the RFE the director advised the petitioner to indicate how many individuals it had employed in the position in the previous two years, to furnish employment records for those individuals, and to submit documentary evidence of the educational requirements for the position, such as job announcements and the employees' college diplomas or transcripts. The petitioner did not respond to this part of the RFE and has furnished no evidence on appeal that it normally requires a bachelor's degree in a specific specialty for the proffered position.

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The record reflects that the duties of the position could be performed by an individual with a musical background and work experience in music and audio restoration that does not involve the attainment of baccalaureate-level knowledge in a specific specialty.

Thus, the proffered position does not meet any of the qualifying criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.