

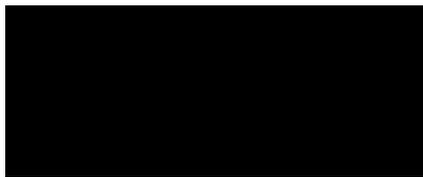


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FILE: EAC 04 018 52244 Office: VERMONT SERVICE CENTER Date: AUG 19 2005

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:
[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 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, a recording studio and sound reinforcement provider, seeks to employ the beneficiary as an assistant sound engineer. The petitioner therefore filed this H-1B petition in order 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 on two separate and independent grounds, namely, that the petitioner (1) did not establish that the proffered position is a specialty occupation, and (2) had failed to submit a Student and Exchange Visitor Information System (SEVIS) Form I-20 as requested in the director's request for additional evidence (RFE).

At the outset, the AAO notes that it does not have jurisdiction over the issue of the petitioner's failure to produce a SEVIS Form I-20. While the record is not clear that the director found the beneficiary not eligible for an extension of stay based on his failure to produce the Form I-20, the regulation at 8 C.F.R. § 214.1(c)(5) states that there is no appeal from the denial of an application for extension of stay filed on Form I-129. Accordingly, the AAO shall not address the SEVIS Form I-20 that the petitioner has submitted on appeal.

The director's decision to deny the petition on the specialty occupation issue was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the RFE; (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and counsel's December 30, 2003 letter on appeal with these enclosures: printouts from the Powerhouse Studio Internet site; and an Audio Engineering Society (AES) publication AESWP-1001, a white paper on a technology report dealing with the use of Internet 2 and next-generation internet capabilities for transmitting music and professional audio.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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. (Italics added.)

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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On the Form I-129 (Petition for Nonimmigrant Worker), the petitioner described the proposed duties as “Set-up and breakdown of recording sessions, engineering and mixing projects, and maintenance of equipment of facility.”

The petitioner's document entitled "Wellspring Sound Job Description for [the Beneficiary]," which accompanied the Form I-129, described the skills and resources required for the proffered position as follows:

1. knowledge of proper microphone choice and placement for all acoustic and electric instruments. Real world experience and college study are essential for this.
2. ability to mix down multitrack recordings into aesthetically-pleasing final mixes suitable for professional mastering.
3. basic knowledge of electronic circuits and ability to troubleshoot simple electronic problems related to signal flow, ground hums and unwanted audio distortion.
4. the ability to step [up] and fill the role of chief engineer on an as-needed or emergency basis.

The petitioner's "additional job description" provided in its response to the RFE asserted that the proffered position requires the following: familiarity with sound recording technologies; knowledge of music project management; basic knowledge of computer hardware, software (such as PRO TOOLS and DIGITAL PERFORMER, for popular music), real-time interfacing, optimizing computer performance, and upgrading audio software as needed; skill and knowledge of college-level computing theory focused on digital sound production: computer generated sound sources and devices, algorithmic composition, digital signal processing, programming, and digital sound distribution/storing/archiving; college-level knowledge of electronic and electrical circuit theory sufficient to diagnose equipment problems and cure them by replacing the defective parts; knowledge of designing electronic circuits; full understanding of college-level audio theory: principles and operating specifications of the major components of a modern recording studio, such as multi-track recorders, mixing consoles, monitoring systems, and signal processing equipment; critical listening ability sufficient to generate an aesthetically-pleasing audio mix; full understanding of the college-level physics of sound waves and its application to microphone technique; the skill of building a better relationship with clients; college-level knowledge of music theory in order to provide clients with appropriate advice on their performances. The petitioner closes the additional job description with this assertion:

As computer production technology is advancing very rapidly, particularly with computer application, the position demands a college-level knowledge and skill focused on music theory, recording theory, and computer theory.

For the following reasons, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹ To the extent that it is described in the record, the proffered position comports with the sound engineering technician occupation as discussed in the 2004-2005 *Handbook's* section on Broadcast and Sound Engineering Technicians and Radio Operators, at pages 258-261. As evident in the following excerpt from pages 259 and 260, the *Handbook* indicates that the sound engineering technician occupation does not have an entry-level requirement of at least a bachelor's degree, or the equivalent, in a specific specialty.

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. In the motion picture industry, people are hired as apprentice editorial assistants and work their way up to more skilled jobs. Employers in the motion picture industry usually hire experienced freelance technicians on a picture-by-picture basis. Reputation and determination are important in getting jobs.

Beginners learn skills on the job from experienced technicians and supervisors. They often begin their careers in small stations and, once experienced, move on to larger ones. Large stations usually hire only technicians with experience. Many employers pay tuition and expenses for courses or seminars to help technicians keep abreast of developments in the field.

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. Working in a studio, as an assistant, is a great way of gaining experience and knowledge.

The evidence of record does not rebut or refute the DOL information. Neither counsel nor the petitioner provide documentary or testimonial evidence to substantiate the claim that the proffered position is one for which the minimal entry-level requirement is at least a bachelor's degree in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes 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)). 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).

The petitioner's reference to the *Dictionary of Occupational Titles (DOT)* comments on the sound mixer occupation is not persuasive. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/.

equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. 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 would require. By the DOT's own terms, the SVP 7 rating upon which the petitioner relies does not equate to a bachelor's-degree-requirement or any specific major or academic concentration.

The Internet printout regarding the Sound Recording Technology program at the University of Massachusetts Lowell does not state or establish that the type of position proffered here requires at least a bachelor's degree or its equivalent in a specific specialty. The Powerhouse Studio materials, the petitioner's Internet site printouts, and the AES white paper neither establish nor address the educational requirements of the proffered position.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted attestations from other persons, firms, or a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty.

As the petitioner has not presented a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy

the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). To the extent that they are described in the record, the proffered position and its duties are not characterized by any uniqueness, complexity, or specialization that would distinguish them from the sound engineer technician positions for which the *DOL's Handbook* indicates no need for a bachelor's degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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