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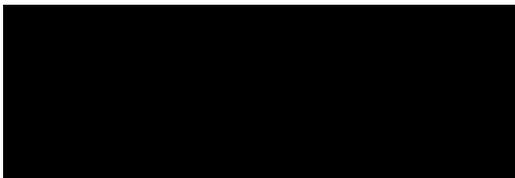


FILE: WAC 04 014 52115 Office: CALIFORNIA SERVICE CENTER Date: AUG 06 2005

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:



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 is a religious organization and seeks to employ the beneficiary as a music director. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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 the Form I-290B.

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) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) counsel'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 a music director. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail directing the choir, organist and the pianist during rehearsals, church performances and at worship services; meeting frequently with the senior pastor to select appropriate hymns for the message presented during service; attending rehearsal meetings, choir practices, and church leader meetings; selecting hymnal pieces for church performances, retreats and other fellowship activities. The petitioner indicated that the position requires a bachelor's degree or equivalent in music or a related field.

The director requested additional information about the proffered position. Counsel for the petitioner responded and indicated that the percentage of time to be spent on each duty is as follows: research, discussions and selection of the musical pieces (1/4 of the time); rehearsals (1/2 of time); and actual performance during worship service (1/4 of the time).

The director determined that the proffered position was not a specialty occupation. The director found that the duties of the position as described by the petitioner reflect those of a music director. The director noted that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicated that the position of music director is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, industry wide minimum for entry into the occupation. The director stated that the evidence submitted is insufficient to establish that the position being offered requires the attainment of a baccalaureate or higher degree or its equivalent and is normally the minimum requirement for entry into the particular position; the degree requirement is common to the industry in parallel positions among similar organizations; or that the position is so complex or unique that it can be performed only by an individual with a degree; or that the employer normally requires a degree or its equivalent for the position; or that 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.

On appeal, counsel states that the petitioner has submitted enough evidence to establish that the proffered position is a specialty occupation. Counsel explains that since the *Handbook* places the occupation music director under the heading musicians, singers and related workers, "the section is not as helpful as the relevant section found in [*Occupation Information Network*] in determining the requirement for a bachelor's degree." Counsel contends that the petitioner submitted evidence to establish that hiring a person with a minimum of a bachelor's degree is a common requirement for the petitioner as well as other employers with a similar income.

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 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 refers to the *Handbook* for the duties of particular occupations and the education, training, and experience normally required to enter into and advance within the occupations.

The *Handbook* discloses that the beneficiary's duties are encompassed within the occupational classification entitled "musicians, singers, and related workers." The beneficiary will direct the choir. According to the *Handbook*, music directors conduct, direct, plan, and lead instrumental or vocal performances by musical groups, such as orchestras, choirs, and glee clubs. Choral directors lead choirs and glee clubs, sometimes working with a band or an orchestra conductor. As noted in the *Handbook*, directors audition and select singers and lead them at rehearsals and performances in order to achieve harmony, rhythm, tempo, shading, and other desired musical effects. This is similar to the proffered position in that the duties include: directing the choir, organist and the pianist during rehearsals, church performances and at worship services; meeting frequently with the senior pastor to select appropriate hymns for the message presented during service; attending rehearsal meetings, choir practices, and church leader meetings; selecting hymnal pieces for church performances, retreats and other fellowship activities.

According to the *Handbook*, employers do not require a baccalaureate degree for this occupational classification; it indicates:

Musicians need extensive and prolonged training to acquire the necessary skills, knowledge, and ability to interpret 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. . . . The National Association of Schools of Music accredits nearly 600 college-level programs in music. Courses typically include musical 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 is usually 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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the music director position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel submitted the following documents: a receipts and expense statement from a different religious organization, an R-1 approval notice and a university degree.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. An R-1 visa is for a religious worker and is different than an H-1B specialty occupation nonimmigrant visa. Consequently, these documents fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position. Counsel asserted that the petitioner has previously required a bachelor's degree is a specific specialty for the proffered position. In support of his assertion, counsel submitted two degrees for a second individual as well as copies of two checks made payable to the same individual. The AAO notes that these two checks indicate an address different than the petitioner's address listed on the Form I-129, and there is no evidence that these are payroll checks. The evidence submitted is insufficient to establish that the petitioner normally requires a specific degree or its equivalent for the position. 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 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. To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties parallel those in the *Handbook* for a music director, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

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.