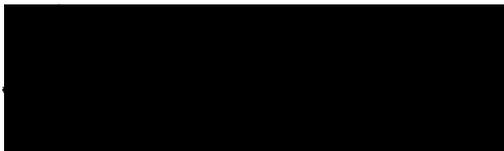


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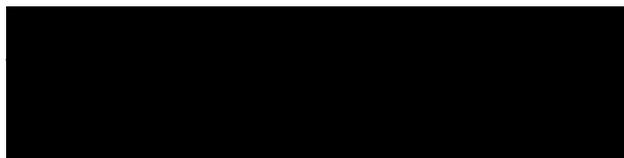
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FILE: WAC 03 015 54971 Office: CALIFORNIA SERVICE CENTER Date: **AUG 10 2008**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director 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 private music instruction school that seeks to employ the beneficiary as a music teacher. 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 on the basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(1) of the Immigration and Nationality Act (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 proposed position.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the petitioner’s RFE response and supporting documentation; (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 a private music instruction school with five employees. It proposes to hire the beneficiary as a music teacher. In the letter of support submitted with the I-129 filing, the petitioner described the duties of the proposed position as follows:

Under direct supervision of the Director, [the beneficiary] will teach students, in both individual and group settings, instrumental lessons in piano and music history and theory. He will plan class lessons based on a teaching outline prepared for a course of study to meet curriculum requirements. He will evaluate students' interests, aptitude, temperament, and individual characteristics to effectively instruct students. He will play the piano to demonstrate musical scales, tones, and rhythm. He will instruct students in music theory, harmony, score and sight reading, composition, music appreciation, and provide individual and group instrumental lessons using technical knowledge, aesthetic appreciation, [and] prescribed teaching techniques. Through the assistance of a specialized computer program, Mr. Concepcion will also train students to develop their 'musical ear' – to distinguish aurally various piano tones, which will improve students' piano performance and understanding of music composition. Furthermore, he will critique performance to identify errors and reinforce correct techniques. Additionally, he will meet with parents of students to discuss student progress, and address suggestions for improvement.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established the proposed position as a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation. Counsel contends that the proposed position qualifies as a specialty occupation under each of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As a preliminary matter, the AAO accepts the petitioner's contention that state licensure is not required in order to teach at a private school.

In determining whether a proposed 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 *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In its discussion of the educational requirements for musicians, the 2004-05 edition of the *Handbook* states the following:

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.

Counsel contends that this language, when taken together with the *Handbook's* discussion of the duties and educational qualifications of teachers, means that music teachers at private schools are required to possess bachelor's degrees, but not state licensure.

However, such an interpretation ignores the clear language of the quoted paragraph. The *Handbook* explains unequivocally that a bachelor's degree is not the normal minimum requirement for entry into the proposed position, and its findings do not support the assertion that a bachelor's degree is required for entry. The *Handbook* states clearly that a degree is required to teach music at a public school. If a candidate has not acquired such a degree, he or she may not teach at a public school, but may do so at a private school.

Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. On appeal, counsel submits printouts from the websites of the Music Teachers' Association of California, the Music Teachers' National Association, and PianoTeachers.com to support the contention that the proposed position qualifies as a specialty occupation under this prong. Counsel, however has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

None of the three internet printouts can be considered to be from an organization similar to the petitioner. The Music Teachers' Association of California and the Music Teachers' National Association are professional organizations of music teachers. Pianoteachers.com is a website that allows potential piano students to search for piano teachers in a given area. While the AAO does not dispute that a degree is required for membership in these three organizations, none of them are private music instruction schools and therefore cannot be considered to be parallel organizations to the petitioner. Moreover, there has been no showing that any of these organizations employ piano teachers directly.

Nor can counsel's submission of the resumes of four members of PianoTeachers.com establish the petitioner's degree requirement as an industry norm. No evidence has been submitted to document that any of these four individuals are employed by organizations similar to the petitioner.

Finally, counsel's assertions with regard to the hiring practices of similar organizations does not establish the petitioner's degree requirement as an industry norm. The assertions of counsel, in the absence of supporting documentation, do not constitute evidence and so do not meet the petitioner's burden of proof in this proceeding. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

Thus, the position does not qualify under the first prong of the second criterion.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. The evidence does not establish that the proposed position is substantially different from other music teacher

positions at private music schools and, as indicated in the discussion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) above, the petitioner has not established that such positions require at least a baccalaureate degree in a specific specialty.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

The director requested additional evidence in the RFE that would have allowed the petitioner to satisfy this criterion. In response, previous counsel submitted two job postings from the petitioner indicating that a successful candidate for the proposed position would possess a baccalaureate or higher degree. However, these postings alone do not prove that the petitioner normally requires a degree for the position.

On appeal, the petitioner again fails to submit copies of current employees' diplomas. Counsel points out that the petitioner has repeatedly stated that the school's director holds a bachelor's degree. While this may be true, there is no way for the AAO to verify this, as there is no copy of his degree in the record. The director requested copies of current employees' diplomas, but the petitioner failed to submit them. 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)).

The AAO notes that while the petition does indicate that the school's director teaches music lessons in addition to his role as director, this would not detract from his managerial and supervisory duties. The beneficiary would not perform such duties. Thus, the school director's position cannot be considered analogous to the proposed position for the purpose of meeting this criterion, so whether the director possesses a degree or not would not be determinative.

No information has been submitted to establish that any of the other music teachers possess degrees, nor does the job posting indicate that the petitioner has required past music teachers to possess a degree.

Therefore, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty occupation.

On appeal, counsel contends that the proposed position qualifies as a specialty occupation under this criterion, and states the following:

As stated in the job description previously provide [sic], the Music Teacher instructs students in music theory, harmony, score and sight reading, composition, and music appreciation. He assists in completing the student performance appraisals in preparing

the students for yearly examinations to reach the subsequent skill level in piano performance and theory.

However, a reading of these duties does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of music teachers in other, similar organizations. As stated in the *Handbook*, music teachers in private schools are not required to have a degree in a specific specialty. The petitioner has not distinguished the job duties of its proposed employment from music teachers at other private schools or otherwise proved a degree requirement for the position. Thus, the proposed position does not qualify as a specialty occupation under the fourth criterion.

Finally, counsel cites the Act and a previous court decision to support the contention that the proposed position qualifies as a specialty occupation.

However, counsel's citations are misplaced. Section 101(a)(32) of the Act, which is cited by counsel, defines certain occupations as "professional" in nature. However, it does not define them as specialty occupations, which is defined in section 214(i) of the Act, 8 U.S.C. § 1184(i). While the terms "professional" and "specialty occupation" are similar, they are not synonymous.

Counsel's citation of *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1988) is similarly misplaced. *Full Gospel Portland Church* was not a case involving H-1B temporary employment. Rather, it involved an immigrant visa case for permanent employment. The decision dealt with membership in the professions, not membership in a specialty occupation. Again, while the terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act, 8 U.S.C. § 1184(i).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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 appeal is dismissed. The petition is denied.