

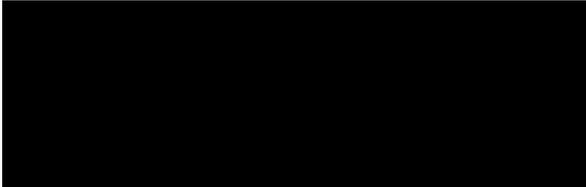


U.S. Citizenship
and Immigration
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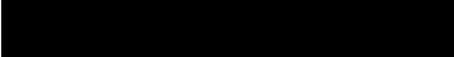
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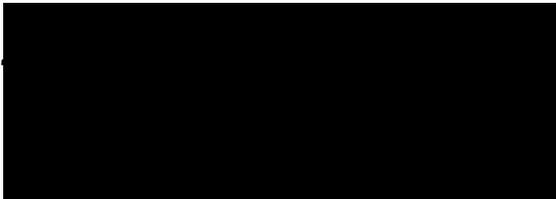


FILE: WAC 03 052 54555 Office: CALIFORNIA SERVICE CENTER Date: JUN 06 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the California Service Center on December 12, 2002. On August 16, 2004, a Notice of Intent to Revoke (NOIR) was served on the petitioner by mailing a copy of same to the petitioner's attorney. That notice set forth the grounds for revocation of the petitioner's Form I-129 petition, and informed the petitioner that it had 30 days in which to respond to the NOIR. The petitioner responded to the NOIR by correspondence dated September 8, 2004. On October 21, 2004 the director revoked approval of the Form I-129 petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The revocation will be affirmed.

The petitioner is a non-profit organization engaged in writing and producing Chinese Christian music. It seeks to employ the beneficiary as a musician (instrumental), and endeavors to classify him 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).

After reviewing the record, the director found that the offered position did not qualify as a specialty occupation under section 101(a)(15)(H)(i)(b) of the Act, and that the position is within the nonimmigrant classification of an alien who has extraordinary ability or performs as an artist or entertainer, which are found within sections 101(a)(15)(O)(i) and 101(a)(15)(P)(ii)(I) of the Act, respectively. For this reason, the director revoked approval of the petition.

The regulation at 8 U.S.C. § 214.2(h)(11) concerning the revocation of approval of a petition is as follows:

(11) *Revocation of approval of petition*—(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

(2) The statement of facts contained in the petition was not true and correct; or

(3) The petitioner violated terms and conditions of the approved petition; or

(4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The director stated in his notice of intent to revoke and in the revocation that the position of a performing violinist does not meet the requirements of a specialty occupation. The AAO agrees and finds that the revocation was appropriate in that the petition's approval did not meet the requirements of 8 C.F.R. § 214.2(h).

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 which is in a specific specialty that is directly related to the proffered position.

The petitioner seeks to employ the beneficiary as a musician (instrumental). In this capacity, under the direction and supervision of the music producer, the beneficiary would:

- Apply knowledge in music fundamentals and instrumental performance to play the violin as a soloist, accompanist, or member of an ensemble in concerts and workshops;
- Read and study music and the composer's intended style and message for the music;
- Rehearse music with the conductor, singer(s), and/or other instrumental musicians in order to learn and interpret music in an effective and appropriate manner so as to achieve the desired purpose, and carry the specific message(s) across to listeners and create an impact on them;
- At the conductor's instruction, transpose music to play it in different keys and occasionally improvise music at live performances;
- Work closely with the producer to create the musical background (with the violin) for the pre-existing melody of music so as to set off the original melody by the background in an effective manner.

Pursuant to 8 C.F.R. § 214.2(h)(11)(B)(iii)(5), the director may revoke an H-1B petition if approval of the petition violated paragraph (h) of 8 C.F.R. § 214.2, or involved gross error. In this instance, the AAO finds that approval of the petition was in violation of paragraph (h) of the cited regulation in that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The following discussion elaborates on the AAO's conclusion.

To qualify as a specialty occupation at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) or (2), the petitioner must establish that 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 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook* (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.

On appeal, counsel refers to the *Handbook*, the *Dictionary of Occupational Titles (DOT)*, the *Occupational Information Network* (the *O*Net*), and the Occupational Employment Statistics (OES) wage survey to show

that the offered position qualifies as a specialty occupation. The *DOT*, the *O*Net*, and the OES wage survey are not persuasive sources of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its 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 specify the particular type of degree, if any, that a position would require. For this reason, the director did not err in discounting the information from the *DOT*, the *O*Net*, and the OES wage survey.

The *Handbook*, however, is a resource that the AAO routinely refers to in order to determine the duties of particular occupations and the education, training, and experience normally required to enter into and advance within occupations. The *Handbook* discloses that the beneficiary's duties are within the occupational classification entitled "musicians, singers, and related workers." The *Handbook* states the following about this classification:

Musicians, singers, and related workers play musical instruments, sing, compose or arrange music, or conduct groups in instrumental or vocal performances. They may perform solo or as part of a group. Musicians, singers, and related workers entertain live audiences in nightclubs, concert halls, and theaters featuring opera, musical theater, or dance. Many of these entertainers play for live audiences; others perform exclusively for recording or production studios. Regardless of the setting, musicians, singers, and related workers spend considerable time practicing, alone and with their bands, orchestras, or other musical ensembles.

Musicians often gain their reputation or professional standing by exhibiting a high level of professionalism and proficiency in a particular kind of music or performance. However, those who learn several related instruments and who can perform equally well in several musical styles have better employment opportunities. Instrumental musicians, for example, may play in a symphony orchestra, rock group, or jazz combo one night, appear in another ensemble the next, and work in a studio band the following day. Some play a variety of string, brass, woodwind, or percussion instruments or electronic synthesizers.

...

Arrangers transcribe and adapt musical compositions to a particular style for orchestras, bands, choral groups, or individuals. Components of music—including tempo, volume, and the mix of instruments needed—are arranged to express the composer's message. While some arrangers write directly into a musical composition, others use computer software to make changes.

All of the beneficiary's duties, such as playing the violin, interpreting and transposing music, and working with the producer to create a musical background, fall within the *Handbook's* classification of musicians and arrangers.

According to the *Handbook*, employers do not require a baccalaureate degree in a specific academic field for musicians, singers, and related workers. It reports:

Musicians need extensive and prolonged training to acquire the necessary skills, knowledge, and ability to interpret music at a professional level. 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 more than 600 college-level programs in music. Courses typically include music 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 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.

The excerpt from the *Handbook* reveals that a baccalaureate degree is not required for a position such as a musician and arranger within the occupational classification "musicians, singers, and related workers." Thus, the AAO disagrees with counsel's assertion that the *Handbook* supports the petitioner's assertion that the offered position qualifies as a specialty occupation. Consequently, the petitioner fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

No evidence establishes that a specific degree requirement is common to the industry in parallel positions among organizations that are similar to the petitioner; or alternately, shows that the proposed position is so complex or unique that it can be performed only by an individual with a degree, which is the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Again, the proposed duties are performed by musicians and arrangers, occupations that the *Handbook* reveals do not require a baccalaureate degree in a specific specialty.

No evidence establishes that the petitioner normally requires a degree or its equivalent for the position, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires the petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to such duties is usually associated with the attainment of a baccalaureate or higher degree. Based on the *Handbook's* information, the duties of the proposed position are performed by musicians and arrangers, which are occupations that do not require a bachelor's degree in a specific specialty. As such, the petitioner fails to establish this last criterion.

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A), and the petitioner has failed to overcome the grounds of the director's revocation. The director's decision shall, therefore, not be disturbed.

Although the petitioner suggests that their rights to procedural due process were violated, they have not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The respondents have fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

The director stated that the offered position is encompassed within the nonimmigrant classification of an alien who has extraordinary ability or performs as an artist or entertainer, which are defined within sections 101(a)(15)(O)(i) and 101(a)(15)(P)(ii)(I) of the Act, respectively. Categorization of the offered position in those classifications is not before the AAO in this proceeding.

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 revoked.