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20 Mass. Ave. N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: WAC 04 212 51561 Office: CALIFORNIA SERVICE CENTER Date: **MAY 24 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 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, a nonprofit organization that makes and produces Christian music, seeks to employ the beneficiary as an instrumental musician. 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation, including the appellate briefs of September 2, 2004 and December 7, 2004. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

As a preliminary matter, the AAO notes that the beneficiary, not an authorized representative of the petitioner, signed the Form G-28, Notice of Entry of Appearance as Attorney or Representative submitted with newly-retained counsel's December 7, 2004 supplemental appellate brief. Citizenship and Immigration Services (CIS) regulations specifically state that a beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary is not a recognized party, newly-retained counsel is **not authorized to file an appeal.** 8 C.F.R. § 103.3(a)(1)(iii)(B). Accordingly, the AAO will reject newly-retained counsel's supplemental appellate brief pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), and will not notify him of this proceeding.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which 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 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.

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 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.

According to the petitioner’s July 21, 2004 letter of support, the duties of the proposed position would include applying the beneficiary’s knowledge of music fundamentals and instrumental performance to play the violin as a soloist, accompanist, or member of an ensemble in concerts and workshops; using her reading and notating skills to study music, to know the tune, rhythm, and pitch of the music and to understand the composer’s intended style and message for the music; rehearsing music with the conductor, singers, and/or other instrumental musicians to learn and interpret each music piece in an effective manner so as to achieve the desired effects, carry message across to listeners, and/or create a certain impact on listeners; assisting the music director in recruiting, selecting, and coordinating fitting and qualified musicians for music recording and live music performance of various music pieces; transposing music to play in different keys and occasionally improvising music at live performances; adapting music to certain string instruments or creating a musical background, using the violin, for preexisting melody of music.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

The AAO will not address the portion of the director’s denial that discussed the O and P visa categories, as the petition was filed under neither of those categories.

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 Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In its discussion of the duties of musicians, singers, and related workers, the 2006-2007 edition of the *Handbook* states the following:

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 . . . Regardless of the setting, musicians, singers, and related workers spend considerable time practicing. . . .

*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. . . .

In its discussion of the educational requirements for musicians, singers, and related workers, the *Handbook* offers the following information:

**Aspiring musicians begin studying an instrument at an early age.** They may gain valuable experience playing in a school or community band or an orchestra or with a group of friends. . . .

Musicians need extensive and prolonged training and practice to acquire the necessary skills, knowledge, and ability to interpret music at a professional level. Like other artists, musicians and singers continually strive to stretch themselves—exploring different forms of 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. For university or conservatory study, an audition is generally necessary. 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 voice. . . .

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.

Musicians must be knowledgeable about a broad range of musical styles but keenly aware of the form that interests them most. Having a broader range of interest, knowledge, and training can help expand employment opportunities and musical abilities. Voice training and private instrumental lessons, taken especially when the individual is young, also help develop technique and enhance one's performance.

Young persons considering careers in music should have musical talent, versatility, creativity, poise, and a good stage presence. Because quality performance requires constant study and practice, self-discipline is vital. To sustain a career as a musician or singer, performers must achieve a level [of] performing excellence and be counted on to be on their game whenever they perform . . . Because musicians and singers always must make their performances look effortless, preparation and practice are important. . . .

Advancement for musicians usually means becoming better known, finding work more easily, and performing for higher earnings. . . .

These findings do not comport with the assertion that a degree is required for a career as an instrumental musician. While formal education is available through degree programs, it may also be obtained through

private study with an accomplished musician. While the *Handbook* does state that a degree is required in order to teach music education at a public elementary or secondary school, this is not such a position. The *Handbook* explains that private instrumental lessons, taken especially when an individual is young, help develop technique and enhance one's performance. The *Handbook* notes that young persons considering careers in music should have musical talent, versatility, creativity, poise, and a good stage presence. The AAO finds no support in the *Handbook* to support the assertion that a baccalaureate degree or its equivalent is normally the minimum entry requirement for a career as an instrumental musician.

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.

However, no such evidence has been presented. As such, the petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

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. It finds no evidence that would support such a finding, as the position proposed in the petition is similar to the musician position described in the *Handbook*.

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.

However, no such evidence has been presented. As such, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

To the extent they are described in the record, the duties of the proposed position do not support a conclusion that they would require the beneficiary to possess at least a bachelor's degree level of knowledge in a specific specialty. Therefore, the proposed position does not qualify as a specialty occupation under the fourth criterion.

The AAO next turns to the issue of the beneficiary's previous H-1B approval. Counsel asserts that because she was granted this status in the past, denial of the instant petition is a due process violation. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon evidence similar to that contained in this record, that

approval would have constituted material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel's assertion that the director's denial of the petition constituted a due process violation fails. Counsel has demonstrated no error by the director in conducting his review of the petition, nor any resultant prejudice that would constitute a due process violation. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). As discussed previously, the petitioner has not met its burden of proof, and the denial was the proper result under the regulation.

Finally, as noted earlier in this decision, the AAO will not consider the assertions of newly-retained counsel. However, the AAO will address his submission of information from the Department of Labor's *Dictionary of Occupational Titles (DOT)*, the *O\*Net*, and the *Occupational Employment Statistics* wage survey (*OES*). The *DOT*, *O\*Net*, and *OES* 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. Their assessments (the SVP rating and the JobZone categories) are meant only to indicate the total number of years of vocational preparation required for a particular position. They do not describe how those years are to be divided among training, formal education, and experience, and do not specify the particular type of degree, if any, that a position would require. As such, the AAO accords no weight to this information.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. 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.