



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

D2

AUG 01 2007



FILE: EAC 05 164 52515 Office: VERMONT SERVICE CENTER Date:

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.

*James Blinzinger, for*

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 is engaged in music instruction, and 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 September 2, 2005, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

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; (5) the Form I-290B; (6) the director's erroneous dismissal of the Form I-290B; and (7) the second Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

An 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.

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.

According to the support letter, dated May 9, 2005, the petitioner described the beneficiary's proposed position as music teacher as follows:

1. Teaching piano and drums using technical knowledge, aesthetic appreciation, and prescribed teaching techniques;
2. Planning daily classwork for students;
3. Evaluating student's interests, aptitudes, temperaments and individual characteristics to determine suitable level of instruction;
4. Playing piano and drums to demonstrate musical scales, tones, and rhythms;
5. Instructing students in musical theory, harmony, score and sight reading, composition and music appreciation;
6. Conducting group rehearsals;
7. Analyzing and critiquing student performances;
8. Teaching performance enhancement techniques such as breathing, relaxation, movement, etc.[.] to reduce performance anxiety;

The director denied the petition on September 2, 2005, concluding that the proposed position does not qualify as a specialty occupation position. The director found that the proposed duties are analogous to those of musicians, singers, and related workers, as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, and noted that the *Handbook* indicates that such positions do not require an individual to obtain a bachelor's degree in order to fill them.

On appeal, counsel submits a letter from [REDACTED] a former Dean of the Music Conservatory of Westchester from 1990 to 2005, stating that in his opinion, the teaching position offered to the beneficiary is a specialty occupation requiring at least a Bachelor's degree in Music or its equivalent.

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 *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the duties of the proposed position finds them closely aligned to the responsibilities of music teachers discussed in the *Handbook*. The *Handbook* states that, while a degree is required for music instruction in public schools, such a degree is not normally required in a private setting:

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.

Thus, 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. 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.

The findings of the *Handbook* regarding music teachers in private school settings demonstrate that a bachelor's degree or its equivalent is not normally a requirement for the proposed position. Accordingly, the proposed position does not qualify for classification 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. Counsel 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 positions that are parallel to the proffered position and found in organizations similar to the petitioner.

The petitioner submitted three opinion letters with the initial petition from individuals employed in the music industry. One letter is from an individual employed in the department of Vocal Arts at the Julliard School of Music, stating that in his opinion a music teacher must possess a bachelor's degree or its equivalent. The petitioner also submitted a letter from a Visiting Specialist in Music History employed at the Montclair State University, stating that the "educational requirement for the position offered to [the beneficiary] is at least a bachelor's degree in Music, or its equivalent." The petitioner further enclosed a letter from the head of the

Dutchess Day School, asserting that the position of music teacher requires an individual who has obtained a bachelor's degree in music or its equivalent. Finally, on appeal, the petitioner submits a letter from Bob Arthurs, a former Dean of the Music Conservatory of Westchester from 1990 to 2005, stating that in his opinion, the teaching position offered to the beneficiary is a specialty occupation requiring at least a Bachelor's degree in Music or its equivalent.

While the individuals from the opinion letters assert that the duties of the proposed position require the beneficiary to possess a bachelor's degree, an inadequate factual foundation to support these opinions has been established. The authors do not note the location or size of the petitioner. Nor do the authors indicate whether they reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. While some music teacher positions in private schools may require a bachelor's degree as a prerequisite for employment, the authors do not give sufficient details about the complexity of the details of the proposed position to substantiate their conclusions, which differ from those in the *Handbook*. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Also, the record fails to establish that the schools represented in the letters are "similar" to the petitioner, a business engaged in providing music instruction which does not provide grades or credit for the instruction, and which does not appear to be affiliated with an educational institution. There is insufficient evidence to establish that the schools in which the authors are employed are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Simply 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. at 165. Moreover, even if the AAO were to find that the schools are similar to the petitioner, four letters are insufficient to establish an industry-wide standard. Thus, this letters are insufficient to establish the petitioner's degree requirement as an industry norm 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 at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is similar to those of music teachers that are employed in private schools as described in the *Handbook*. Although counsel for the petitioner asserts that the petitioner requires an employee with a bachelor's degree to fill the position of music teacher, the petitioner did not submit any documentation corroborating this statement. 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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 record establishes that the duties of the proposed position do not exceed the scope of the music teacher positions at private schools discussed in the *Handbook*, which do not require a bachelor's degree as a minimum entry requirement. The AAO is not persuaded that the proposed duties are more complex than those of typical music teachers at private schools or that the knowledge required to perform the duties of the position are usually associated with the attainment of a bachelor's degree.

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner stated that the position of music teacher is a newly-created position, which precludes approval under the third criteria.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Based on the foregoing discussion, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that specific duties to be performed by the beneficiary in the context of the

petitioner's business operations possess the requisite specialization and complexity. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. 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.