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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: WAC 04 216 52985 Office: CALIFORNIA SERVICE CENTER Date: APR 20 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 engaged in music education and retail sales of musical instruments, and seeks to employ the beneficiary as a music systems analyst. 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 because the proffered position is not a specialty occupation. Specifically, the director concluded that there was no bona fide position. On appeal, counsel submits a brief and additional evidence.

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.

United States Citizenship and Immigration Services (USCIS) 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) the petitioner'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 systems analyst. Evidence of the beneficiary's duties includes: the Form I-129; the company support letter dated July 27, 2004; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary will perform the following duties:

Composes and creates digital music files and scores to will [sic] used for our educational projects. Duties include copyright research, making licensing requests to publisher, keep status updates of song requests, and use of complex computer programs and applications such as Digital Performer, KORG OIWF, MIDI Programming, DSP, Pro Tools, TDM/AS plugins, Performer, Metasynth, Csound, SonicWrox and others to assist in the conversion, creation, encoding and maintenance of digitized audio and music files. Specifically, the music systems analyst will be involved in music editing of pre-existing music, creating the score for surround music theatrical mixes, resolve any collaboration and synchronization issues that may appear between sound and image, multi-tracking audio for seamless sound design and conversion of synchronization data.

The petitioner further submitted a copy of the beneficiary's diploma from California State University, Northridge, demonstrating that she possesses a Bachelor of Arts degree in music. Additionally, the petitioner submitted copies of what appear to be pages from the petitioner's catalog, evidencing various musical instruments such as guitars, which were available for purchase.

The director issued a request for evidence on October 5, 2004, and specifically requested the petitioner to submit additional evidence pertaining to the specialty occupation offered to the beneficiary, as well as pertinent information regarding the petitioner's business. In response, the petitioner provided a more detailed overview of the proffered position, as well as documents discussing the petitioner's employees. Specifically, the petitioner submitted a letter dated December 14, 2004, which indicated that all of the petitioner's current employees possessed musical training, with two holding bachelor's degrees in music and one holding a master's degree in music. It is also noted by the AAO that all employees were either full-time or part-time music instructors.

The AAO further notes that pursuant to an organizational chart for the entity, it appeared that the petitioner had four departments, namely operations, finance and administration, education and sales. Some of the employees listed on the chart were not included in the December 14, 2004 list of employees.

The director determined that the proffered position was not a bona fide position within the petitioner's organization. Specifically, the director noted that the petitioner had failed to demonstrate that the petitioner had unique and specific needs for the duties associated with the proffered position.

Upon review, the AAO concurs with the director's ultimate conclusion yet finds that the director's analysis is somewhat flawed. The issue to be examined in this matter is whether the proffered position constitutes a specialty occupation as contemplated by the regulations. The director's conclusion that there is no bona fide offer of employment is misplaced.

In this matter, the record clearly indicates that the beneficiary has a credible offer of employment with the petitioner by virtue of the statements contained in the petition, the letter of support, and the labor condition application. There also appears to be no basis to question whether the actual position offered is that of a music systems analyst, even though as noted below the position title does not exactly match any existing occupation listed in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The fundamental question in this matter, then, is whether the petitioner has established that the proffered position of music systems analyst is in fact a specialty occupation. The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS 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 (5th Cir. 2000). The critical element is not the title of the position nor 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 make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Handbook* on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the 2008-2009 edition of the *Handbook*, and finds that there is no specific position entitled “music systems analyst.” Upon review of the stated duties of the proffered position, the AAO notes that the position appears to be a hybrid of a sound technician, sound mixer, and music arranger. It has taken particular note of the following sections discussed under the heading for *Broadcast and Sound Engineering Technicians and Radio Operators and Musicians, Singers, and Related Workers*:

Sound engineering technicians operate machines and equipment to record, synchronize, mix, or reproduce music, voices, or sound effects in recording studios, sporting arenas, theater productions, or movie and video productions.

* * *

The transition to digital recording, editing, and broadcasting has greatly changed the work of broadcast and sound engineering technicians and radio operators. Software on desktop computers has replaced specialized electronic equipment in many recording and editing functions. Most radio and television stations have replaced videotapes and audiotapes with computer hard drives and other computer data storage systems. Computer networks linked to specialized equipment dominate modern broadcasting. This transition has forced technicians to learn computer networking and software skills.

* * *

Sound mixers or *re-recording mixers* produce soundtracks for movies or television programs. After filming or recording is complete, these workers may use a process called “dubbing” to insert sounds.¹

* * *

[Music 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.²

The petitioner’s overview of the proposed duties of the proffered position in the response to the request for evidence includes such tasks as “compos[ing] and creat[ing] digital music files and scores,” “music editing of

¹ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos109.htm.

² *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos095.htm.

pre-existing music,” and “creating the score for surround music theatrical mixes.” It appears upon comparison of these tasks to the above-stated descriptions of the duties of sound engineering technicians and sound mixers that the duties of these positions are all very similar. Moreover, the petitioner claims that the beneficiary will have to implement complex computer programs to perform the duties of the proffered position. The AAO notes that, based on the above description, most sound technicians have been forced to learn computer networking and software skills based on the modern movement to replace videotapes and audiotapes with computer hard drives and data storage systems. This seems to corroborate the petitioner’s claim that the beneficiary must use computers to compile and arrange musical files.

According to the *Handbook*, there is no specific degree requirement for employment as a sound engineering technician, a sound mixer, or a music arranger. Moreover, the petitioner did not cite to any other provisions of the *Handbook* or otherwise provide supporting documentation that the proffered position requires the beneficiary to hold a baccalaureate or higher degree in a related field, specifically music.

Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In support of this premise, the petitioner has submitted two job postings from www.monster.com. Upon review, both of the job listings can be distinguished from the proffered position in this matter.

The first job posting is for a Music Label Public Relations and Production Coordinator for a record label. This position, according to the description of duties, is a sales and publicity position, and is therefore distinguishable from the duties of the proffered position in this matter. The second posting is for a Manager of Music and Licensing Clearance for an advertising firm, which requires the candidate to perform production estimation, handle purchase orders, and billing. It is noted that none of the position responsibilities match those of the proffered position. Consequently, the AAO concludes that none of the job postings submitted sufficiently represent a specific degree requirement in similar parallel positions; specifically, neither posting requires a degree in music, neither position is similar to the proffered position, and neither employer is similar to the petitioner. Accordingly, the petitioner has failed to satisfy the second criterion’s condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

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. USCIS 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 (5th 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.³ To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a petitioner's self-imposed 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.

To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's request for evidence, the petitioner asserted that it currently employs three music instructors with a bachelor's or master's degree in music, and three other employees with certifications in music. However, these employees are music instructors and not music systems analysts. Moreover, the petitioner has provided no evidence of a history of hiring a degreed individual in the position of music systems analyst, nor has it documented the attainment of a degree by any of its named employees as alleged in the December 14, 2004 letter. 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. The petitioner has asserted that the duties of its proffered position "dictate the need for the specified educational background" and claims that this is the only way the proffered duties could be performed. The petitioner does not specifically state the degree requirement in this matter, but implies that it is a bachelor's degree in music based on the educational credentials of the beneficiary contained in the record. The petitioner has provided no evidence to demonstrate that a higher degree of knowledge and skill than would normally be required of music arrangers, sound mixers, or sound engineering technicians is required to perform the proposed duties of the position. Furthermore, based on the *Handbook's* information, the duties of the proposed position are performed by music arrangers, sound mixers, and sound engineering technicians, which are occupations that do not require a bachelor's degree. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered

³ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall 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.