

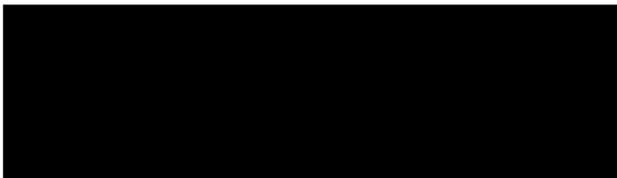
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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



42

Date: **APR 29 2011** Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 141 50720

IN RE:

Petitioner:

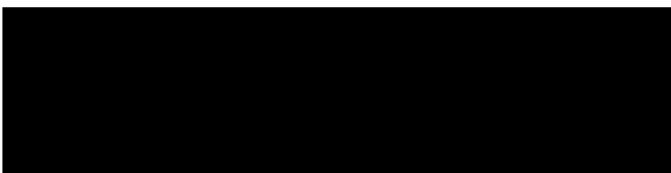
Beneficiary:



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:

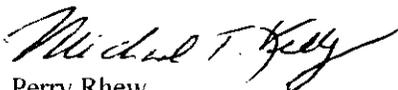


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for 
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center 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.

On the Form I-129 visa petition the petitioner stated that it is a “music learning school” with four employees, established in 2003. To employ the beneficiary in what it designates as a piano instructor position, the petitioner endeavors to classify her 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director’s basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner’s Form I-129 and the supporting documentation filed with it; (2) the service center’s first request for additional evidence (RFE) and the response to that RFE; (3) the service center’s second RFE and the response, (4) the director’s denial letter; and (5) the Form I-290B and counsel’s brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which (1) 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 (2) 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry

requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted a letter, dated March 11, 2009, from the petitioner's president, who gave the following description of the duties of the proffered position:

In addition to performing the regular duties of a Piano Instructor, the beneficiary will be responsible for the instruction of piano players in music theories and techniques, duo piano, harpsichord, fortepiano, comprehensive piano literature classes, piano technology, piano pedagogy, accompanying classes, and a complete series of organ courses from hymnology to design and maintenance. The beneficiary will be responsible for the entire process of preparing lessons, grading papers and performance, attending faculty meetings, and keeping abreast of developments in their [sic] field. In addition, this individual will be responsible for the lectures to the students in lecture halls, lead small seminars, or supervise students in the piano performance lessons. The beneficiary will also be supervising staff faculties. The beneficiary must be able to keep abreast of developments by reading current literature, talking with colleagues, and participating in recitals and concerts. As a faculty at our institution, the faculty is required to use sophisticated telecommunications and videoconferencing equipment and the Internet to teach courses to students at remote sites. The beneficiary will be responsible for Composition, Instrumental Conducting, Harmonic Theory for Piano Players, History of American and European Music. The beneficiary will be assigned a private and fully equipped studio, and a support staff.

The petitioner's president also stated:

The foregoing duties do mark the position as a Specialty Occupation in accordance with the statutory definition set forth in section [214(i)(1) and 8 C.F.R. §214.2(h)(4)(iii)(A)]. Meanwhile, [the petitioner] always requires a bachelor's degree in a related field for all of our instructing professionals including the piano teacher.

The petitioner's president stated "Our degree requirement, or in rare instances, degree equivalency, emanates from the fundamentally quantitative/analytic nature of the work for which we have been retained," but did not otherwise explain why the duties of the proffered position, or any one of them, could not be performed by a person who did not have a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner's president did not reconcile her assertion that the beneficiary would be assigned a support staff with the assertion on the visa petition that the petitioner has only four employees.

On April 28, 2009 the service center issued an RFE in this matter. The subject matter of that RFE, however, was not related to the basis of the director's subsequent denial of the visa petition and will not be discussed further.

On June 16, 2009, the service center issued another RFE in this matter. The service center requested, *inter alia*, additional evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center also explicitly requested that the petitioner, ". . . explain why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field."

In response, counsel submitted another letter, dated May 27, 2009, from the petitioner's president, who stated that the petitioner requires its piano instructors to have a minimum of a bachelor's degree in music, "or related quantitative discipline." She reiterated, "Our degree requirement, or in rare instances, degree equivalency, emanates from the fundamentally quantitative/analytic nature of the work for which we have been retained," but, again, without any indication of what equivalent of a bachelor's degree is acceptable and without any further explanation of why the position requires a bachelor's degree.

The petitioner's president further stated:

The imposition of a degree requirements [sic] as a prerequisite for employment in Piano Instructor positions, such as the above described, is, in fact, nearly universal among large-scale users of proprietary music schools. Indeed, our institution has imposed such a requirement since its inception.

The assertion of a degree requirement among "large-scale users of proprietary music schools" is not entirely clear. However, the petitioner and counsel provided no evidence to corroborate the assertion that such a requirement is common in any group, including music schools.

With the response to the RFE, counsel provided California Form DE-6 Quarterly Wage and Withholding Reports pertinent to the third quarter of 2007 through the second quarter of 2008. Those reports show that the petitioner had three employees during the third and fourth quarters of 2007 and seven employees during all four quarters of 2008 and the first and second quarters of 2009.

Counsel also provided evidence that the petitioner has employed two people with master's degrees in music, [REDACTED] and [REDACTED]. The petitioner's president and counsel did not demonstrate nor even allege that those are the petitioner's only two piano teaches, or its only two music instructors, nor even that they are music instructors. Counsel observed that H-1B petitions for those two employees had been approved and implied that the instant petition should therefore also be approved.

The director's decision denying the instant visa petition does not indicate whether she reviewed the prior approvals of the other nonimmigrant petitions. However, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current

record, the approval would constitute 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 USCIS 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).

The director denied the visa petition on September 8, 2009 finding, as was noted above, that the petitioner failed to demonstrate that it would employ the beneficiary in a specialty occupation.

In the brief filed to support the appeal, counsel reiterated the previously provided description of the duties of the proffered position and stated,

The above described position mandates the assignment of a professional level music instructing professional. The Petitioner consistently requires that the Piano Instructor delegated to the undertaking of instruction in piano performance possesses a Baccalaureate or Mater's Degree in Music, or related quantitative [sic] professional discipline, and up to one year of experience in the music field. The degree requirement, or in rare instances, degree equivalency, emanates from the fundamentally quantitative/analytic nature of the work for which we have been retained. The imposition of a degree requirements [sic] as a prerequisite for employment in Piano Instructor positions, such as the above described, is, in fact, nearly universal among large-scale users of proprietary music schools. Indeed, the Petitioner has imposed such a requirement since its inception.

Counsel did not explain what he meant by a "related quantit[ative] professional discipline." Counsel did not explain what the petitioner would consider to be equivalent to a bachelor's degree in music. Counsel did not explain what he meant by "the fundamentally quantitative/analytic nature" of teaching music, or by "large-scale users of proprietary music schools." Although counsel asserted that the petitioner required, and had always required, a minimum of a bachelor's degree or the equivalent in a specific specialty for its piano instructor positions, he provided no evidence in support of that assertion.

The unsupported assertions of counsel are not evidence and will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also provided various documents to support the proposition that the proffered position qualifies as a specialty occupation pursuant to the various alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Those documents are addressed below.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of

occupations that it addresses.¹ More than one section of the *Handbook* addresses positions teaching music.

The *Handbook* chapter pertinent to *Musicians, Singers, and Related Workers* states:

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. (Information related to *teachers—postsecondary and teachers—kindergarten, elementary, middle, and secondary* can be found elsewhere in the *Handbook*.) 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.

That chapter of the *Handbook* does not indicate that a minimum of a bachelor's degree or the equivalent in a specific specialty is a requirement for positions teaching music except in public school and in college.

The chapter of the *Handbook* entitled "Teachers—Self-Enrichment Education" addresses positions teaching both vocal and instrumental music and states, as to those positions and self-enrichment teaching positions in general:

Education and training. In general, there are few educational or training requirements for a job as a self-enrichment teacher beyond being an expert in the subject taught. To demonstrate expertise, however, self enrichment teachers may be required to have formal training in disciplines such as art or music, where specific teacher training programs are available. Prospective dance teachers, for example, may complete programs that prepare them to teach many types of dance—from ballroom to ballet. Other employers may require a portfolio of a teacher's work. For example, to secure a job teaching a photography course, an applicant often needs to show examples of previous work. Some self-enrichment teachers are trained educators or other professionals who teach enrichment classes in their spare time. In many self-enrichment fields, however, instructors are simply experienced in the field, and want to share that experience with others.

That section also does not indicate that a bachelor's degree is necessary in order to teach instrumental music in a venue other than public school or college. The petitioner is neither a public school nor a college. Neither the *Handbook* nor any other evidence in the record suggests that piano teacher positions in general require a minimum of a bachelor's degree or the equivalent in a specific specialty.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

As was noted above, the petitioner's president and counsel have asserted that the requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty is "nearly universal among large-scale users of proprietary music schools." The exact meaning of that phrase is unknown but, in any event, no evidence was submitted to support it.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether 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)).

As was already observed, the *Handbook* offers no support for the assertion that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel provided no letters from other firms or individuals in the industry to demonstrate that they recruit and employ only those with degrees.

On appeal, counsel submitted a printout of content from the website of the Music Teacher's Association of California (MTAC). That content indicates that the MTAC has four different classes of membership. Membership in one of those classes, Active Teacher Membership, is available only to those actively engaged in teaching music who have a degree in music from an accredited college, university, or conservatory. That web content does not indicate that the degree must be a minimum of a bachelor's degree. Further, the record contains no indication that membership in that association is mandatory for music teachers.

With the appeal, counsel also provided printouts of three vacancy announcements taken from a popular job search website.

One of those vacancy announcements was placed by the Joyful Melodies Music School for a private music teacher to work in the San Francisco bay area. That announcement states that the position requires a bachelor's degree, but not that it must be in any specific specialty.

Another vacancy announcement was placed by the Napa School of Music in Napa County, California for Piano/Voice Teachers. That announcement states that applicants with a music degree are preferred. The AAO observes that a preference is not a minimum requirement.

The final vacancy announcement was placed by an unidentified music school in the Sunnyvale-Cupertino area of California for Piano, Voice, Drums, Clarinet, Violin Teacher Positions. It states that the positions require a university degree, but not that the degree must be in any specific specialty.

The vacancy announcements were apparently provided as evidence that other positions teaching music require a minimum of a bachelor's degree or the equivalent in a specific specialty. Those vacancy announcements, however, do not indicate that the vacancies they announced require a minimum of a bachelor's degree or the equivalent in a specific specialty. They are of no utility in demonstrating that the proffered position is a position in a specialty occupation. Neither they nor any other evidence in the record demonstrates that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other piano teacher positions may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered is so complex or unique that it can be performed only by an individual with a degree.

The duties of the proffered position consist, foremost, of duties directly related to preparing lessons and teaching students to play the piano and other keyboard instruments. Such duties, or very similar duties, would necessarily be common to all piano teaching positions. The ancillary duties of the position, grading papers and performances, attending faculty meetings, etc., are neither unique nor of such complexity that they would necessarily require a degree. The position also requires the use of telecommunications and videoconferencing equipment, but the record contains no indication that this incidental duty requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The critical point, however, is that upon consideration of the totality of the evidence in the record of proceeding, the AAO finds that the petitioner has failed to establish the degree of complexity or uniqueness that would require the services of a person with at least a bachelor's degree or higher in a specific specialty.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the position. The petitioner's president and counsel have asserted that the petitioner always does, and always has, required a minimum of a bachelor's degree in music, or perhaps occasionally some unidentified equivalent to a bachelor's degree in music, for the proffered position, piano teacher, and for all of its music teaching positions. The petitioner provided evidence that two of its current employees have master's degrees in music, but not evidence that they are its only music teachers, or its only piano teachers, or even of what positions those two employees actually hold. Further, the petitioner did not state or provide evidence pertinent to the number of piano teachers and/or other music teachers it now employs and/or previously employed. The evidence pertinent to those two employees with master's degrees is the only evidence pertinent to the petitioner's recruitment and hiring practices, and it is manifestly insufficient to demonstrate that the petitioner normally requires a degree or its equivalent for the proffered position. The petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider the alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates 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.

As was stated above, most of the duties attributed to the proffered position are the generic duties of any piano teacher position, and the few additional ancillary and incidental duties contain no indication that they would require any degree, let alone a degree in any specific specialty, such as music.

The petitioner has not demonstrated 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the argument submitted on appeal has not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.