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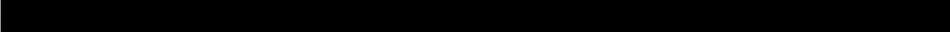
Date: DEC 08 2011

Office: CALIFORNIA SERVICE CENTER

FILE: 

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:

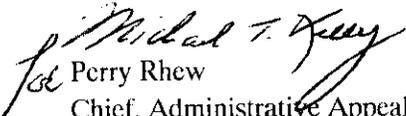


INSTRUCTIONS:

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,

  
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, submitted April 1, 2009, the petitioner stated that it is a "Private Music School and Sale of Musical Instrument" firm. To employ the beneficiary in what it designates as a percussion instructor position, the petitioner 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).

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 request for additional evidence (RFE); (3) the response to the RFE; (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 (5<sup>th</sup> 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 evidence showing that the petitioner received a bachelor's degree in music from the California State University, Los Angeles; and a master's degree in music from the Southern Illinois University.

Counsel also submitted a letter, dated April 1, 2009, from the petitioner's president, who gave the following description of the duties of the proffered position:

Responsible to teach Percussion group and private classes for students in different ages; Planning and preparing course objectives, outlines and contents according to curriculum guidelines and school requirements; Conducting classes through lectures, demonstrations and presentations using systematic and well balanced approach to play percussion to order to help students to play correctly and musically on percussion and develop ability to make their own musical arrangements and compositions; Enhancing methods of course/lesson presentation by arranging use of audio-visual equipment, assembling teaching materials and preparing various instructional aids; Assigning class-work, projects and activities to augment the coursework being taught, and evaluating student performance; and maintaining attendance.

[Verbatim from the original.]

The petitioner's owner cited the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* for the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and also stated:

In order to satisfactorily carry out the above outlined duties, the candidates must have knowledge in music or related fields, and the minimum requirement for the job is [a] bachelor[']s degree in music or its equivalent.

Because the evidence did not demonstrate that the petitioner would employ the beneficiary in a specialty occupation position, the service center, on April 22, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, counsel submitted a vacancy announcement; printed content from the website of the Moscow Central School of Music in Los Angeles, California and the California College of Music, in Pasadena, California; printed content from the website of the Music Teachers' Association of California (MTAC) and a certificate from MTAC; and an undated letter from the petitioner's owner.

The vacancy announcement submitted pertains to a music teacher position at the Cerritos Yamaha Music School in Cerritos, California and was printed from their website. It states that the position

involves teaching music history and music theory and requires a master's degree in music, music arts, or music theory.

The content from the Moscow Central School of Music's website describes eleven members of its teaching staff. That content states that one of the school's teachers was awarded and "Advanced Diploma (Equivalent to Master degree) Piano teaching." It does not describe the degrees of any of the school's other teachers. The proposition that content was provided to support is unclear to the AAO.

The content from the California College of Music's website describes two members of its faculty. It indicates that one of those faculty members has a bachelor's degree in Jazz Studies and Composition and a master's degree in Fine Arts. It indicates that the other has a bachelor's degree in Professional Music. It further indicates that the school has 19 faculty members. The educational qualifications of the remaining 17 faculty members were not revealed.

The MTAC certificate shows that the beneficiary was granted Active Teacher Membership in that association on May 8, 2009, after the instant visa petition was submitted. The printed content from the MTAC website states that, of the four types of membership offered:

**Active Teacher Membership** is granted to those who have a degree in music from an accredited college, university or conservatory (or the equivalent), and who are actively engaged in the profession of teaching.

The body of the petitioner's owner's undated letter states, in its entirety:

In reply to your questions, we did put Job Opening for the position of Percussion, Violin, Piano, and clarinet/Saxophone/Flute instructors on our website.

Our website: [REDACTED]

[The petitioner] had a drum instructor in 2002 named [REDACTED]. Here attached the 1099 form for him, after that [the petitioner] had another teacher, [REDACTED]. [REDACTED] he worked from October 2005 till July 2006. Due to lack of students his income was less than \$600, so no 1099 was issued. [REDACTED] worked from Jan 2005 till April, 2007 as a Guitar and Drum teacher. Here attached the 1099 for your reference.

We really want to develop the whole line of percussion, and [the beneficiary] will be the highest degree that we will ever have.

As regards to understand us more, please visit our website at [REDACTED]

[Verbatim from the original.]

In his own letter, dated May 21, 2009, counsel provided the following additional description of the duties of the proffered position, but did not indicate the provenance of that description:

A. Music Instrumental Teaching:

- I. Western Percussion Instrument Skills with 2 and or 4-mallet on:
  1. Drums (Snare Drum, Field Drum, Tenor Drum, Bass Drum, Tom-toms)
  2. Keyboard Percussion (Marimba, Vibraphone, Xylophone, Bell, Chime)
  3. Auxiliary Percussion (Triangle, Tambourine, Castanets, Crash Cymbal)
  4. Multiple Percussion (Drum Kit, Mixed Percussion Kit)
  5. Timpani
- II. Latin, African, and Cuban Percussion Instrument Skills
  1. Bongos, Congas, Djembe, Timbales
  2. Cowbells, Maracas, Claves, Cabasa, Agogo Bell, Guiro
  3. Multiple Percussion and Drum Kit in Latin, and Cuban Style
- III. Jazz Percussion Instrument Skills
  1. Four-Piece Drum Kit in Mainstream Jazz, Blue, Behop, Swing Style
  2. Application and interpretation of mallets and brushes
- IV. Chinese Percussion Instrument Skills
  1. Metal Percussion (Bian-Zhong, Chao Gongs, Chinese Cymbals)
  2. Wood Percussion (Bangzi, Temple blocks, Wood Blocks)
  3. Drums (Ban-Gu, Da-Tang-Gu, Pai-Gu)
- V. Basic Piano Skills and Human Body Percussion

B. Music Theory:

- I. Basic Notation, Scales, Key Signature, Note Value, Rhythm and Beat
- II. Music Harmony Recognition and Usage, Figured Bass
- III. Melody and Basic Composition Method
- IV. Analytical Technique on conductor score, orchestral and instrumental music

C. Musicianship:

- I. Ear Training (Pitch Recognition, Melodic and Harmonic Dictation)
- II. Sight-singing for Timpani Tuning

D. Musicology:

- I. Music History of major European and American Composers
  - II. Western and Non-Western Percussion Literature and Interpretation
  - III. Performance Practice for Western and Non-Western Percussive Arts
  - IV. History and Construction of the Percussion Instrument
- E. Percussion Instrument Repair and Maintenance:
- I. Change and tune various kind of drum-heads including timpani-heads
  - II. Adjust the resonators and bars of keyboard percussion instruments
- F. Conduct Percussion and other Music Ensembles in rehearsal, and in concert:
- G. Present Public Recital and Ensemble Concert:
- I. Coordinate and perform percussion music for the public
  - II. Select music repertoire for public performances
- H. Revise, Upgrade, and Design the percussion music curriculum at [the petitioner]:
- I. Arrange music of various styles for percussion instruments and ensembles
  - II. Establish pre-college and college level courses that suit American and various ethnicity learning environment
- I. Assist [the petitioner] to elevate into a conservatory of music:
- I. Generate more income for [the petitioner]
  - II. Offers more music faculty positions for domestic music teacher
  - III. Offers NASM accredited certification for local community and abroad
- J. Produce Music Recording and DVDs for conservatory promotion:
- K. Establish a specialized training program for musicians of various backgrounds to be successful in:
- I. University undergraduate and graduate music program admission test
  - II. Certificate of Merit examination
  - III. Professional orchestra auditions in North America and abroad
  - IV. Personal music career development worldwide
- L. Basic Music Therapy
- I. Alexander Techniques (Injury Prevention)
  - II. Philosophy of Music (Studies about Character, Concept, and Temperament)

Again, without stating its provenance, counsel provided the following third description of the duties of the proffered position, with percentages of time spent on each duty:

- i. Music Instrumental Teaching (35% of time)
- ii. Music Theory (23% of time)
- iii. Musicianship (15% of time)
- iv. Percussion Instrument Repair and Maintenance (2% of time)
- v. Conduct Percussion and other Music Ensembles in Rehearsal, and in Concert (5% of time)
- vi. Present Public Recital and Ensemble Concert (2% of time)
- vii. Revise, Upgrade, and Design the percussion music curriculum at [the petitioner] (2% of time)
- viii. Assist [the petitioner] to elevate into a conservatory of music (2% of time)
- ix. Produce Music Recording and DVDs for conservatory promotion (2% of time)
- x. Establish a specialized training program for musicians of various backgrounds (1% of time)
- xi. Basic Music Therapy (1% of time)

Counsel did not state which of the three different descriptions of the duties of the proffered position the petitioner intends to rely upon to demonstrate that the proffered position qualifies as a position in a specialty occupation. In any event, as the record contains no indication that the petitioner provided the descriptions contained in counsel's letter, or even approved them, the AAO will concentrate on the description of the duties of the proffered position contained in the petitioner's owner's April 1, 2009 letter.

The director denied the petition on July 1, 2009, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and had not established that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel asserted that the petitioner demonstrated that it would employ the beneficiary in a specialty occupation, and that the proffered position qualifies pursuant to each of the alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO will analyze that assertion.

The AAO will first address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which is satisfied if the petitioner demonstrates that the particular position proffered here is one that normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The AAO recognizes the *Handbook*, cited by the petitioner's owner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>1</sup>

More than one section of the *Handbook* addresses positions teaching music. The *Handbook* section pertinent to *Musicians, Singers, and Related Workers* states:

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<sup>1</sup> 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.

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 section 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 colleges.

The section 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:

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 percussion instructor positions, or music teacher positions in general, categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. Further, the evidence in the record of proceeding does not in any other way demonstrate that the particular position proffered in this petition is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

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)(I).

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.

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)).

In the instant case, as was observed above, the *Handbook* offers no support for the proposition that the petitioner's industry, or any industry other than colleges and public schools, requires a minimum of a bachelor's degree or the equivalent in a specific specialty for music teacher positions.

The web content pertinent to the MTAC does indicate that it requires a degree in music for one of its four levels of membership. That web content does not indicate that membership in MTAC is necessary in order to teach music, or in order to teach music in California. None of the documents provided indicates that membership in MTAC is necessary in order to teach music. Further, the evidence indicates that the beneficiary was not a member of that association when the petitioner filed the instant visa petition. Although counsel stated that the association has over 4,500 members with degrees, he provided no evidence to support that assertion, and provided no evidence of the total number of music teachers in California.<sup>2</sup> The record contains no evidence that a substantial percentage of the total number of music teachers in California are members of that association.

The vacancy announcement submitted indicates that one particular teaching position at a music school requires a minimum of a bachelor's degree or the equivalent in a specific specialty. That single vacancy announcement, of course, is statistically insufficient to show an industry-wide requirement.

The web content pertinent to the Moscow Central School of Music shows only that one of that school's eleven listed teachers has a degree in music. That is no indication, of course, that a bachelor's degree or the equivalent in a specific specialty is a minimum requirement for a music teacher position in the petitioner's industry, or even at that particular institution.

The web content pertinent to the California College of Music shows that two of its 19 listed teachers have a minimum of a bachelor's degree or the equivalent in a specific specialty related to music. Again, that does not support the proposition that a bachelor's degree or the equivalent in a specific specialty is a minimum requirement for teaching music in the petitioner's industry, or even at the California College of Music.

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<sup>2</sup> Independent reference to that association's website indicates that it claims 4,700 members, but does not reveal how many of those members have degrees. As three of the four levels of membership with that association do not require a degree, the website fails to support counsel's assertion.

Therefore, the petitioner has not demonstrated 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, and 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 music teacher positions in the petitioner's industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

Notwithstanding that counsel objected, on appeal, to the characterization of the various duty descriptions provided as merely the generic duties of a music teacher position, the AAO observes that they contain no indication of complexity or uniqueness beyond the duties of a typical music teacher position. For instance, the record contains no indication that teaching percussion, assigning class-work, projects and activities, and evaluating student performance are more complex or unique than such duties of music teacher positions performed by persons with less than a bachelor's degree, or the equivalent, in a specific specialty.

Further, although counsel asserted, in both of his descriptions of the duties of the proffered position, that the beneficiary will assist the petitioner in elevating its status to that of a true music conservatory, he provided no evidence to support his assertion. 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).

In any event, counsel did not even assert that the petitioner is presently a conservatory of music, rather than a private music school. That the duties of a music teacher at a conservatory may be more complex or unique than the duties of a music teacher at other private music schools is irrelevant to the instant petition, as USCIS regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on the complexity or uniqueness of duties that the petitioner anticipates the beneficiary may perform beginning on some future, unspecified date. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

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 alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) is satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the position. The only evidence provided

pertinent to the petitioner's history of recruiting and hiring for the proffered position is the petitioner's owner's undated letter.

That letter states that the proffered position was announced on the petitioner's website, but does not state whether the announcement indicated a minimum requirement of a bachelor's degree or the equivalent in a specific specialty for the position. The petitioner's owner also identified three people who previously taught percussion at the petitioner's school, but did not state what educational credentials they had. The petitioner's owner's statement that, "[the beneficiary] will be the highest degree we will ever have" is unclear, but certainly does not support the proposition that the petitioner has a history of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty for the proffered position.

On appeal, counsel asserted, again, that the petitioner "is in the process of expanding to become a comprehensive conservatory of music," but, again, provided no evidence in support of that assertion. The AAO observes, again, that the assertions of counsel are not evidence, *see INS v. Phinpathya*, and *Matter of Ramirez-Sanchez, supra*, and that the petitioner's future plans for the school cannot be used as a basis of eligibility. *Matter of Michelin Tire Corp., supra*.

The evidence does not indicate that the petitioner has a previous history of recruiting and hiring only individuals with a minimum of a bachelor's degree or the equivalent in a specific specialty to fill the proffered position, and 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 address the alternative criterion 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 noted above, however, the record does not indicate that any of the duties of the proffered position are more specialized and complex than the duties of typical music teacher positions, which the *Handbook* indicates may not require knowledge usually associated with the attainment of a minimum of a bachelor's degree or the equivalent in a specific specialty.

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 criterion 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 submissions on appeal have 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.