



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: **JUN 26 2013** Office: CALIFORNIA SERVICE CENTER [Redacted]

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:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

*for Michael T. Kelly*  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner, which describes itself as a church established in 2005 with four employees, seeks to employ the beneficiary in a position to which it assigns the job title "music director" for thirty or more hours per week.<sup>1</sup> Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 had not established the proffered position as a specialty occupation.

On appeal, the petitioner submits a brief and additional evidence and contends that, contrary to the director's findings, the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for further evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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 [(1)] 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,

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<sup>1</sup> The Labor Condition Application (LCA) submitted by the petitioner in support of the petition was certified for the SOC (O\*NET-OES) Code 27-2041, the associated Occupational Classification of "Music Directors and Composers," and a Level I (entry-level) prevailing wage rate.

medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] 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 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 particular positions 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a

specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

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. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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.

The AAO will first address the proposed duties as described in this record of proceeding. As will be reflected in the discussion below, the AAO finds the evidence insufficient to establish whatever educational level of music knowledge would have to be practically and theoretically applied in order to perform the proffered position.

This is an appropriate juncture for the AAO to note that, after reviewing the entire record of proceeding, it is left without a firm sense of what particular work the beneficiary would actually perform and at what level of musical knowledge. The AAO has reviewed all of the statements and documentary submissions in support of the petition (including, but not limited to, the Comparison Table of unknown origin, the what-appears-to-be examples of relatively-low musical instruction materials that the beneficiary would use if and when she in fact would engage in music lessons under the umbrella of this petition, the copies of flyers regarding musical presentations, and the unexplained assertions about participation in music-album production) and is left without a satisfactory evidentiary foundation for apprehending even the general scope of the musical work that the beneficiary would actually perform, let alone the substantive nature of that work and any particular level of educational attainment that would be required to perform it. In particular, in light of what the AAO finds to be a consistently superficial and generalized level of supportive evidence, the AAO is not persuaded that the beneficiary would be employed in a position that is substantially similar or parallel to any Music Director position, referenced anywhere within this record of proceeding, that would actually require at least a bachelor's degree or the equivalent in a specific specialty. That being said, the AAO will now proceed to discuss the evidentiary record more directly.

In the May 24, 2012 letter of support filed with the petition, the petitioner explains that it seeks a music director who would choose and orchestrate the musical component of every church service. However, the AAO finds that the record of proceeding lacks evidence documenting what those duties, or any other of the cited duties, would substantively entail in terms of the nature and level of theoretical and practical applications of musical knowledge.

The AAO next notes the letter of support states that the duties of the proffered position would include the following:

1. Plan and implement appropriate music for Sunday church worship services, and for midweek and special service as required, after consulting with minister regarding theme.
2. Recruit, train and rehearse members of the choir and/or music team, if applicable.
3. Provide administrative assistance to any ensembles not under her direction.
4. Contract with individual musicians, both from within and without the community, to provide special music as needed.
5. Plan and produce special musical concerts and/or workshops (examples: Fundraiser, Worship Night, Easter Musical Production, Christmas Celebration).
6. Attend at least one conference workshop annually to remain up-to-date on the latest music and trends in New Thought and worship music industry.
7. Coordinate with sound team regularly to plan for A/V requirements and volunteer training.
8. May teach music in the Church summer or winter camp and also in church music school.
9. Attend staff meetings, if applicable.
10. Provide all administrative effort required for all of the above, to include fundraising, budget proposals, communications with and training of volunteer musicians, etc.
11. Select, purchase and maintain music resources and sound equipment, within budget guidelines and restrictions.
12. Provide budget information to accountant and/or management on a regular basis.

As obvious in the duties list quoted below from the petitioner's RFE reply, the petitioner's response to the RFE expanded the scope of the duties to include types work not clearly evident within the initial listing of duties. The duties as outlined in the RFE reply include:

1. Write and transcribe musical scores. (10%)
2. Compose music for musical production. (25%)
3. Editing, mixing and mastering musical album. (25%)
4. Prepare, plan, and teach private lesson[s] for music school. (5%)
5. Direct the planning, organizing, and conducting and evaluating of a comprehensive music program in worship services, rehearsals and special music events. (10%)
6. Work with the ministerial staff on special music needs in the total Church Program.
7. Supervise the work of the music ministry staff. (5%)
8. Work with the pastor in selecting music for regular and special worship services including weddings, and special projects.
9. Work at [REDACTED] supervise all the teachers, work as administrative and teach music lessons. (20%)
10. Monitor the purchasing, maintenance and the replacement of all music-related equipment, supplies and instruments.
11. Keep informed on music methods, materials, promotion and administration. (5%)
12. Play the instrument for all regular and special services of the church. (5%)
13. Plan and give direction to a training program designed for developing musicians in the church. (5%)
14. Maintain music ministry files, library and equipment.
15. Perform other duties as necessary.

Notes: 10% for the rest of the duties.

Upon review of the complete constellation of duties as described in the record of proceeding, done in conjunction with a review of all of the documentation submitted into the record of proceeding about the petitioner's music involvement, the AAO finds that the petitioner has not established a persuasive correlation between the duties that the beneficiary would perform and the asserted need for at least a bachelor's degree level of knowledge in music. Further, it is impossible for the AAO to find such a correlation where, as here, the petitioner has not provided substantive evidence of the work to be performed.

In the above regard, the AAO notes that the petitioner, that appears to claim to have both the beneficiary and other musicians as part of its structure, does not provide substantive expositions from any of its musicians as to specific and substantive aspects of the proffered position's duties; likewise, there is no word from them as to why, if at all, the duties' performance would require the practical and theoretical application of at least a bachelor's degree level of a body of highly specialized knowledge in music or any particular musical specialty.

The AAO observes that, as evident in the two compilations of the proposed duties presented above in this decision, the petitioner describes the proposed duties, and the position that they comprise, in terms of relatively abstract, generalized functions, such as, "Recruit, train and rehearse members of the choir and/or music team"; "Coordinate with sound team regularly to plan for A/V requirements and volunteer training"; and "[REDACTED] supervise all the teachers, work as administrative and teach music lessons." The AAO finds that such relatively abstract descriptions of general functions to be performed are not sufficiently specific, substantive, and substantively explained to show whatever academic level of musical knowledge their actual performance would require.

Also, the petitioner should note that the AAO will not accord any evidentiary weight to the claims of prospective work that are stated in language indicating that the likelihood of such work is speculative. Here, the AAO is referring in particular to the following activities for which the petitioner provides no documentary corroboration that they would in fact occur:

1. Write and transcribe musical scores. (10%)
2. Compose music for musical production. (25%)
3. Editing, mixing and mastering musical album.

This naturally leads to a discussion of letters that the petitioner submitted from persons involved in the direction of church music.

The record includes what appears to be the first page of a letter from a [REDACTED] who describes himself as a holder of B.M., M.M., and D.M.A. degrees, as an organ professor and

principal organist at the [REDACTED], and as person who has served as music director and organist at many churches (which he names).

[REDACTED] attests that all of the churches for which he and his colleagues have worked “required degrees in music.” The AAO accords no probative weight to this document for several reasons.

First, of course, is the obvious fact that [REDACTED] does not specify the level of the “degrees” (important as junior college and community college associate’s degrees are also “degree”). [REDACTED] also does not state the sources of such degrees (that is, whether they were in fact degrees from accredited institutions in the United States.) This fact significantly reduces the value of [REDACTED] statements.

Moreover, there is this fatal aspect of the statement: this one-page document appears to be incomplete on its face, as it bears no signature. Also, as it bears no signature, the letter does not merit the AAO’s recognition as being an accurate capture of [REDACTED] input or even as being a statement at all that [REDACTED] has endorsed. Further, this single page fails to provide any evaluation of the proffered position in terms of how its actual performance requirements would compare with the positions that [REDACTED] and his colleagues have held. Further still, the document’s incompleteness lends to reasonable speculation as to what information in the letter as actually drafted may not have been included in this single page, but may have been included in another page (such as a signature page) that has not been submitted into the record. Without seeing the full document, the AAO cannot ascertain the apparently missing page or pages contain qualifying language, reservations, or other information not supportive of the proffered position as a specialty occupation.

Additionally, the single page before us refers to the type of position upon which he opines as Music Director/Composer, but it does not identify the proffered position as within the scope of that position type. In fact, the page does not mention any particular position at all.

In any event, the author opines on the bases of his experience and the experience of unnamed and unnumbered colleagues. The author does not presume to opine as to an industry-wide recruiting and hiring practice for positions that are parallel to the one that is the subject of this petition, and, further, he provides no studies, surveys, or authoritative publications of any kind regarding industry practices pertaining to positions like the one here proffered – which he neither evaluates or even identifies.

For each and all of the reasons discussed above, the AAO accords no probative weight to this unsigned and apparently incomplete document. The AAO may, in its discretion, use as an 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’r 1988).

Next, the AAO will now discuss its finding that the one-page letter written by [REDACTED] the Senior Pastor of [REDACTED] Inc. also has no probative value towards satisfying any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

██████████ indicates that he is aware of the educational credentials of the current and prior music directors, and that they were required to have “degrees in Music fields.” However, the Reverend does not explain or document the extent and basis of his knowledge about those directors’ backgrounds. ██████████ also states his opinion that a bachelor’s degree in Music is a minimum necessity for serving as music director for a church, but, the AAO notes, the Reverend’s letter is conclusory, in that it provides no specific, substantive analysis as the basis for the Reverend’s ultimate opinion. Further, this author expresses no personal knowledge of the particular position that is the subject of this appeal, and, as naturally must follow, he does not establish that his observations about the his own church and its music director would be applicable to the petitioner and its music director. Additionally, the AAO notes that the Reverend does not hold himself as an authority on the educational requirements of church music directors in general, and he cites no authoritative studies, surveys, statistical reports, or publications of any kind. For all of these reasons, the AAO finds no probative value in ██████████ letter.

The AAO finds no indication in his letter that ██████████ possesses any knowledge of the petitioner's proffered position beyond the job title. The fact that he attributes a degree requirement to such a generalized treatment of the proffered position undermines the credibility of his opinion. ██████████ neither asserts nor demonstrates in-depth knowledge of the petitioner's specific musical operations or how the duties of the position would actually be performed in the context of the petitioner's operations. ██████████'s opinion does not relate his conclusion to specific, concrete aspects of this petitioner's operations, so as to provide a sound factual basis for a conclusion about the educational requirements for the particular position here at issue.

In summary, and for each and all of the reasons discussed above, the AAO concludes that the advisory opinion rendered by ██████████ is not probative evidence to establish that the proffered position qualifies as a specialty occupation. The conclusions reached by ██████████ lack the requisite specificity and detail and they are not supported by independent, objective evidence demonstrating the manner in which he reached such conclusions. There is an inadequate factual foundation established to support the reliability of the Reverend’s opinion in the area in which his letter opines.

Again, the AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. Again, 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. As a reasonable exercise of its discretion the AAO discounts both advisory opinion letters as not probative of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

For efficiency’s sake, the AAO hereby incorporates the above discussion and analysis regarding the opinion letters into each of the bases in this decision for dismissing the appeal.

The AAO notes that the second iteration of job duties provided in the July 16, 2012 RFE response letter indicates that the proffered position would entail working at ██████████ 20% of the time.

The petitioner did not explain the nature of its relationship to [REDACTED] explicitly, but instead submitted documentary materials from [REDACTED], such as an untitled document that reads [REDACTED] with logo graphic, as well as a telephone number and website address. The AAO observes that these materials list one of the addresses used by the petitioner. There is a handwritten notation on this document stating, [REDACTED].<sup>2</sup> Additional materials include a promotional postcard of the [REDACTED] plans; a [REDACTED] student enrollment roster; and a document entitled, “[The Beneficiary’s] [Work] Timetable. The AAO notes that the petitioner has not clearly established, through documentary evidence, that it may be conducting business under the trade name [REDACTED]. In this respect, the AAO cannot determine whether [REDACTED] is a separate legal entity, and a corollary issue to this open question is whether the proposed employment, insofar as it would involve work at [REDACTED] would constitute placing the beneficiary to work at a third party location. For these related reasons, the AAO finds that the petitioner did not adequately describe the nature of the employment.

Additionally, the AAO notes that in the second iteration of the duties, submitted in response to the RFE, the time allocation per duty does not correspond to the timetable submitted in response to the RFE. In particular, the timetable shows that the beneficiary would work at the petitioner’s church location one day a week, on Sundays for six hours. For another three hours a week, the beneficiary will spend time at a music studio. The majority of the beneficiary’s time, twenty-one hours per week, would be spent working at the [REDACTED] and the beneficiary would be engaged in teaching, managing the music school, and composing and practicing music. Notably, the petitioner had indicated that the beneficiary would spend 5% of her time teaching private lessons for “the music school.” For a 30 hour per week position, 5% of the time would be 90 minutes, which is far less time than is indicated on the beneficiary’s timetable. Another discrepancy that AAO observes is that the petitioner had indicated that the beneficiary would work at the [REDACTED] for 20% of her time (or roughly six hours per week), but contrary to the timetable, the beneficiary spends twenty-one hours per week at the [REDACTED]. The AAO finds that these are material inconsistencies regarding the composition of the proffered position. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Without an adequate and consistent description of the proffered employment, the AAO finds that the petitioner has failed to establish the substantive nature of the position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of

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<sup>2</sup> The AAO observes that the petitioner refers to itself as [REDACTED] interchangeably throughout the record.

complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

Nevertheless, in order to highlight other evidentiary deficiencies precluding approval of this petition, the AAO will proceed to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) requires that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position for which the petition was filed.

Factors considered by the AAO when determining this criterion include whether the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports a requirement for at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO first turns to the 2012-2013 online edition of the *Handbook* section pertaining to Music Directors and Composers. This occupational category is described as follows:

Music directors typically do the following:

- Select musical arrangements and compositions to be performed for live audiences or recordings
- Prepare for performances by reviewing and interpreting musical scores
- Direct rehearsals to prepare for performances and recordings
- Choose guest performers and soloists
- Audition new performers or assist section leaders with auditions
- Practice conducting to improve technique
- Meet with potential donors and attend fundraisers

Music directors lead orchestras and other musical groups. They ensure that the musicians play with one coherent sound, balancing the timing, rhythm, and volume. Working with a variety of orchestras and musical groups, they give feedback to

musicians and section leaders so that they can achieve the sound and style they want for the piece.

Music directors may conduct youth orchestras or orchestras at colleges and universities. Some work with orchestras that accompany dance and opera companies.

Composers typically do the following:

- Write original music that orchestras, bands, and other musical groups perform
- Arrange existing music into new compositions
- Write lyrics for music or work with a lyricist
- Meet with companies, orchestras, or other musical groups that are interested in commissioning a piece of music
- Study and listen to music of various styles for inspiration
- Work with musicians to record their music

Composers write music for a variety of musical groups and users. Some work in a particular style of music, such as classical, jazz, or rock. They also may write for musicals, operas, or other types of theatrical productions.

Some composers write scores for movies or television; others write jingles for commercials. Many songwriters focus on composing music for popular audiences.

Some composers are hired by music publishers and producers to write music for bands and groups that are under contract with the company.

Some composers use instruments to help them as they write music. Others use software that allows them to hear a piece without musicians.

Bureau of Labor Statistics, U.S. Dept. of Labor, *Occupational Outlook Handbook*, 2012-13 ed., "Music Directors and Composers," <http://www.bls.gov/ooh/entertainment-and-sports/music-directors-and-composers.htm#tab-2> (accessed June 20, 2013). The director concluded that this occupational category was most akin to that of the proffered position, and the AAO concurs.

The *Handbook's* section pertaining to the educational requirements for music directors states:

A degree in music theory, music composition, or conducting is generally preferred for those who want to work as a conductor or classical composer. To enter these programs, applicants are typically required to submit recordings or audition in person or both.

These programs teach students about music history and styles, as well as composing and conducting techniques. Information on degree programs is available from the National Association of Schools of Music.

A bachelor's degree is typically required for those who want to work as a choir director.

There are no specific educational requirements for those interested in writing popular music. These composers usually find employment by submitting recordings of their compositions to bands, singers, and music and movie studios. They may seek representation by an agent, who helps them find employment and performance opportunities.

Bureau of Labor Statistics, U.S. Dept. of Labor, *Occupational Outlook Handbook*, 2012-13 ed., "Music Directors and Composers," <http://www.bls.gov/ooh/entertainment-and-sports/music-directors-and-composers.htm#tab-4> (accessed June 20, 2013).

Thus, the *Handbook* does not indicate that a bachelor's degree or higher in a specific specialty or its equivalent is the normal minimum requirement for entry into the pertinent occupational group. While the *Handbook* does state that a degree in music theory, music composition, or conducting is preferred for conductor or composer positions, this is not such a position, nor is the degree required—it is merely a preference. The *Handbook* also indicates that choir director positions do not need at least a bachelor's degree in a specific specialty. Rather, the *Handbook* indicates a degree is typically required, but this does not express a threshold requisite of a bachelor's degree in a specific specialty for entry into the occupational classification. The AAO finds no support in the *Handbook* for the proposition to support the assertion that a baccalaureate degree in a specific specialty or its equivalent is normally the minimum entry requirement for a career as a music director.

(Although the petitioner submitted documentation for the occupational classification for Musicians, Singers, and Related Workers with an associated O\*NET-SOC code for this occupational classification is 27-2042, the AAO will not address this classification because the petitioner did not characterize the position as such on the LCA.)

In support of the claim that entry into the occupation normally requires a bachelor's degree, the petitioner submitted a copy of the U.S. Department of Labor's (DOL's) *Dictionary of Occupational Titles* (DOT) for Music Directors, with an SOC code of 27-2041.01. The AAO does not find this is probative because the DOT has been superseded by the O\*NET. As noted at section A.1.1 in the DOL's Employment and Training Administration's Clearance Package Supporting Statement to the Office of Management and Budget, which is accessible on the Internet at [http://www.onetcenter.org/dl\\_files/omb2011/Supporting\\_StatementA.pdf](http://www.onetcenter.org/dl_files/omb2011/Supporting_StatementA.pdf), "The O\*NET data supersede the U.S. Department of Labor's (DOL's) *Dictionary of Occupational Titles* (DOT)," and the DOT "is no longer updated or maintained by DOL." It should also be noted that the DOT was last updated more than 20 years ago, in 1991. See <http://www.oalj.dol.gov/libdot.htm>, the homepage of the DOL's Office of Administrative Law Judges (OALJ) Internet site's copy of the DOT's Fourth

Edition, Revised in 1991. Therefore, the *DOT* information is not probative of the proffered position being a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner has therefore failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position for which this petition was filed. Consequently, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Next, the AAO finds that the petitioner has not satisfied 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.

Factors often considered by USCIS when determining the industry standard include: 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 previously discussed earlier in this decision, the letters from [REDACTED] and [REDACTED] do not have probative value for the proposition that a bachelor's degree in a specific specialty is common to the petitioner's industry in parallel positions in organizations that are similar to the petitioner.

The petitioner also submits 12 job-vacancy advertisements for the position of music director. However, none of the advertised positions are considered akin to that of the proffered position in that the neither the job advertisements themselves nor the any other documentation in the record establish that the advertised positions are parallel to the one here proffered. Also, as correctly noted by the director, several of the job advertisements did not specify a bachelor's degree requirement at all, and several did not specify a degree in a specific specialty. For these reasons, the AAO will not address each advertisement herein.

Further, there is little inherent value to the collection of advertisements as they are not supplemented by any evidence to establish how representative they are of the hiring and recruiting practices of either the firms that placed the advertisements or of firms similar to the petitioner in the petitioner's industry.<sup>3</sup>

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<sup>3</sup> Further, according to the *Handbook's* detailed statistics on Music Directors and Composers, there were approximately 93,200 persons employed within this occupational classification in 2010. *Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos020.htm> (last accessed April 15, 2013). Based on the size of this relevant study population, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from just twelve job postings with regard to the common educational requirements for entry into parallel positions in churches in the religion industry. *See generally* Earl Babbie, *The Practice of Social*

In summary, then, as the evidence in the record of proceeding has not established that similar companies in the same industry routinely require at least a bachelor's degree in a specific specialty or its equivalent for parallel positions, the petitioner has not satisfied the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO finds that the petitioner did not satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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."

The record does not demonstrate any complex or unique nature of the proffered position that distinguishes it from similar but non-specialty degreed employment under the second prong of the criterion. A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

The AAO notes, on the LCA, the petitioner has designated the proffered position as a Level I position, indicating that it is an entry-level position for an employee who has only basic understanding of the occupation. See Employment and Training Administration (ETA), *Prevailing Wage Determination Policy Guidance*, Nonagricultural Immigration Programs (Rev. Nov. 2009). This fact also does not weigh in favor of the proffered position being distinguished by relative complexity or uniqueness.

Further, the AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry will assist her in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. Although the petitioner submitted a comparison table on

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*Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job advertisements supported the finding that the position of music director in a church required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

appeal, which lists the stated music director duties, and notes that nonprofessional music clerks would not be delegated with such duties, the AAO observes that this comparison table does not provide persuasive, concrete and substantive explanations establishing that the relative complexity or uniqueness required to satisfy this criterion.

That all being said, the AAO hereby incorporates into this present discussion and analysis this decision's earlier comments and findings regarding the record's lack of substantive information about the proposed duties and the position that they comprise. Simply put, the evidence of record does not develop the proffered position sufficiently to show that it possesses the relative complexity or uniqueness required to satisfy this criterion.

Consequently, as the evidence in the record of proceeding fails to demonstrate the requisite complexity or uniqueness as aspects of the proffered position, the petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO evaluates the record of proceeding to see whether the petitioner has established that it normally requires a degree or its equivalent for the position, pursuant to the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The petitioner submitted the curriculum vitae, transcript, and W-2 wage report for an individual, E-S.<sup>4</sup> On the curriculum vitae, E-S- lists employment with the petitioner as a general manager, but not as a music director. The transcript reports that E-S- earned 30 undergraduate degree hours, but the transcript does not report that E-S-earned a bachelor's degree in a specific specialty. The AAO

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<sup>4</sup> The name of this individual has been withheld for anonymity purposes.

observes that the transcript copy is unclear, and therefore the AAO cannot determine the subject matter of the courses earned by E-S-. In addition, the petitioner submitted the I-797 H-1B approval notice for E-S-, but did not submit the underlying H-1B petition.<sup>5</sup>

This collective evidence for E-S- does not support the contention that the petitioner has a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent, in music.

The petitioner also submitted documentation pertaining to another individual, L-H-, including an employment authorization document (EAD), a Master of Business Administration degree with a concentration in accounting from Keller Graduate School of Management at DeVry University, and the corresponding transcript to the degree.<sup>6</sup> The AAO observes that there is no evidence within the record of proceeding demonstrating that L-H- is employed by the petitioner, or employed as a music director. Moreover, the AAO notes that L-H- does not appear on the organization chart submitted by the petitioner.

In any event, whatever their educational background, these two persons would not represent a sufficient number of recruiting and hiring actions to establish the history required by this criterion.

Thus, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Here again the AAO incorporates by reference its earlier comments and finding with regard to this record of proceeding's lack of substantive information as to the nature of the proposed duties. The

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<sup>5</sup> The petitioner noted that USCIS approved the petition that had been previously filed on behalf of E-S-. The director's decision does not indicate whether she reviewed the prior approvals of the other nonimmigrant petition for E-S-. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory 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'r 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).

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

<sup>6</sup> The name of this individual has been withheld for anonymity purposes.

evidence of record simply does not develop relative specialization and complexity as distinguishing aspects of the nature of the proffered position, let alone as aspects rendering the nature of the proposed duties so specialized and complex that their performance would require knowledge usually associated with attainment of at least a bachelor's degree in a specific specialty.

The AAO notes that the duties as described in the record of proceeding are broad and numerous and appear to span a variety of functions, including planning lessons, composing music for musical production, supervising the work of the music ministry staff, and managing the church's music school, but, to the very limited extent to which they are described, the duties do not convey either the need for the beneficiary to apply a particular body of highly specialized knowledge in a specific specialty, or a usual association between such knowledge and the attainment of a particular educational level in a specific specialty.

As the evidence in the record of proceeding has not established that the nature of the proffered position's specific duties is so specialized and complex that performance would require knowledge usually associated with the attainment of a baccalaureate degree or higher degree in a specific discipline, the petitioner has not satisfied the criterion at 8 C.F.R. ^ 214.2(h)(4)(iii)(A)(4).

As the evidence of record does not satisfy any criterion at 8 C.F.R. ^ 214.2(h)(4)(iii)(A), it cannot be found that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed, and the petition will be denied.

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.

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