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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: LIN-01-198-52086 Office: Nebraska Service Center Date: JAN 06 2003

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a non-profit church with three employees. It seeks to employ the beneficiary as a choir director for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a statement along with additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

The director denied the petition because the petitioner had not established that the proffered position was a specialty occupation requiring at least a baccalaureate degree. On appeal, counsel presents documentation in support of his argument that the petitioner normally requires a baccalaureate degree or its equivalent and that the requirement of a bachelor's degree in music is common in parallel positions among similar organizations.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- Instruct, supervise, and conduct choir at rehearsals and performance to achieve desired effects, such tonal and harmonic balance, dynamics, rhythm, tempo, and shading, utilizing knowledge of conducting techniques and music theory;

- Direct and train the following groups: Adult Choir, Youth Choir, Graded Choir Program, and other such Vocal or Instrumental Ensembles as desired;

- Plan, organize and direct all music programs including:
  a) Select music to suitable [sic] for religious services in consultation with leaders of congregation, and
  b) Create variations of traditional music or composing music for services; and

- Plan and organize Sunday praise worship, and lead and train the Sunday evening praise team.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

3. The employer normally requires a degree or its equivalent for the position; or

4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in music or a related field. Although the position of choir director may, in some instances, qualify as a specialty occupation, the petitioner has not established that the beneficiary's duties as choral director are of such complexity that a baccalaureate degree in a specific specialty is necessary for the successful completion of its duties.

In support of his argument, counsel, on appeal, cites two prior cases in which petitions involving choir directors had been approved. The first is an unpublished AAU decision and, therefore, has no precedential effect in this proceeding as the Service is not

bound by such decisions. See 8 C.F.R. 103.3(c). Counsel also refers to Full Gospel Portland Church v. Thornburgh, 730 F. Supp. 441 (D.D.C. 1998). The beneficiary in that decision, however, performed the duties of accompanist, choir director and piano teacher. It has not been shown that the more limited scope of this beneficiary's duties warrants comparison to those enumerated in the cited case. Both decisions cited by counsel involved determinations of "professional" status in which the designated responsibilities of the positions were considerably more extensive than those assigned to the current beneficiary. Thus, the cases cited by counsel fail to support his argument that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, counsel argues that, in the past, the petitioner required the services of individuals with baccalaureate or higher degrees for the offered position. In support of its argument, counsel submits a copy of a transcript of the beneficiary's predecessor in the position of music director, who held a bachelor's degree in music. Nevertheless, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.[1] To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the petitioner has previously hired an individual with a bachelor's degree in music for the proffered

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

position, the position, nevertheless, does not meet the statutory definition of a specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner may have hired an individual with a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

In an effort to establish that a bachelor's degree is common to the industry in parallel positions among similar organizations, the petitioner has provided three job listings for music director positions from America's Job Bank. Each listing includes a requirement of a bachelor's degree in music. However, while the advertisements refer to openings for the position of music director at religious institutions, they provide no information as to the annual budgets of these institutions or the size and scope of their operations. Nor do the listings provide data regarding the number of employees and the educational credentials of those employees. Moreover, a total of three selected advertisements are insufficient to demonstrate the existence of an industry standard regarding the position offered by the petitioner.[2]

Finally, the petitioner has not demonstrated that the nature of the beneficiary's proposed 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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[2] Another listing from America's Job Bank, the *same* source as that used by the petitioner for the three job advertisements provided on appeal, referenced a position for a full-time musical director [Job Number 1890452] at the [redacted], in [redacted] The duties of that position -- "directing, planning, teaching, composing, arranging and leading instrumental and vocal performances" -- are similar to those set forth in the petition under consideration. Nevertheless, the only academic requirement for applicants is the attainment of a high school diploma or GED.