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U.S. Citizenship
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Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JUL 15 2008
SRC 06 212 52568

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

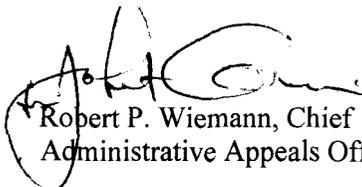
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, sent the petitioner a Notice of Intent to Deny (NOID) on August 3, 2006. The petitioner responded on August 31, 2006, and the director then denied the petition on September 11, 2006. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gymnastics training facility. It seeks to employ the beneficiary permanently in the United States as a head coach, competitive gymnastics. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position based both on the beneficiary's two-year program of studies in coaching and her years of work experience as a head coach. The director determined that it appeared the petitioner was using the beneficiary's work experience to both establish her additional two years of college studies and her requisite six years of previous work experience as a head coach. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 11, 2006 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evident of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 7, 2003.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*,

NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel resubmits documentation submitted in the petitioner's response to the director's request for further evidence dated August 3, 2006. Counsel also submits a graph that examines the beneficiary's education in China consisting of two years of college studies at the Tianjing Institute of Physical Culture in Tianjing, China, and her work experience both in China and elsewhere following her college-level studies.

The initial I-140 petition was submitted with a copy of the beneficiary's diploma from Tianjing Physical Culture Institute, Tianjing, signed by [REDACTED], president of Tianjing Physical Culture Institute. This document states the beneficiary attended the institute from September 1981 to July 1983.

The petitioner also submitted an educational equivalency document written by [REDACTED], Evaluator, Foundation for International Services (FIS) dated September 9, 1992. In his evaluation, Mr. [REDACTED] stated that the beneficiary through her educational programs and employment experience had the equivalent of a bachelor's degree in physical education with a specialization in gymnastics.

The petitioner also submitted an additional document entitled "Determination of Expertise," dated August 28, 2006 and written by [REDACTED], Assistant Professor, Oxford College, Division of Physical Education and Dance, Emory University. In this document, Dr. [REDACTED] examined the beneficiary's specialized work experience in the field of physical education and related areas. Dr. [REDACTED] specifically examined the beneficiary's six years of work experience from August 1983 to July 1989, as assistant coach and head coach in China.

Dr. [REDACTED] then concluded that the beneficiary's six years of work experience were the equivalent of not less than two additional years of bachelor's-level academic training in physical education and related areas. Dr. [REDACTED] then stated that based on the beneficiary's academic and experiential qualifications, the beneficiary had attained the equivalent of a bachelor of arts degree in physical education from an accredited U.S. institution of higher education.

The record contains the following letters of work experience:

A letter from [REDACTED], Head Coach, Chinese women's National Gymnastics Team, dated August 22, 2006. The letter writer stated that the beneficiary worked as an assistant coach from November 1986 to June 1987, and as head coach for the Sichuan Gymnastic team that led to the team's first place finish at a gymnastics meet in 1989.

A letter from [REDACTED] retired head coach, Sichuan Province Team, dated August 22, 2006. The letter writer stated that the beneficiary had worked with the Sichuan Province Gymnastics Team as assistant coach from August 1983 to October 1988, and as head coach for the period July 1987 to June 1992.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

A letter written by [REDACTED] dated April 18, 2006. In his letter, [REDACTED] described himself as former owner and manager at Golden Strip Gymnastics Training in Simpsonville, South Carolina. Mr. [REDACTED] stated that the beneficiary worked as head gymnastics coach from December 1992 to December 1995, during which time she coached and trained gymnasts at all levels including Junior Olympic Levels 4-6, and that the beneficiary also developed and communicated training program leads in levels 7-10.

A letter written by [REDACTED] Markham Gymnastics Club, Markham, Ontario, Canada dated May 5, 2006. In her letter, [REDACTED] states that she was director of the Markham Gym Club in Markham, Ontario, Canada. Ms. [REDACTED] states that the beneficiary worked part-time as a girls team head coach from January 1996 to October 1997, and was responsible for the coaching and training of provincial level gymnasts, or the U.S. equivalent of levels 5, 6, and 7.

An undated letter written by [REDACTED] the petitioner's director. In his letter, Mr. [REDACTED] stated that although not specifically stated on the ETA 750, the petitioner's position has always been to accept a combination of education and work experience equivalent to a U.S. bachelor's degree in physical education. The director stated that this was what the petitioner intended, and not necessarily a degree-for-degree equivalency only. Mr. [REDACTED] explained that the combination of education and experience was a non-restrictive equivalency that further opened the proffered position to a wider source of applicants and allowed the petitioner the opportunity to find the most qualified and experienced individual to meet the needs for its students enrolled in competitive gymnastics. Mr. [REDACTED] stated that the beneficiary has filled the proffered position since October 1998 in H-1B classification based on her two-year diploma from the Tianjing Physical Culture Institute and her six years of progressive training in the area of gymnastics coaching. Mr. [REDACTED] stated that it was this education/experience combination that uniquely qualifies a head gymnastics coach to identify children with exceptional talent and to use every conceivable resource to develop their talent.

The petitioner, in its response to the director's RFE, also submitted a copy of a district court decision, *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005), and an unpublished AAO decision dated January 20, 2004 that concerns a petition for an alien worker as a member of the professions holding an advanced degree or an alien of exceptional ability.

On appeal, counsel asserts that the petitioner's intent and practice was to accept a combination of education and experience equivalent to a bachelor's degree in physical education for the proffered position. Counsel further states that the director stated that the beneficiary had the educational equivalence to a bachelor's degree in physical education based on her two years of education (September 1981 through July 1983) at Tianjing Physical Culture Institute, and her six years of work experience with three years equating one year of college level education. Counsel further notes that in the director's NOID, she acknowledged that the beneficiary had four years and ten months of work experience and specifically asked for evidence of an additional one year and two months more experience. Counsel states that the petitioner assumed it only had to provide evidence only of the missing one year and two months. Counsel states that the petitioner has met that burden and that the remaining of two years and eleven months from the period August 1983 to June 1992 is subsequent to the beneficiary's completion of her two year degree, and is exclusive of the six years of work experience used for the degree equivalency. Counsel refers to a graph submitted on appeal.

To determine whether a beneficiary is eligible for an employment-based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of accountant. In the instant case, item 14 describes the requirements of the proffered position as follows:

| | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 4+ |
| | College Degree Required | Bachelor's Degree in Physical Education or equivalent |
| | Major Field of Study | Physical Educations/Sports |

The applicant must also have four plus years of vocational, on the job training, and six years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A stated the following special requirements: "Proven record in developing athletes at Junior Olympic levels 4-6, with minimum state level championship team and a history of work with proven international level gymnasts and athletes. Record of travel with athletes in past." The Form ETA 750 also notes that the beneficiary would supervise four to six workers.

The beneficiary set forth her credentials on Form ETA 750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated she attended Tian Jing Institute of Physical Culture, Tian Jing, China, studying coaching from September 1981 to July 1983, and received a college diploma. The beneficiary also noted that she had attended Chong Qing Gymnastics Institute, Chong Qing, China, studying gymnastics technique, from June 1972 to May 1976, and did not indicate that she received a degree or certificate for these studies. With regard to her work experience, the beneficiary indicated that she had worked for the petitioner as Gymnastics Coach from April 1998 to the date she signed the Form ETA 750, January 17, 2003, working 30-35 hours a week. She also indicated that she had worked at Markham Gymnastics Club, Markham, Ontario, Canada as coach of the girls team from March 1996 to October 1997, working 25 hours a week, and that she had worked at Golden Strip Gym, Simpsonville, South Carolina, as head coach of the girls team from December 1992 to December 1995, working 30 hours a week.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 750, which in this case includes 4 years of college, with a bachelor's degree in physical education or equivalent, four years of on the job vocational training, and six years in the proffered position.

The petitioner clearly delineated four years plus as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. The Form ETA 750 in the instant petition clearly states four years plus as the required number of years for the stipulated baccalaureate degree.

In the director's NOID and in her denial of the instant petition, the director analyzed whether the petitioner had provided sufficient evidence to establish that the beneficiary had the equivalent of a U.S. baccalaureate degree based on her two-year program of studies at Tian Jing Physical Culture Institute, and her years of work experience. In both documents, the director appears to examine both the beneficiary's academic studies and her work experience in determining whether the beneficiary is qualified to perform the duties of the employment-based immigrant visa petition. The director's comments in both documents are misplaced.

Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permit equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent third-preference immigrant visa petitions. The director's decision will be withdrawn. Counsel's assertions on appeal with regard to the beneficiary's years of work experience being sufficient to both establish an additional two years of college-level studies and the requisite six years of work experience are equally misplaced.

Evaluation of the actual credentials held by the beneficiary is provided through credentials evaluations submitted into the record of proceeding for this case. It is noted that *Matter of Sea Inc.*, 19 I&N Dec. 817 (Comm. 1988), provides: "[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight." With regard to the FIS educational equivalency document written by Mr. [REDACTED] and the evaluation of expertise document written by Dr. [REDACTED] both documents combined the beneficiary's academic studies in physical culture with her progressively more responsible work experience as a coach to determine that the beneficiary had the equivalent of a U.S. bachelor's degree in physical education from an accredited U.S. educational institution. Both documents in the record equated three years of the beneficiary's work to one year of college level education, but, as stated previously, that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have four years of college and a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The proffered position requires at least a four-year bachelor's degree, four or more years of vocational, on the job training, and six years of experience in the proffered position. DOL assigned the occupational code of 999-272-022, coaches and scouts, which in the *O'Net Online Occupations* website corresponds to category 27-2022.00, coaches and scouts. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five requiring "extensive preparation." According to DOL, many occupations in this category require more than five years of experience for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 8 and above, and states that a bachelor's degree is the minimum formal education

required for these occupations, and that many also require graduate school. Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

With regard to Job Zone examples, DOL states: “these occupations often involve coordinating, training, supervising, or managing the activities of others to accomplish goals. Very advanced communication and organizational skills are required. Examples include librarians, lawyers, aerospace engineers, physicists, school psychologists, and surgeons.”

Based on the DOL classification and assignment of educational and experiential requirements for professions such as coaches and trainers, the proffered position may be properly analyzed as professional since the position requires a bachelor’s degree and six years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C). The proffered position also includes supervisory duties for four to six employees. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements.

The petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification. Therefore the AAO will comment on the requisites of both classifications in these proceedings.

The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must also prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 750 stipulates a four-year bachelor’s degree in physical education or the equivalent, and also indicates by the use of the word “plus” that additional years of baccalaureate level studies were acceptable. The Form ETA 750 also stipulated six years of work experience in the proffered position of head coach, L7-10, and noted further special requirements.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary’s bachelor’s degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), providing the evidentiary requirements for “professionals,” states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by

evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, *and any other requirements of the individual labor certification*, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of the category sought, the beneficiary must have a four-year bachelor’s degree or its foreign equivalent in physical education.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 750. The beneficiary’s education is limited to a two-year diploma from the Tian Jing Physical Culture Institute. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of a four-year foreign degree equivalent to a U.S. bachelor’s degree.²

The burden of proof in these proceedings rests entirely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1391. Here, the petitioner has not met that burden. Therefore, the appeal must be dismissed.

ORDER: The appeal is dismissed.

² Under the skilled worker classification, the petitioner would also have to establish that the beneficiary had six years of relevant work experience. The record, based on various letters of work verification, establishes the beneficiary’s requisite six years of work experience based on her work as a head coach in China with the Sichuan Gymnastics Team from July 1987 to June 1992, and her work as a coach in the United States with both the petitioner, from April 1998 to the February 7, 2003 priority date, her part-time work with Markham Gym from March 1996 to October 1997, and her part-time employment with Golden Strip Gymnasium as head coach from December 1992 to December 1995. The beneficiary also appears to have fulfilled the other specialized requirements listed in section 15, ETA Form 750, Part A.