



U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



Di

FILE: SRC 04 253 53973 Office: TEXAS SERVICE CENTER Date: JUN 22 2006

IN RE:



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:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a public tennis facility. It seeks to employ the beneficiary as its head tennis coach and 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 on the ground that the record failed to establish that the proffered position qualifies as a specialty occupation.

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.

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.

Citizenship and Immigration Services (CIS) 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.

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

The petitioner describes itself as a public tennis facility, owned by the City of Southlake, Texas, that offers a variety of programs including private and group lessons with certified teaching professionals. The petitioner states that it was established in 1999, has twelve employees and gross annual income of \$130,919, and proposes to employ the beneficiary for three years, at an annual salary of \$34,950, as its head tennis coach. In the Form I-129 the petitioner provided the following description of the job:

Instruct or coach groups or individuals in the fundamentals of sports. Demonstrate techniques and methods of participation. Evaluate athletes' strengths and weaknesses as possible recruits or to improve the athletes' techniques to prepare them for competition.

In its response to the RFE the petitioner listed the duties of the proffered position as follows:

- Support the efforts of the Southlake Tennis Center to promote the game of tennis in the Southlake community.
- Create a marketing plan to increase participation in our adult lesson/league programs and the junior tennis program.
- Develop a business plan to promote the advanced junior program, including the ZAT level players.
- Take responsibility for the junior travel team by developing a program to take juniors to advanced tournaments, including travel and hotel arrangements and coaching.
- Assist in pro shop buying and management as determined by the general manager.
- Teach private and group lessons to clients of the [petitioner].
- Assist in the junior development program as offered by the director of tennis, including weekly drills and USA Team Tennis teams.
- Assist in scheduled adult drill sessions as offered by the director of tennis, including drop-in drills, adult social events, Pro-Am events, and adult camps.
- Run an event at least once a month in either the adult or junior program. Be responsible for all marketing, promotion, and accounting of event.
- Participate in charitable events at the Southlake Tennis Center, to market yourself and to grow the game of tennis. Develop sponsorship leads and promote attendance at events.
- Maintain product knowledge on all items sold in the pro shop, including racquets, string, accessories and special orders.
- Assist in general maintenance of teaching courts, including preparing courts for play, repairing windscreens, and keeping facility in superior condition at all times.
- Gain active membership and maintain certification in the USPTA/USPTR within six months of hire. Attend continuing education courses to improve teaching expertise.
- We encourage you to compete on a regular basis in local pro tournaments to maintain playing ability and establish playing reputation for staff.
- Act in professional manner at all times, showing respect for fellow staff members, students, and customers of the tennis center.
- Wear professional teaching attire at all times, including a collared shirt. Set a good example for students by wearing appropriate protective sun gear.
- Must be able to stand for 8 hours, lift at least 40 pounds, and operate standard office equipment.
- Provide assistance to the director of tennis and the tennis center manager as needed to insure the smooth running of all activities at the tennis center.

According to the petitioner, the beneficiary's baccalaureate degree – a bachelor of science in business, with a major in management, from the University of Southern Indiana – qualifies him to perform specialized job-related work in public relations, marketing, sales development, and business planning.

In her decision the director found that the evidence of record did not establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into a position as head tennis coach, or that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can only be performed by an individual with a degree. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that the proffered position qualifies as a specialty occupation under the first three criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel groups the job duties into five categories, which are described as follows:

- Management requirements: Assist in the development and implementation of policies and procedures designed to advance the tennis facility's mission and ensure quality service while maintaining steady growth. Direct and supervise the facility's personnel. Responsible for hiring, termination, and promotional evaluations and decisions, as well as all aspects of the junior travel team including travel arrangements, tournament scheduling, and creating a plan to ensure the program's success.
- Marketing requirements: Create and implement a marketing plan to increase game awareness, center promotion, community involvement, and sales for the tennis facility. Serve as liaison between clients and senior management. Promote the junior travel team league by organizing various charity events, social events, and camps. Assist the director of tennis with scheduled adult drill sessions. Drop in drills, and Pro-Am events.
- Accounting/Finance/Budgeting requirements: Review, analyze, and prepare budgets to ensure profitability of club, prepare monthly, quarterly, and annual sales budget, and maintain client accounts.
- Operations requirements: Oversee tennis center operations, including staff schedules and ground/facilities maintenance. Oversee pro shop operations, including purchasing, inventory control, employee scheduling and presentation.
- Tennis Instructional requirements: Provide group and private lessons to clients. Demonstrate techniques and methods of participation. Evaluate each individual athlete's strengths and weaknesses to prepare them for competition.

According to counsel, the foregoing duties require a bachelor's degree in business management, marketing, psychology, or childhood education. Counsel contends that a degree requirement is common to the industry in parallel positions among similar organizations, and that the petitioner has consistently required that its head tennis coach have a bachelor's degree.

The AAO notes that some of the job duties described in the appeal are substantially different from those described in the petition and in the response to the RFE. For example, there is no mention in the earlier submissions that the beneficiary would "direct and supervise the facility's personnel," or that he would be "responsible for hiring, termination, and promotional evaluations and decisions." While one of the duties

listed in the response to the RFE indicated that the beneficiary would be responsible for the accounting function of a monthly adult or junior program event, there is no mention that the beneficiary would have broad facility-wide accounting, finance, and budget duties as asserted on appeal. Furthermore, the description of the beneficiary's operational duties on appeal – which include the oversight of the tennis center and pro shop operations – conflicts with the response to the RFE, which described the beneficiary as responsible for “provid[ing] assistance to . . . the tennis center manager as needed” and “assist[ing] in pro shop buying and management as determined by the general manager.” The foregoing duties described in the appeal represent an expansion of the duties originally identified for the proffered position. A petitioner may not make material changes to its petition in an effort to make a deficient petition conform to legal requirements. *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998). “The AAO cannot consider facts that come into being only subsequently to the filing of the petition.” *Id.* at 176. Accordingly, the new duties described in the appeal – *i.e.*, the managerial, financial, and operational functions which were not included in the original petition or the response to the RFE – will not be considered by the AAO in adjudicating the appeal.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. *See Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the proffered position accords with the *Handbook's* description of a sports instructor, which is a subcategory of the *Handbook's* broad occupational category of athletes, coaches, umpires, and related workers. The occupation is described in the *Handbook*, 2006-07 edition, as follows:

Sports instructors teach professional and nonprofessional athletes individually. They organize instruct, train, and lead athletes in indoor and outdoor sports such as bowling, tennis, golf, and swimming . . . Like coaches, sports instructors also may hold daily practice sessions and be responsible for any needed equipment and supplies. Using their knowledge of their sport and of physiology, they determine the type and level of difficulty of exercises, prescribe specific drills, and correct athletes' techniques. Some instructors also teach and demonstrate the use of training apparatus, such as trampolines or weights, for correcting athletes' weaknesses and enhancing their conditioning. As coaches do, sports instructors evaluate the athlete and the athlete's opponents to devise a competitive game strategy.

With respect to the training and educational requirements of the occupation, the *Handbook, id.*, states as follows:

Education and training requirements for athletes, coaches, umpires, and related workers vary greatly by the level and type of sport. Regardless of the sport or occupation, jobs require immense overall knowledge of the game, usually acquired through years of experience at lower levels

For high school coaching and sports instructor jobs . . . [s]ome entry-level positions . . . require only experience derived as a participant in the sport or activity.

Head coaches at public secondary schools and sports instructors at all levels usually must have a bachelor's degree Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine.

For those interested in becoming a tennis, golf, karate, or other kind of instructor, certification is highly desirable There are many certifying organizations specific to the various sports, and their training requirements vary. Participation in a clinic, camp, or school usually is required for certification

[T]here are two organizations that certify tennis instructors and coaches Both organizations offer three levels of certification Each level of certification is based on the candidate's National Tennis Rating Program rating, teaching experience, and the score on the organization's written and practical certifying exams

While the *Handbook* indicates that sports instructors in public schools usually require a bachelor's degree, it does not address the educational requirements for sports instructor positions which, like the proffered position in this petition, are unaffiliated with educational institutions. Based on the information provided in the *Handbook*, it appears that prior experience in the sport and certification as a tennis instructor may be the most important qualifications for entry into the occupation of tennis instructor. The AAO determines that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a sports instructor position in the field of tennis, as required for the position to meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The duties of the proffered position also include some marketing and promotion functions. These duties are largely supportive in nature, however, not managerial. For example, the beneficiary would "support" the Southlake Tennis Center in promoting tennis in the community, "provide assistance" to the tennis center manager in running the facility, and "assist" in the development and implementation of policies and procedures to promote the facility's growth. Though the petitioner indicates that the beneficiary would be responsible for creating a marketing plan for the adult lesson/league and junior tennis programs, and for developing a business plan for the junior program, there is no evidence in the record that these activities involve managerial or substantive functions that require the application of a body of highly specialized knowledge and a baccalaureate or higher degree in a specialty field, as required to meet the statutory definition of a specialty occupation.

For the reasons discussed above, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

On appeal counsel cites the DOL's *Dictionary of Occupation Titles (DOT)*, which assigns the occupation of coach an SVP ("specific vocational preparation") of level 8. According to counsel that means the occupation requires a bachelor's degree. The *DOT*, however, is not a persuasive source of information about whether a particular job requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not specify how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a particular position would require. Counsel also cites another DOL resource – the *Occupational Information Network*, or *O*NET* – which places the occupational category of coaches (and scouts) in its Job Zone Five ("Extensive Preparation Needed") and states that a bachelor's degree is the minimum formal education required for the occupation. It does not indicate, however, that the bachelor's degree must be in any specific specialty. Thus, neither the *DOT* nor the *O*NET* establishes that a baccalaureate or higher degree in a specific specialty is required for entry into a coaching position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel cites literature from the United States Professional Tennis Association (USPTA) entitled "Hiring a tennis professional" as evidence that coaching positions on the level of the petitioner's head tennis coach require managerial skills acquired through a baccalaureate program in a business-related discipline. The subject literature, however, contains no reference to educational requirements for the tennis positions it discusses. On appeal counsel submits a series of internet job announcements for tennis coaches, all of which indicate that a baccalaureate degree is required, but only one of which states that the degree must be in a specific specialty. The foregoing evidence does not establish that a specialty degree requirement is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Subsequent to the appeal brief letters were submitted from the coaching directors of three tennis academies, each of whom states that tennis coaches and/or directors require a baccalaureate degree in business. None of the authors indicates that he has such a degree, however, or submits any documentation of a degree. The letters are not supplemented by any documentary evidence that the three tennis academies have policies of requiring business degrees of their tennis coaches and directors. Nor is there any evidence in the record to establish the expertise or authority of the three tennis directors to evaluate the industry-wide educational requirements of a tennis coach or director. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion does not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. See *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the three opinion letters discussed above are not persuasive evidence that a baccalaureate degree in business is a common requirement in the industry for entry into a position as head tennis coach, as required for the position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record show that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), counsel asserts that the petitioner has consistently required its head tennis coach to have a bachelor's degree. On appeal the petitioner submits an affidavit from its general manager stating that it is company policy to hire only individuals with bachelor's degrees for head tennis coach/head tennis professional

positions. The affidavit is supplemented by a list of eleven of the petitioner's "teaching pros" (employees and independent contractors) during the year 2004, eight of whom are listed as having degrees in business management or related specialties. Two of the degrees are in unrelated specialties (psychology and computer engineering), however, and one individual is not listed as having any degree. No corroborative evidence has been submitted, such as employee records or payroll statements, to show that any of the individuals is or was actually employed by the petitioner, and in what capacity. Nor has any documentary evidence been submitted of their educational degrees. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the record does not demonstrate that the petitioner normally requires a degree or its equivalent in a specific specialty for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties are so specialized and complex that their performance requires knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Though counsel asserts that the duties of the position involve not only coaching, but also business-related functions required to manage and sustain a profitable business, the record does not establish that those duties are so specialized and complex that their performance requires baccalaureate level knowledge in a business-related specialty. In regard to the beneficiary's business-related credentials, the USPTA certification submitted subsequent to the appeal brief states that the beneficiary "has successfully completed all requirements, including an extensive examination of teaching, playing *and business skills*, necessary for the rating of Professional 2." [Emphasis added.] According to the USPTA ratings for tennis professionals – ranging from master professional to developmental coaches – the proffered position would be at the level of Professional 2. As far as the record shows, the business acumen needed for the head tennis coach position could be acquired in a USPTA training course. It does not show that baccalaureate level knowledge of business is required. The record also includes literature from Ferris State University in Big Rapids, Michigan, discussing its professional tennis management educational program, which indicates that the USTA accredits both two-year (associate degree) and four-year (baccalaureate degree) programs. This documentation further indicates that baccalaureate level knowledge in a business-related specialty is not required to perform the business management skills of tennis professional positions like the proffered position in this case.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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