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U.S. Department of Justice

Immigration and Naturalization Service

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



File: LIN 00 256 51617 Office: Nebraska Service Center Date: 11 APR 2002

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a firm that provides gymnastics and dance instruction which employs eight persons and seeks to employ the beneficiary as a gymnastics coach for a period of three years. The director determined that the petitioner had failed to submit the required approved labor condition application, and that the petitioner had not established that the offered position is a specialty occupation.

On appeal, the petitioner argues that the offered position is a specialty occupation and that the beneficiary is qualified to perform services in a specialty occupation. The petitioner also submitted evidence in rebuttal regarding the labor condition application.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

Although the petitioner was required by regulation and requested by the director to provide a certification from the Department of Labor that a labor condition application had been filed, that document was not initially submitted.

The petitioner has provided a certified labor condition application and explained the steps taken by the firm to obtain the signed application. Nevertheless, that application was certified on May 17, 2001, a date subsequent to September 29, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(i) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Since this has not occurred, the petition may not be approved.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary earned a diploma under the specialty of "Physical Culture and Sports" in 1985 from the Belarussian State ordena Trudovogo Krasnogo Znameni Institute of Physical Culture. At that time he was found qualified as a physical training teacher and gymnastics coach. Since 1987, he has worked as a senior gymnastics coach and teacher abroad.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) 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.

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 duties of the offered position are described on a daily basis as:

12 to 1:30 p.m. Work with and train talented young children to develop movement and gymnastics abilities by teaching a pre-school class. This is to prepare children for pre-team gymnastics and eventually team competition. Will also train recreational coaches on spotting techniques, safety, and skill acquisition process.

1:30 to 2:30 p.m. Coordinate with Girl's team coaches as to strategies for improvement of girl's and boy's team competition and work out schedule. Plan and organize week and review progress. Brainstorm on how to improve performance and discuss problems that have occurred. Also

work with assistant coaches to review progress they are making and to give pointers on improvement.

2:30 to 3:30 p.m. Stretch & Warm up Boy's Team Athletes. Eventually assistant coach will take on the task and Uladzimir will work with individual athletes to enhance and improve their skills. Discussion regarding attitudes and mental power and concentration will be included.

3:30 to 4:30 p.m. Condition Boy's Team Athletes. Work with assistant coach to explain methodology, techniques, reasons for each exercise and how it pays off in developing higher level skills.

4:30 to 5:30 p.m. Begin working techniques to learn new skills or more advanced skills for each event - horizontal bars, rings, vault, floor, parallel bars, pommel horse. Use method of working on daily drills for each event, breaking higher skills down into elements. Will teach assistant coach how to spot each element and how to connect the elements with spotting different parts of the body.

5:30 to 7:00 p.m. Continue working techniques & practice routines with team boys. Will work with assistant coach to train to watch for potential dangerous moves or techniques, correct gymnasts and assistant coaches as needed to improve performance.

7:00 to 8:00 p.m. Complete routines and begin cool down stretching and conditioning. Meanwhile discussing competitive attitude and psychological approaches to gymnastics. Give gymnasts and assistant coach feedback on evenings workout and pointers for improvements and congratulations on work well done.

The petitioner states that all of the team level coaches at the firm at equivalent positions to the position to be filled by the beneficiary, have baccalaureate degrees. However, the petitioner has not shown that it requires a degree in a specialized and related field of study.

The petitioner provides a letter from a company specializing in teaching gymnastics and dance. The writer is the State Director of an organization named USA Gymnastics Washington. The writer asserts that it is now commonplace in the United States for gymnastics coaches to have college degrees. The writer explains that while there is no gymnastics major available in the United States, the organization has increased the number and type of training programs that it offers. It is concluded that the letter verifies that there

is no current national requirement of a baccalaureate degree in any field for a gymnastics coaching position.

The petitioner has also provided two letters from a business consultant who asserts that the offered position is a specialty occupation and that it takes college level knowledge and experience to be able to teach well enough to provide instruction to upper level gymnasts. However, while the writer state that a baccalaureate degree is required, he does not indicate that a degree in a specific and specialized area is required. Additionally, two letters are not sufficient to establish an industry standard.

The petitioner argues that the offered position is a specialty occupation due to the complexity of the duties of the position. However, the petitioner has provided insufficient evidence of such complexity. The petitioner has not adequately differentiated the offered position from other coaching positions whose usual requirement is experience in the particular sport.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

The offered position is that of a sports instructor or coach. In its Occupational Outlook Handbook (Handbook), 2000-2001 edition, at page 179, The Department of Labor lists no requirement of a baccalaureate degree in a specialized area for employment as a sports instructor or coach in private industry. Some entry-level positions only require experience derived as a participant in the sport or activity, while others require substantial education or experience. Part-time workers and those in smaller facilities are less likely to need formal education or training. 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.