



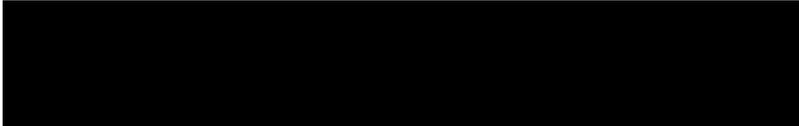
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U.S. Department of Justice

Immigration and Naturalization Service

Identification 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



File: EAC-01-158-50841

Office: Vermont Service Center

Date: APR 29 2002

IN RE: Petitioner:
Beneficiary:



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:



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, Vermont Service Center and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner describes itself as a martial arts and physical fitness instruction business with 16 employees and a gross annual income of \$920,000. It seeks to employ the beneficiary as the director of physical education programs for a period of three years. The director determined that the petitioner had failed to establish that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) further 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 determined that the petitioner had not established that the duties and responsibilities of the offered position are so complex that the degree requirement is standard throughout the industry. The director stated that the petitioner could not adequately explain why a former student or someone with an advanced knowledge in [REDACTED] could not just as easily perform the duties of the position.

On appeal, counsel argues that the job duties are so specialized and complex that a bachelor's degree is required for the position. Counsel further argues that a baccalaureate or higher degree in the specific specialty or its equivalent plus experience specific to Tae Kwon Do is normally the minimum requirement for entry into the field. Counsel also argues that the degree requirement is standard to the industry for parallel positions in similar organizations and that the petitioner requires at least a bachelor's degree for the position.

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. The petitioner states in the initial I-129 petition that it is a corporation which at the present time has three locations, each employing five or six employees including teachers and support staff. The petitioner states that its total student enrollment at the three locations is in excess of 1200. The petitioner wishes to employ the beneficiary as a director of physical education programs at its West Seneca, New York, location. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

[The beneficiary] will plan, organize, direct and coordinate the educational programs including the development and modification of our physical and martial arts training programs. Analyzing data from surveys and group discussions, he will develop curriculums [sic] to meet the needs and interests of students and the community. He will participate in the preparation of publicity materials to promote classes that will be offered. Programming must be developed to allow for grouping according to age and ability so that each individual student achieves maximum benefits from the physical education training. The Program Director will meet with teachers and students periodically to evaluate performance levels to ensure that each student is obtaining maximum instruction, cardiovascular, and psychological benefit from the program. He will interview and select staff members and provide in-service training for the instructors.

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 are so specialized and complex that knowledge required to perform the duties is usually

associated with the attainment of a baccalaureate or higher degree.

The Service does not agree with counsel's argument on appeal that the petitioner has met all four of the requirements to classify the offered position as a specialty occupation.

Counsel asserts that the Department of Labor's (DOL) Occupational Outlook Handbook, (Handbook), 2000-2001 edition, equates the occupation of director of physical education programs at a Tae Kwon Do center with that of an athletic director. Counsel bases his assertion on the portion of the Handbook relating to "Instructors and Coaches, Sports and Physical Training." Under the heading "Related Occupations," the Handbook indicates that athletic directors have similar duties to sports instructors in that they instruct, inform, and encourage participants in sports activities. That reference pertains to the duties of the respective positions. It draws no comparison between the minimum educational requirements for a position as an athletic director and those for a position as the director of a [REDACTED] center.

The DOL's Handbook, 2002-2003 edition, groups athletic directors under the general heading "Education Administrators." According to the Handbook at page 43, athletic directors plan and direct intramural and intercollegiate athletic activities, seeing to publicity for athletic events, preparation of budgets, and supervision of coaches. The Handbook states at page 44 that most education administrators, including athletic directors, begin their careers in related occupations, and prepare for a job in education administration by completing a master's or doctoral degree.

The Service is not persuaded to classify the offered position as that of an athletic director because of the type of institution in which the beneficiary would be employed. According to the Handbook:

In the year 2000, about 9 out of 10 jobs in education administration were in educational services, which includes elementary, secondary, and technical schools, and colleges and universities.

The beneficiary's proposed employment is not in an educational institution such as a middle school, high school, or college, but rather in a privately owned [REDACTED]. Although some of the administrative duties of an athletic director and the director of physical education programs at [REDACTED] center may be similar, the proffered position is clearly not comparable to that of an athletic director.

Upon further review, it is determined that the proffered position is most similar to that of a fitness director. A review of the

Handbook finds no requirement of a baccalaureate degree in a specialized area for employment as a fitness director or manager of a fitness center. Sometimes fitness workers become health club managers or owners. To advance to a management position, a degree in physical education, sports medicine, or exercise physiology is useful, but not required.

In response to a Service request for additional evidence, counsel submitted an advisory opinion letter from [REDACTED] Professor of Physical Education at Buffalo State College. Dr. Schwartz states that the position of Director of Physical Education Programs "should be required to have a Bachelor's degree in Physical Education." However, [REDACTED] appears to be describing the educational requirements for a position as an athletic director at a public school or an institution of higher learning. [REDACTED] does not state that a baccalaureate degree in a specialized area or its equivalent is normally the minimum requirement for entry into the position of director of physical education programs at a [REDACTED] center.

Although counsel admits that no specific degree in [REDACTED] is offered in the United States, counsel asserts that the combination of a degree in physical education or kinesiology along with a certain level of martial arts training should be considered the "equivalent" of a bachelor's degree in [REDACTED]. In support of this claim, counsel cites Tapis International v. INS, which found that the Service improperly ignored the provision of the regulations which allowed for a bachelor's degree or "its equivalent." 94 F.Supp.2d 172 (D.Mass. 2000). Although counsel asserts that the combination of a degree in physical education or kinesiology and martial arts training should be considered the equivalent of a bachelor's degree in martial arts, the petitioner has not established that such an equivalency is required to enter a position as director of a [REDACTED]. A degree "equivalency" will not be found to be the minimum requirement for entry into a position merely because that equivalency might have a reasonable relation to the position. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, counsel submitted information on the physical education programs at various United States universities. According to the evidence submitted, many universities include martial arts in their physical education programs. While this material shows that instruction [REDACTED] is available at colleges and universities as part of the physical education program, it has no relevance to a claim that a bachelor's degree in physical education or a related field is a minimum requirement for employment as the director of a [REDACTED].

In view of the foregoing, it is concluded that the petitioner has not established that a degree or the claimed degree equivalency is "normally the minimum requirement for entry into the particular position" of a director of physical education programs.

Counsel asserts that the degree requirement is common to the industry in parallel positions among similar organizations. In support of this assertion, counsel submits a letter from Sang Lee, President of the U.S. Taekwondo Union (USTU). [REDACTED] states that:

In the U.S., there is no university bachelor's degree in martial arts. Therefore, it is custom[ary] to employ a person with a foreign bachelor's degree in martial arts or a person who was educated in the U.S. with a related degree. It is the normal minimum requirement in the industry for a Director to hold a bachelor's degree in physical education as well as extensive experience in all aspects of Taekwondo.

However, [REDACTED] does not provide evidence of the number of USTU member schools that employ directors with the allegedly required bachelor's degree. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, id.

Counsel also submits three job advertisements for martial arts instructors. City College of San Francisco and California State University are both seeking martial arts instructors. However, these positions cannot be considered to be parallel to the proffered position in that both advertised positions are with large public universities, whereas the proffered position is with a privately owned [REDACTED]. Additionally, the advertised positions are for martial arts instructors, not directors of a martial arts center.

The National Institute for Fitness and Sport is seeking a corporate health and fitness assistant manager. However, this position is not parallel to the offered position as it does not involve the management of a [REDACTED] for a martial arts center. In view of the foregoing, it is concluded that the job advertisements are not sufficient to show that the degree requirement is common to the industry in parallel positions among similar organizations.

Counsel also submits a list of names and educational credentials of eight individuals who are directors at other [REDACTED] fitness centers. According to the list, each of the individuals has a bachelor's degree in physical education or related fields. The record contains printouts of informational material from the websites of the various [REDACTED] centers at which these

individuals are employed. However, the educational credentials of eight individuals who manage martial arts centers do not exemplify an industry standard. Additionally, the website printouts do not specify that the centers listed "routinely employ and recruit only degreed individuals" for the position. See Shanti, Inc. v. Reno, supra at 1165. Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

While counsel maintains that the employer normally requires a degree or its equivalent for the position of Director of Educational Programs, the petitioner did not submit documentary evidence to demonstrate that the company requires a bachelor's degree as part of the hiring process, such as copies of previous job announcements or public advertising for open positions. Again, simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this matter. Matter of Treasure Craft of California, supra.

Counsel, on appeal, submits a printout of informational material from the petitioner's internet web site, along with a copy of the student manual for the petitioner's martial arts program. While the manual states that "[o]ur instructors make the difference," the manual does not offer any information regarding the educational requirements for its instructors or center directors. In view of the foregoing, it is concluded that the petitioner has failed to establish that it normally requires a bachelor's degree in a specialized area or its equivalent for the position of director of a [REDACTED]

Finally, counsel claims that the specific duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In support of his claim, counsel submits a detailed description of the duties of the position. According to this expanded description, the director of educational programs is responsible for the selection, training, and supervision of teachers; the curriculum taught to the students by the instructors; the progress of the students; and also for the general managerial duties which are part of any managerial position in an office. However, the duties of the position do not appear to be so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree in a specific, specialized area.

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.