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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: EAC-03-013-51972 Office: Vermont Service Center

Date: FEB 05 2003

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 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tennis club with ten full-time employees and eight part-time employees. It seeks to employ the beneficiary as its director of fitness/conditioning 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 brief and additional documentation.

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.

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.

(Emphasis added.) The director determined the petitioner had not established that a baccalaureate degree in a specific specialty was the normal minimum requirement for entry into the occupation.

On appeal, counsel contends that the petition was denied, not because of any legal deficiency, but solely because of the ethnicity of the beneficiary. Counsel asserts that the position in question requires the theoretical and practical application of a body of highly specialized knowledge for the successful performance of the duties. Counsel further asserts that the petitioner has shown that the degree requirement is the usual requirement for similar positions in tennis clubs in Fairfield County, Connecticut.

Counsel states that the proffered position is a specialty occupation since the Department of Labor (DOL) has assigned the position of "Instructor, Sports" an SVP of 7 and the Connecticut Department of Labor in its prevailing wage determination assigned the position to "Level 2," a position higher than entry level positions. Finally, counsel asserts that the offered position is a specialty occupation because it is professional in nature. In support of this assertion, counsel cites the holding reached in *Turbomotive, Inc. v. INS*, Civ. No. H-88-563 (JAC) (D. Conn. July 27, 1989).

When determining whether a particular job qualifies as a specialty occupation, the Service considers the specific duties of the offered position combined with the nature of the petitioning entity's business operations. On the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Responsible for design and management of fitness programs offered to club members and guests; design fitness and conditioning programs unique for each level of tennis player (adult, junior, and professional); design and implement special, individualized programs to address member-specific weaknesses/needs, and rehabilitation programs for sports injury; responsible for designing and conducting daily warm-up programs; participate in exhibition matches and substitute as instructor as required; and until persons are found to direct the fitness/conditioning programs at other clubs managed by Jeff Gocke, specifically Beaver Brook Tennis Club, the SRC Director of Fitness/Conditioning will address the needs of those clubs on a consulting basis. The [holder of the] position will work with the Club Manager and Tennis Director in setting up Fitness Programs, and will monitor results and make adjustments as required.

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 regulatory definition of "specialty occupation," moreover, makes it clear that the baccalaureate degree referred to in section 214.2(h)(4)(iii)(A) must be "in a specific specialty." 8 C.F.R. § 214.2(h)(4)(ii). That is to say, if a baccalaureate degree in any field at all will satisfy the requirements of the position, the position is not in a specialty occupation. The petitioner has not met the requirements specified in 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A). Thus, the petitioner has failed to establish that the offered position qualifies as a specialty occupation.

Counsel's assertion that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the DOL's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991), and has been determined to be a "Level 2" occupation by the Connecticut Department of Labor, is not persuasive. The Administrative Appeals Office does not consider the *DOT* a persuasive source of information regarding whether a particular job 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.

The DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The DOL's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Service is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

The position appears to combine the duties of a coach, a sports instructor, and a general manager, as those jobs are described by the DOL in the *Handbook*, 2002-2003 edition. A review of the *Handbook* at page 128 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a sports instructor and coach. Regardless of the sport or occupation, these jobs require immense overall knowledge of the game, usually

acquired through years of experience at lower levels. A baccalaureate degree is required for coaches and sports instructors in schools but there is no indication that a degree in a specific specialty is required. Additionally, coaches and sports instructors must relate well to others and possess good communication and leadership skills.

Similarly, a review of the *Handbook* at pages 86-89 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a general manager. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

Counsel's statement that the position in question is not an entry-level or part-time position, but rather is that of a fitness director who supervises coaches and sports instructors is noted. Nevertheless, as stated above, the evidence of record does not support a finding that a baccalaureate degree in a specific specialty is the normal minimum requirement for entry into the occupation.

On appeal, counsel reiterates his assertion that other tennis clubs in the Fairfield County, Connecticut area require a bachelor's degree as a minimum for tennis professionals above the level of tennis instructor. The record contains four letters from officials of other tennis clubs. Joette Smythe, Club Manager of Kings Highway Tennis Club, states:

We require our Tennis Professionals and Training Directors to have competed in World Class competitions. We also require our professionals to hold, at minimum, a baccalaureate degree. This letter requirement is the Industry standard for Fairfield County, due, in part, to the upscale nature of the area.

Ms. Smythe provided a list of the tennis professionals currently employed by Kings Highway Tennis Club. One of these individuals holds a Master's degree in physical education; one has completed three years of college-level coursework in marketing; one holds a bachelor's degree in sociology; one holds a bachelor's degree in psychology; one holds a bachelor's degree in computer engineering; and two are described as having the equivalent of a four-year degree. While most of this club's tennis professionals have a bachelor's degree, only one of these individuals holds a degree in a specific specialty. It appears that Kings Highway Tennis Club requires that its tennis professionals have a bachelor's degree or the equivalent, but there is no apparent requirement of a degree in a specific and related specialty.

[REDACTED] Club Manager of Trumbull Racquet Club, Inc., states:

Our minimum educational requirement for a Tennis Instructor is a 2-year degree or equivalent. In all cases, we require experience in world-class competition.

Clearly, this tennis club does not even require a baccalaureate degree for its tennis instructor positions.

[REDACTED] Club Manager of Shippan Racquet Club, Inc., states in pertinent part:

At minimum our Tennis Professionals must hold a baccalaureate degree and have competed in World-Class competitions... . The educational requirement is fairly standard in the industry in Fairfield County... .

[REDACTED] provides a list of her club's tennis professionals and their level of education. Seven of the club's nine tennis professionals have bachelor's degrees. One holds a bachelor's degree in merchandising and one holds a bachelor's degree in psychology. [REDACTED] does not provide the area of specialization of the other five individuals. The two remaining tennis instructors have, respectively, three years of college and a "4-year equivalency." It appears that this tennis club does not require that its tennis professionals have bachelor's degrees in a specific specialty.

Beth McPadden, Club Manager of Fairfield Indoor Tennis, Inc., states:

We insist that our Tennis Professionals have, at minimum, a baccalaureate degree and experience in world-class competition. Occasionally, we will accept a person with an Associates degree if that individual is an exceptional talent and/or has distinguished him/herself in the sport either as a player or coach.

[REDACTED] provided a list of her club's tennis professionals and their level of education. All six of the club's tennis professionals have bachelor's degrees, [REDACTED] has not provided any information regarding the specific specialty. The tennis instructor holds an associate degree. Again, this club apparently requires that its tennis professionals have a bachelor's degree, but does not require that the degree be in a specific specialty. The petitioner has shown that other tennis clubs in the Fairfield, Connecticut area usually require that their tennis professionals have bachelor's degrees or the equivalent, but the evidence of record does not support a conclusion that these clubs require that their tennis instructors hold a baccalaureate degree

in a specific and related specialty. Thus, the petitioner has not shown that the degree requirement is common to the industry in parallel positions among similar organizations.

██████████ General Manager of Beaver Brook Tennis Club, states in a letter dated April 26, 2002:

we have not now, or ever for that matter, hired a Tennis Professional who lacked a degree, either from the United States or from his country of origin. This is truly a requirement for being hired at this level.

██████████ provided a list of his club's current tennis professionals and their level of education. One of these individuals holds a bachelor's degree in Spanish; one holds a master's degree in business administration; one holds a bachelor's degree in music; one holds a bachelor's degree in physical education; and one holds a bachelor's degree in business with a specialization in marketing. While the petitioner apparently requires that its tennis professionals have a bachelor's degree or the equivalent, it clearly does not require that the degree be in a specific and related specialty.

Counsel argues that some tennis professionals have degrees related to the specific nature of their duties. For example, counsel states that a degree in business or marketing can be required for a tennis professional whose job involves more marketing than others, or a degree in Spanish may be required for some tennis professionals who are required to deal with Hispanic students. Counsel has not, however, provided any independent evidence to corroborate his assertion. The unsupported assertions of counsel do not constitute evidence. *Matter of Laureano* 19 I&N Dec. 1 (BIA 1983), *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. (BIA 1980). As such, the petitioner has not persuasively shown that it requires a bachelor's degree in a specific specialty for the position being offered to the beneficiary.

Finally, the petitioner did not demonstrate 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 in a specific specialty. The duties of this position do not appear to be any more specialized or complex than those normally performed by coaches, sports instructors, or general managers. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate that a bachelor's degree in a specific specialty is the normal minimum requirement for employment as a coach or sports instructor.

Counsel asserts that the Service has already determined that the proffered position is a specialty occupation since the Service has approved other, similar petitions in the past. The record contains copies of two other approved H-1B petitions for tennis professionals and the following documents from each of those records of proceeding: the certified Form ETA 9035 Labor Condition Application, the petitioner's cover letter, the employment offer letter, and the approval notice. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the prior H-1B petitions to which counsel refers were approved in error.

It is important to note the relationship between the AAO and the Vermont Service Center. The Vermont Service Center has authority to decide H-1B petitions in the first instance. 8 C.F.R. § 214.2 (h) (2) (i) (A). The AAO, by contrast, is the appellate body that considers cases under the appellate jurisdiction of the Associate Commissioner for Examinations. 8 C.F.R. § 103.3(a) (1) (iv). The AAO has jurisdiction over appeals from denials of H-1B visa petitions. 8 C.F.R. § 103.1(f) (3) (iii) (J). It is for the AAO to overrule, modify or authoritatively distinguish a prior precedent. Thus, the relationship between the AAO and a service center is analogous to the relationship between a United States Court of Appeals for a particular circuit and a United States District Court for a district within the territory of that circuit.

By designating an AAO decision as a precedent, the Commissioner can bind all service center and district directors to follow the reasoning of the decision. 8 C.F.R. § 103.3(c). However, the AAO is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Indeed, the AAO could not exercise the error-correcting function that is central to its appellate jurisdiction, if, when an issue first came before the AAO, the AAO were bound by a service center or district director's decision. The AAO may not even be aware of a decision of a district director or service center director unless the underlying application or petition is denied and the matter is appealed to the AAO. Such an assertion would be akin to saying that, when an issue comes before a United States Court of Appeals for the first time, the Court of Appeals would be bound by a decision of a United States District Court, even though the Court of Appeals has jurisdiction to reverse the district court.

Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of

statutory eligibility, the Service is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted an error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that is substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been an error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the Service nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), cert denied, 485 U.S. 1008 (1988).

Counsel's assertion that the offered position is a specialty occupation because it is professional in nature is not persuasive. While counsel asserts that the holding reached in *Turbomotive, Inc. v. INS*, Civ. No. H-88-563 (JAC) (D. Conn. July 27, 1989), dictates a similar outcome in this particular case, the question at issue in *Turbomotive* differed from that in this proceeding. In *Turbomotive*, the question of whether the proffered position of "engineer" was a member of the professions was not at issue. The H-1B petition in *Turbomotive* was denied based on a finding that the beneficiary did not have a bachelor's degree in engineering and, therefore, did not qualify as a professional. The court found the beneficiary's 24 years of work experience in the engineering field to be equivalent to the attainment of a bachelor's degree in engineering. In contrast, this petition was denied, and the appeal dismissed, based on a finding that the proffered position did not qualify as a specialty occupation. The beneficiary's credentials are not at issue in this proceeding.

Furthermore, the criteria in this proceeding do not relate to membership in the professions as in *Turbomotive*; the Service must determine whether the proffered position qualifies as a specialty occupation. The term "specialty occupation" is specifically defined in section 214(i) of the Immigration and Nationality Act. That statutory language effectively supersedes the cited decision and any prior categories of occupations under the law.

Counsel alleges that the director discriminated against the beneficiary on the basis of the beneficiary's ethnicity. As noted above, allegations of counsel are not evidence. *Matter of Laureano*, *Matter of Obaigbena*, and *Matter of Ramirez-Sanchez*, supra. The AAO notes, moreover, that the director correctly denied the petition based on the evidence of record. As stated above, if the other petitions cited by counsel were approved based on evidence that was substantially similar to the evidence contained

in this record of proceeding, those approvals would have involved error and those other petitions should, in fact, have been denied.

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. The evidence of record does not establish that the proffered position is in a specialty occupation, as specified in 8 C.F.R. § 214.2(h)(4)(ii) and (iii)(A).

ORDER: The appeal is dismissed.