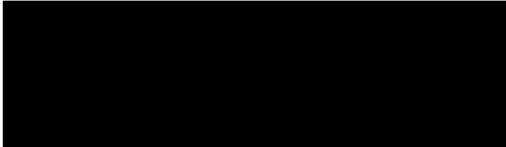


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



JUL 10 2003

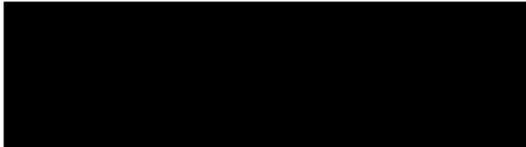
File: EAC 02 034 53835 Office: VERMONT SERVICE CENTER Date:

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)

ON BEHALF OF PETITIONER:



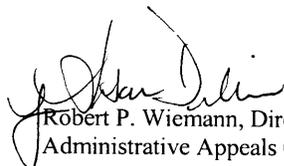
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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.


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 gymnastics academy with 30 employees and a gross annual income in excess of \$1 million. It seeks to employ the beneficiary as a gymnastics teacher/coach 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.

The term "specialty occupation" is defined at section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), 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 further 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.

The director denied the petition because the duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree in a specific specialty.

On appeal, counsel asserts that the petitioner requires a bachelor's degree in physical education or equivalent experience for the proffered position and that the degree requirement is

common to the industry in parallel positions among similar organizations. Finally, counsel states that the Bureau has already determined that the proffered position is a specialty occupation since the Bureau has approved other H-1B visa petitions for gymnastic coaching positions.

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

- (1) Following prescribed curriculum and daily lesson plans;
- (2) Setting up gym equipment as it pertains to lesson plans;
- (3) Establishing individual training regimens regarding nutrition, diet and discipline;
- (4) Ensuring the development of confidence, motivation, desire, perseverance and competitive spirit in the competitive team to maximize each individual's performance and achievements;
- (5) Developing and orchestrating complicated routines for the Academy's competitive team, having a cognitive as well as physical application to the competitor's routine; and
- (6) Conducting the required classroom instruction in basic gymnastics and health and safety rules related to the sport.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The proffered position is primarily that of a sports instructor or coach. A review of the Department of Labor's *Occupational Outlook Handbook*, 2002-2003 edition, at page 128, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a sports instructor or coach. 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. Certification is highly desirable for those interested in becoming tennis, golf, karate, or any other kind of sports instructor. Employers often require that a sports instructor be at least 18 years old and CPR certified. Participation in a camp, clinic, or school usually is required for certification. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

In attempt to demonstrate that the degree requirement is an industry standard, the petitioner submits two articles detailing results of surveys of athletic coaches in the United States. The first survey was discussed in an article entitled "Survey of Coaches - Sport Science and Education" by Dr. [REDACTED]. This article, which appeared in the January-March 1990 issue of *Technique* magazine, describes a survey of members of the U.S. Elite Coaches' Association (USECA) that was conducted from July through September of 1990. It is noted that this survey was directed at coaches of all Olympic sports, not just gymnastics. The survey was returned by 110 members of USECA, approximately 45 percent of the total membership of that association. According to

the article, 60.9 percent of the coaches participating in the survey held a bachelor's degree and 20 percent held a master's degree. This survey is too broad to provide general demographic information about gymnastics coaches in the United States, as the membership of USECA is composed of coaches of all Olympic sports. Furthermore, since only 45 percent of the association's membership responded to the survey, the results do not illustrate the educational credentials of the majority of U.S. Olympic coaches. Additionally, the article does not identify the specific specialty of those participants who held a bachelor's or master's degree.

The second survey is discussed in an article entitled "Enhancement of Coaching Effectiveness in Adolescent Gymnastics" by Dr. [REDACTED] November/December 1993 issue of *Technique* magazine. This survey was distributed to U.S. gymnastics coaches at various clinics, seminars and coaching sessions as well as through *Technique* magazine during the summer and fall of 1993. A total of 130 gymnastics coaches out of a pool of 9,671 potential subjects responded to the survey. According to the survey, only 29.2 percent of the respondents held a bachelor's degree and only 17 percent held a master's degree. Again, the article does not identify the area of specialization of those who held a bachelor's or master's degree. It is not clear why the petitioner chose to submit evidence reflecting outdated demographic statistics in support of its claim that the proffered position qualifies as a specialty occupation. Nevertheless, for the reasons discussed above, these two surveys clearly do not show that the degree requirement is an industry standard.

The petitioner also submitted two advisory opinion letters from owners of other gymnastics academies. [REDACTED] of USA Gymnastics, stated:

The successful gymnastics instructor should have a bachelor's degree in physical education and/or several years of experience working with a recognized mentor in a training program. Experience as a competitive athlete is very helpful, but not necessary.

He did not, however, state that the degree requirement is common to the industry in parallel positions among similar organizations. It is noted that Mr. [REDACTED] does not indicate that his facility requires a bachelor's degree in physical education or equivalent experience for its coaching positions.

Thomas Waddell, President and Owner of Perfect Balance Gymnastics, stated:

At our academy, we employ 6 head coach/instructors, all of whom have a minimum of a bachelor's degree and or substantial experience in competitive gymnastics. In my years of experience in gymnastics coaching, it has been common in our industry for a head coach to have a minimum of a bachelor's degree in physical education, especially at the highly competitive level that Eastern Gymnastics Academy competes.

Two letters are insufficient evidence to demonstrate an industry standard. Additionally, neither writer has not provided any independent evidence to corroborate his statements. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel states that the petitioner requires a bachelor's degree in physical education or equivalent experience for the proffered position. Counsel's reasoning, however, is problematic when viewed in light of the statutory definition of "specialty occupation." The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Bureau must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if the Bureau were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. *Id.* at 388.

In this case, the proffered position of gymnastics coach does not meet the statutory definition of "specialty occupation." The position does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has indicated that it requires a bachelor's degree in physical education or equivalent experience for employment in the offered job, this requirement is the petitioner's preference rather than an indication that the position requires the theoretical and practical application of a body of highly specialized knowledge.

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 or its equivalent. As noted above, the *Handbook* does not provide any indication that a baccalaureate degree in a specific specialty is required for employment as a gymnastics coach.

With respect to the petitioner's objection to denial of this petition in view of the approval of similar petitions in the past, the Bureau is not required to approve applications or petitions where eligibility has not been demonstrated. The director's decision does not indicate whether he reviewed the other nonimmigrant petitions referred to by counsel, and this record of proceeding does not contain copies of the prior petitions and their supporting documentation. If the prior petitions were approved based on evidence similar to the evidence contained in this record of proceeding, however, the approval of those petitions may have been erroneous. The Bureau 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 Bureau 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). Moreover, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.).

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, 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.