

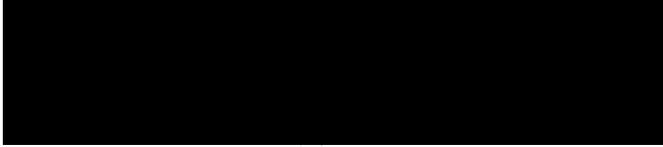
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U.S. Department of Homeland Security

Citizenship and Immigration Services

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**DR**  
ADMINISTRATIVE APPEALS OFFICE  
CIS, A-10, 20th Floor, S1  
425 I Street, N.W.  
Washington, DC 20536



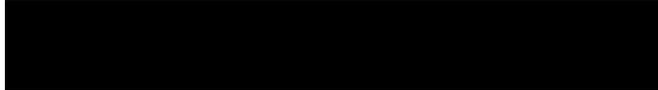
**NOV 07 2003**

FILE: SRC 02 222 53336

OFFICE: TEXAS 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:

SELF-REPRESENTED

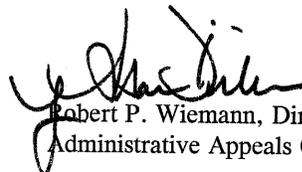
**INSTRUCTIONS:**

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 Citizenship and Immigration Services (CIS) 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 corporation in the general construction industry that currently employs six persons and has a gross annual income of approximately \$4,297,317. It seeks to employ the beneficiary as a sports therapy/rehabilitation expert for a period of three years. The director denied the petition as failing to establish that the proffered position qualified as a specialty occupation.

On appeal, the petitioner submits a brief statement.

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 for the classification of qualified nonimmigrant 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 the term "specialty occupation" as an one 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.

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 Form I-129 identified the proffered position as "Sports Therapy/Rehab Expert," and, for proposed duties, stated:

Our workers get aches and pains and take days off due to injuries, such as Repetitive Strain Syndrome. [The petitioner] will diagnose and set up a suitable rehabilitation program.

In response to a request for additional evidence the petitioner's vice president provided a detailed, four-page letter which addressed the proffered position in depth. According to the letter, the position would reduce absenteeism and increase the health, fitness, and overall performance of its employees and subcontractors, the total number of which can be as high as fifty at a particular time. This "Breakdown of Hours and Responsibilities" provided by the letter reflects the scope of the proposed duties, on which the letter provides greater detail:

- Fitness Assessment - Carry out accurate fitness assessment procedures appropriate to individual needs. Medical screening, health appraisal and medical referral.
- Procedures and Protocols for Accessing (sic) - Blood pressure, resting heart rate, body composition, muscular strength, endurance, flexibility, functional and graded test for aerobic endurance.
- Program Design - Introducing employees (subcontractors) to aerobic training including interval training, interpreting results of assessment, planning safe and effective exercise programs, presenting recommendations and monitoring training progress. [The beneficiary] will make daily visits to each project site to ensure that safe and effective procedures are being followed in the field and offer

alternatives to practical solutions in relation to carrying, lifting and moving heavy objects.

- Body [M]assage - Time spent giving Swedish Body Massage techniques for relaxation purposes. Full body Massage 1½ hours.
- Massage Therapy - Time spent on relating to the prevention and treatment of injuries. Conducting safe and appropriate physical examinations, treat soft tissue injuries through the application of scientifically based sports massage techniques and rehabilitation of work related injuries.
- Explaining Theory - Theory needed in anatomy, physiology and causes of injuries, common injuries or work related practices, inflammation and repair of soft tissue, fracture classification and repair, post injury complications and medical conditions, safety and contraindications, affects (sic) and benefits of sports massage and cryotherapy.
- Practical Skills - Sport massage techniques, clinical pre and post event management. Assessment of joint range, movement and muscle power. Assessment for postural dysfunction, emergency and immediate treatment. Application of cryotherapy treatments, bandaging and supportive strapping techniques to the lower limb, rehabilitations and exercise, soft tissue manipulation and muscle energy techniques, neuromuscular and positional release techniques.
- Business administration - Setting up practice, legislation, health and safety industrial codes of practice, record keeping and business planning.
- Optimum Nutrition - Time spent writing out nutritional guidelines and consultations explaining such.
- Emergency aid - Priorities of sorting out first aid equipment

According to the letter, the proffered position would involve these types of services for individual workers: setting lifestyle and personal objectives; establishing baselines of current fitness; highlighting areas for improvement; prescribing an exercise program; motivating dedication to health and fitness improvement steps; identifying injuries, current or past, that may be affected by intense work; setting up a total exercise program addressed at injury rehabilitation; assessing nutrition; developing a nutritional program incorporating long term goals and the

beneficiary's expert advice; carrying out sports therapy, massage, and rehabilitation measures; assessing treating soft tissue injuries; advising on injury avoidance; providing "specialist rehabilitation" treatment before and after vigorous work duties; providing stress-management instruction; and carrying out physical therapy function tests and range of motion assessments (13 tests are named as examples).

Referring to the beneficiary's own educational background, the letter states, in part, that the position "requires someone not only who has the practical knowledge of rehabilitation/massage/nutrition but also a sound knowledge of business operations, who is able to come in, implement, organize and run the program with confidence."

In the denial of the petition, the director acknowledged that the petitioner's response to the request for additional evidence had included "a lengthy description of the beneficiary's duties and responsibilities, an evaluation equating the beneficiary's credentials to a bachelor's degree in Sports Sciences, copies of contracts, and a copy of the petitioner's 2001 tax return." However, the director maintained that the petitioner had failed to establish that the proffered position was a specialty occupation.

The director determined that the duties of the proffered position were essentially those of the fitness trainer occupation outlined in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an occupation which according to the *Handbook*, does not require a baccalaureate degree as a minimum requirement for an entry-level position. The director therefore decided that "it has not been demonstrated that the duties of the position are of such complexity, uniqueness, or specialization as to require the attainment of bachelor's degree in a field of study that consisted of a theoretical and practical application of highly specialized knowledge."

The director's decision also asserted that the record contained no evidence that a baccalaureate in a specific field of study was an industry standard. Finally, the director added that it seemed "unreasonable to assume that a construction company employing six people has the need for a full time sports therapy/rehabilitation expert."

The petitioner's brief statement on appeal insists, in part, that the record has demonstrated that the proffered position is more than a fitness trainer. The statement also asserts that, as the record already indicated, the proffered position would serve the petitioner's subcontractors "which can total up to 50+ people, not the six you stated in your denial." The petitioner also appears to assert that the beneficiary's educational credentials both indicate the position's educational requirements and its stature as a specialty occupation. The petitioner states, in part:

[T]he beneficiary in this case has a BA in Sports Therapy as well as a Business Degree which will help in the initial implementation of this department. He has already been extensively interviewed and tested by my firm in order to insure his compatibility in this position, as well as the environment in which he will work. We have gone to great lengths in researching the immediate advantages of this program in our industry and the positive long term effects. We submitted the equivalent requirements of his BA in our original application and have demonstrated that we are not just seeking a fitness trainer for this position. Furthermore, we previously explained that our workforce encompasses our subcontractors which can total up to 50+ people, not the six you stated in your denial. This is a full time position and this beneficiary has been the only candidate that has qualified in all areas.

The AAO concurs with the petitioner's insistence that the record has established that the proffered position would serve the corporation's direct employees and also its subcontractors, for a total of around 50 or more persons at a particular time. Thus, the director's statement about it being "unreasonable" to assume that the petitioner would have a need for the proffered position is without merit: the petitioner has established the practical utility of the proffered position. However, this does not settle the issue of whether the proffered position is a specialty occupation.

As the following discussion of each criterion will show, the facts presented by petitioner do not establish the proffered position is a specialty occupation under any one of the qualifying criteria of 8 C.F.R. § 241.2(h) (4) (iii) (A).

**I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.**  
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1).

The first issue to discuss is whether the duties of the proffered position normally require, as a minimum for entry, a bachelor's degree or higher, or equivalent, in a specific specialty.

As it often does on specialty occupation issues, the AAO has considered the *Handbook* for its information on duties and education requirements of potentially relevant occupations. In surveying the 2002-2003 edition of the *Handbook*, the AAO found that the fitness trainer occupation, as addressed at pages 336 to 339 of the *Handbook*, included only those duties involved in assessing physical fitness and developing exercise programs. The proffered position also contains some aspects of the physical therapy occupation, which, as described at *Handbook* pages 259 and 260, includes, in part, tests of strength and range of motion and injury-treatment

strategies, such as deep-tissue massage and exercises to improve strength, coordination, balance, and endurance. The requirement for visits to work sites in order to develop safer procedures is an aspect usually associated with occupational health and safety specialists. And the nutrition aspects of the position also range beyond a fitness trainer's usual duties.

The AAO agrees with the petitioner's insistence that the record demonstrates that the proffered position is more than a fitness trainer. Rather, it is a hybrid position with a range of duties that does not neatly fit one particular occupational category. Accordingly, the duties do not come packaged in an occupation that is readily recognized as normally requiring a degree in a specific specialty. Accordingly, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

The AAO finds that the director was correct in not granting the petition under this regulatory provision.

A. Degree requirement common to the industry.

The record contains no evidence relevant to this provision.

B. Degree necessitated by the complexity or uniqueness of the position.

The evidence in the record does not establish that the proffered position is so complex or unique that it requires an individual with a degree in a specific specialty.

For the reasons indicated, the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

According to the record, this is the first time that the position in question has been proffered. Therefore, the petitioner cannot provide any evidence of a prior hiring history. It follows that the proffered position does not qualify as a specialty occupation under 8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 14.2 (h) (4) (iii) (A) (4).

The evidence establishes that the proffered position involves a number of duties in different practical areas that would require applications of different skills. Likewise, the evidence indicates that the proffered position's duties require the application of knowledge from a number of areas, including, but not limited to, nutrition, anatomy, stress reduction, and rehabilitative therapy. However, the evidence does not establish that the duties, alone or combined, are so particularly specialized and complex as to require knowledge usually associated with a bachelor's or higher degree in a specific specialty.

Accordingly, the petition does not succeed under 8 C.F.R. § 214.2 (h) (4) (iii) (A) (4).

For the reason's discussed above, the AAO will not disturb the director's denial of the petition, which was justified by the evidence of record. Review of the record did not reveal sufficient evidence to qualify the job under any provision of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

Beyond the decision of the director, it should be noted that the record contains no documentary evidence to substantiate statements in the record to the effect that the beneficiary has a business degree or has completed a certain number of business courses. As this fact did not figure in the AAO's decision on this appeal, it will not be further discussed.

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. The petition is denied.