

D2

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

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

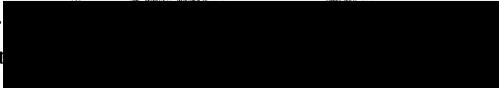
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 I Street, N.W.
Washington, DC 20536



File: EAC 02 039 54501 Office: VERMONT SERVICE CENTER Date:

OCT 17 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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

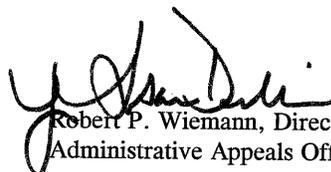
INSTRUCTIONS:

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 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 the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York Taekwondo school. It has two employees and a gross annual income of \$240,000. It seeks to temporarily employ the beneficiary as a Taekwondo instructor for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that a supervisory Taekwondo instructor would require at least a baccalaureate degree and that the director's request for advertisements from newspapers to establish this fact was not necessary. In addition, counsel asserts that the director failed to recognize that a supervisory instructor position for a school of physical education is the equivalent of a dean of a physical education department in a secondary school or university.

Section 214(i)(1) of the Immigration and Nationality Act (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 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 field 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 issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on November 7, 2001, the petitioner described the duties of the proffered position as follows: "[T]he specific duties to be undertaken by the Taekwondo [i]nstructor [are to] teach the technique and movements of Taekwondo. He will score and grade students. He will also lead students through training and supervise sparring. He will also train student[s] to compete in Taekwondo competition[s]."

On January 2002, the director requested further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested evidence that the job required the Taekwondo instructor to have a baccalaureate degree in physical education with a major in Taekwondo. In addition, the director stated that the petitioner could submit evidence that, within the Taekwondo industry, a baccalaureate degree in a specific field of study is a standard requirement for the proffered position. The director noted that the beneficiary had first worked as a 3rd degree black belt Taekwondo instructor from February through November 1995, when the beneficiary was 17 years old and before he commenced university studies. Finally, the director requested information on how many other individuals the petitioner had employed as Taekwondo instructors and how many of these individuals possessed a baccalaureate degree, and in what field of study.

In response, the petitioner described the proffered position as a supervisory Taekwondo instructor. The petitioner stated that the sport of Taekwondo was fully integrated as a full medal sport for the first time in the 2000 Olympics held in Sydney, Australia. The petitioner stated that since then, there had been an influx of participants on all levels to learn and master the sport of Taekwondo. The petitioner described the job duties of the supervisory Taekwondo instructor as follows:

[The position requires] a [s]upervisory [i]nstructor to not only instruct novices, but an instructor who is familiar with advanced[d] level techniques to further

improve the skills of students of more advanced levels. [The beneficiary] will be responsible for directing, teaching[,] and developing the core curriculum in the physical education activities that involves [sic] promotion [sic] [and] the develop[ment] of the student's physical and mental attributes as [well as] social skills. [The beneficiary] will teach the various techniques and movement[s] through [his] training of the 3rd Dan black belt to our instructor. [The beneficiary] will write instructional materials, develop curricular [sic] as well as information[al] articles [and] brochures about physical educational topics[.] [He will] judge [the] student's promotion tests as well as develop policies for students entering local, regional, national and international levels. The position [for] supervisory instructor among schools [that specialize] in physical education is the equivalent of a dean of physical education department in [a] major university.

The petitioner also stated that it was attaching copies of other employees' diplomas. One of the diplomas provided was the beneficiary's that indicated his date of graduation from the College of Physical Education and Sports at Kyung Roo University. Another diploma was for Soon Gil Hong from Yongin University in Korea. A third uncertified translation of a document in Korean stated that Dong Soo Kwak, who signed the petitioner's letter that accompanied the petition, also had a diploma in physical education issued in 1985.

On June 20, 2002, the director denied the petition. The director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) classification of sports instructors in examining the necessary educational credentials for the proffered position. The director noted that the petitioner had introduced the supervisory job duties in response to the director's request for further evidence, but that even with these additional duties, the position did not appear to be specialized or complex enough to require an employee who held a baccalaureate degree in a specific field. The director finally noted that the petitioner had not submitted any letters from similar schools or advertisements from newspapers or trade journals to show that the requirement for a baccalaureate degree in a specific specialty is common to the Taekwondo instruction industry.

On appeal, counsel asserts that a supervisory instructor who writes instructional materials for other instructors and who develops the curricula for physical education activities should be considered employed in a specialty occupation. Counsel states that because the position should be considered a specialty occupation, advertisements from newspapers with regard to the industry standard are not necessary. Counsel also reiterates his assertion that a supervisory instructor position for a school of physical education

is the equivalent of the dean of a physical education department in a secondary school or university.

Upon review of the record, the changes made by the petitioner to the job description for the proffered position at the time it responded to the director's request for further evidence, appear to be significant. Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition cannot be considered when determining whether the proffered position is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A review of the record reveals that the director requested additional evidence because there was insufficient evidence that the proffered position was a specialty occupation. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). In response, the petitioner added supervisory duties to the Taekwondo instructor position and assigned job responsibilities that had previously not been submitted for the record.

When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire, id.* If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Accordingly, only the original job description submitted by the petitioner will be considered in this proceeding.

In addition, counsel makes several assertions with regard to the equivalency of a sports instructor position to that of a dean of a physical education department in a secondary school or university. It should be noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988)

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), namely that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the sports instruction field, the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*) 2002-2003 edition, on page 127, examines the following duties and educational requirements for sports instructors:

Sports instructors teach professional and nonprofessional athletes on an individual basis. They organize, instruct, train, and lead athletes of indoor and outdoor sports such as bowling, tennis, golf, and swimming. Because activities are as diverse as weight lifting, gymnastics, scuba diving, and may include self-defense training such as karate, instructors tend to specialize in one or a few types of activities. . . . Some instructors also teach and demonstrate use of training apparatus, such as trampolines or weights, while correcting athlete's [sic] weaknesses and enhancing their conditioning. Using their expertise in the sport, sports instructors evaluate the athlete and their opponents to devise a competitive game strategy.

With regard to training, and other qualifications for the sports instructor position, the *Handbook* states on page 128:

Education and training requirements for athletes, coaches, and sports officials vary greatly by the level and type of sport. Regardless of the sport or occupation, jobs require immense overall knowledge of the game, usually acquired through years of experience at lower levels. . . .

For high school coach and sports instructor jobs, schools usually first look to hire existing teachers willing to take on the jobs part time. . . . Some entry-level positions for coaches or instructors only require experience derived as a participant in the sport or activity. . . .

Public secondary school coaches and sports instructors at all levels usually must have a bachelor's degree and meet State requirements for licensure as a teacher. . . .

For sports instructors, certification is highly desirable for those interested in becoming a tennis, golf, karate, or any other kind of instructor. . . .

Accordingly the *Handbook* does not indicate that the minimum educational requirement for entry into the position of a Taekwondo instructor at a private school of instruction is a baccalaureate degree in a specific specialty. Experience in the sport as well as the appropriate certification in the sport appear to be predominant requirements for entry into the proffered position. Without more persuasive evidence, the petitioner has not established this criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

With regard to the remaining criteria, the petitioner, as noted by the director, did not submit any further documentation with regard to educational requirements for Taekwondo instructors in other companies or within the Taekwondo sports industry. While the

petitioner provided some documentation with regard to the third criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), namely, whether the employer normally requires a baccalaureate degree in a specific specialty for other employees in similar positions, this documentation is inconclusive. For example, the petitioner submitted a copy of a baccalaureate diploma in Taekwondo for Dong Yoen Shin; however, the petitioner provides no evidence that this individual is or has been its employee. The diploma and accompanying translation for Dong Soo Kwak would provide more weight in this proceeding; however, it is also problematic. First, it does not have a certified translation as to its contents. 8 C.F.R. § 103.2(b)(3). Second, there is no explanation as to how Mr. Kwak is employed by the petitioner, and whether he also is a Taekwondo instructor. Without more persuasive evidence, the petitioner has not established either of these two criteria.

With regard to the final criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) namely, that the job is so specialized and complex that only a person with a baccalaureate degree could perform it, the petitioner has submitted no substantive evidence or documentation for the record to establish this criterion. Although counsel reiterates the job duties of the position throughout the proceedings, the job duties do not appear to be more specialized or complex than any other instructor position in the martial arts instruction field. The petitioner did not establish the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.