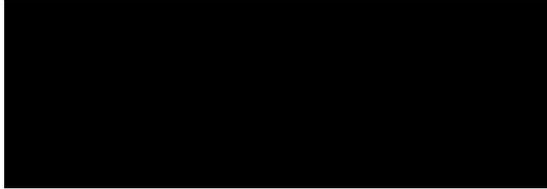


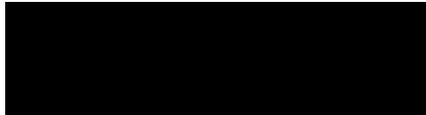


U.S. Citizenship
and Immigration
Services



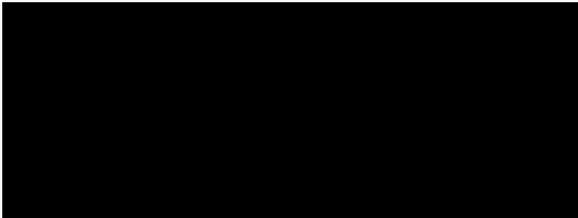
FILE: SRC 03 008 53672 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 of the Administrative Appeals Office 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.

to *Mari Johnson*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is corporation that operates a swim school and club swimming program. In order to employ the beneficiary as an age group swimming coach, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition on the basis that the petitioner had not established that it was offering employment in a specialty occupation. On appeal, counsel submits (1) a Form I-290B annotated with a statement that the director abused his discretion because the evidence of record established that the position is a specialty occupation, and (2) a brief with exhibits of documentary evidence.

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documents attached to the brief as exhibits.

The director's decision to deny the petition was correct. The record does not present sufficient evidence for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

According to the letter submitted by the petitioner’s president with the Form I-129, the proffered position “involves coaching four (4) different levels of swimmers, running a competitive swim team, and traveling with the swim team.”

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) is satisfied where the evidence establishes that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The proffered position comports with the athletic coaching occupation as addressed in the 2004-2005 *Handbook’s* section on “Athletes, Coaches, Umpires, and Related Workers.” The information in that section, however, indicates that a bachelor’s or higher degree in a specific specialty, or the equivalent, is not a normal minimum requirement for athletic coaching positions.

Furthermore, the record does not support counsel’s contention to the effect that, because the proffered position would require the incumbent to effectively communicate all that he that he has learned about swimming, the position should be classified among educator specialty occupations. The distinct difference between educators and athletic coaches is reflected in the DOL’s treating these *Handbook’s* two enterprises as separate occupations. 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). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The letter from the Executive Director of the American Swimming Coaches Association does not establish that the age group swimming coach position is one that normally requires a baccalaureate or higher degree, or its equivalent, in a specific specialty. The letter acknowledges that only “78% of those we cater have undergraduate degrees,” and it does not specify the areas of study in which those degrees are held. Likewise, the letter’s statement that “[o]ur best clubs in the USA, who develop most of our top age group swimmers and future Olympians, have indeed age group coaches who have bachelor degrees from our Universities” does not indicate the percentage of age group coaches who hold at least a bachelor’s degree or the academic majors in which those degrees are held.

The Director of National Team Technical Support at USA Swimming opined that “the world level in swimming is so far advanced, that it requires at least a basic college level of education for our coaches to keep up with the world level.” The tenor of the letter is that the coursework involved in achieving *any* baccalaureate degree helps equip a person to understand the “[s]pecial knowledge in the fields of physiology, psychology, kinesiology, and biomechanics” that is “essential to age group and senior coaches.” Thus, the Director did not provide evidence that even performance as a coach of elite swimmers requires a degree in a specific specialty.

The AAO finds no merit in counsel’s contention that the *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988) “should be the basis for approval of the petition.” The facts in *Hertz* are easily distinguishable. Here there are no documentary equivalents to this evidence that was decisive in the *Hertz* opinion: a letter from a professional association for industrial designers which attested that the minimum entry level requirement for industrial designers is a bachelor’s degree in industrial design; several letters from highly respected industrial design firms that reflected that the industrial design industry recruited and employed only degreed individuals for industrial design positions; and additional articles and affidavits supporting the same conclusion.

Next, the petitioner has not presented evidence that would qualify the proffered position under either alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The evidence of record has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) by establishing that a degree requirement is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As noted earlier, the *Handbook* does not report that the proffered position requires a degree in a specific specialty. In addition, the submissions from the Executive Director of the American Swimming Coaches Association and the Director of National Team Technical Support at USA Swimming do not attest that swimming instruction firms such as the petitioner “routinely employ and recruit only degreed individuals.”

The AAO also found that the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that “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.” While the record contains general statements that the age group swimming coach must effectively implement and communicate physiology, psychology, kinesiology, and biomechanics (brief, at paragraph 2 of page 2; USA Swimming letter, at paragraph 4; and American Swimming Coaches Association letter, starting with the last line of page 1), no details are offered about the knowledge required. The totality of the evidence of

record does not indicate that that the work would be either so unique or so technically demanding as to require a bachelor's or higher degree in a specific specialty.

Next, the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position – is not a factor in this proceeding, as the petitioner provided no evidence about the educational credentials of the “at least 13 Age Group Swimming Coaches” that it has employed through the years.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record indicates that a college education in general would enhance a person's ability to understand and communicate technical principles involved with high-level competitive swimming, but it does not establish that the duties are so specialized and complex as to require knowledge usually associated with a degree in a specific specialty. In fact, the USA Swimming Letter stated that “there are very few colleges who support a coaching degree,” and no one who offered evidence in the petitioner's behalf stated that a bachelor's degree in a specific specialty is required for age group swimming coaches.

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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.