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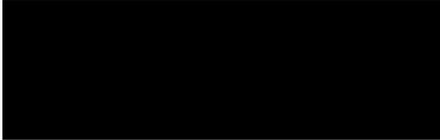
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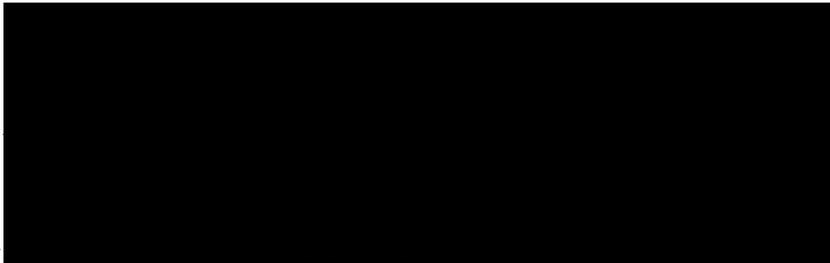
*D2*

FILE: LIN 03 029 52944 Office: NEBRASKA SERVICE CENTER Date: **JUL 13 2004**

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 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.

*Mari Johnson*

*for* Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the service center 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 provides gymnastics instruction to children. It seeks to employ the beneficiary as a team leader – preschool gymnastics. The petitioner, therefore, 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 because the proffered position is not a specialty occupation. On appeal, the petitioner states that the proffered position qualifies as a specialty occupation.

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a team leader – preschool gymnastics. Evidence of the beneficiary's duties includes the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail conferring with the director to prepare and develop instructional materials, curriculum, manuals, announcements, and bulletins; training and supervising instructors; assessing educational programs and recommending improvements; overseeing the use of equipment and materials; reporting to the director on activities, groups, and individuals; and managing the assessment of the preschooler's baseline health/fitness performance levels, personal objectives, and monitoring progress of the objectives. The petitioner stated that a candidate must possess: (1) a bachelor's degree in physical education or a related field; (2) national safety certification from USA gymnastics; and (3) knowledge of procedures, methods, and techniques of instruction.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by an athletics coach or sports instructor, and that these positions do not require a bachelor's degree in a specific specialty. The director found unpersuasive the petitioner's likening the proffered position to a preschool or kindergarten teacher. Referencing the *Handbook*, the director stated that although play and hands-on instruction are used in kindergarten classrooms, academics begin to take priority and there is no evidence that the beneficiary will teach such skills to the program participants. The director mentioned that the petitioner is neither a public nor a private school, organizations where preschool teachers are employed. Moreover, the director mentioned that a specific bachelor's degree is not required for a preschool teacher job, and the director found unpersuasive the petitioner's claim that a bachelor's degree is the industry standard, and pointed out the deficiencies in the submitted evidence of job advertisements and staff lists which were used to support the claim. According to the director, because the submitted copy of the present team leader's bachelor of arts degree did not indicate a major course of study, the petitioner failed to establish a past practice of employing persons with a specific baccalaureate degree. Last, the director mentioned that the petitioner did not demonstrate that the nature of the position's duties is so specialized and complex as to require knowledge associated with the attainment of a specific baccalaureate degree.

On appeal, counsel states that the proffered position qualifies as a specialty occupation. Upon review of the record, however, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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)).

Counsel claims that it satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel maintains that the director misclassified the proffered position's duties by claiming they parallel those of an athletic coach or sports instructor. According to counsel, the proffered position's duties are more extensive and complex than those of an athletic coach or sports instructor. Counsel avers that the more appropriate classification is preschool teacher, a position that requires a bachelor's degree, because the scope of responsibility and duties are specific to preschool children. Citing the *Handbook*, counsel contends that coaches teach amateur and professional athletes in the fundamentals of individual and team sports, and sports instructors teach professional and nonprofessional athletes on an individual basis. Counsel contends that the beneficiary will work with preschool children, not athletes, and will focus on teaching classes in fundamentally sound progressions based on the child's age and ability. Counsel stresses that academics may begin to take priority in a kindergarten classroom; however, the basis of learning in a preschooler's classroom is usually derived from play, which is consistent with the development program that the beneficiary will use. The petitioner, counsel states, will use gymnastics to promote a child's social, physical, and intellectual growth. On appeal, counsel submits a curriculum plan to demonstrate how the proffered position resembles a preschool teacher, and counsel submits a document entitled "Illinois State Board of Education" to establish that a preschool teacher must possess a bachelor's degree.

The petitioner's assertions are not persuasive. In deciding whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* coupled with the evidence in the record discloses that the proffered position's duties more closely resemble those of a recreation supervisor who oversees recreation leaders and plans, organizes, and manages recreational activities to meet the needs of a variety of populations. These workers often serve as liaisons between the director of the park or recreation center and the recreation leaders. Recreation supervisors with more specialized responsibilities also may direct special activities or events or oversee a major activity, such as aquatics, gymnastics, or performing arts.

The evidence in the record such as the petitioner's class schedule and the job description support the AAO's determination. The class schedule stated that the petitioner services nine park districts and 27 day care facilities by providing gymnastics classes. This particular schedule indicates that classes are held on Tuesday evenings for one hour at a community gym. The job description mentions that, similar to a recreation supervisor, the beneficiary will "train instructors," "[o]versee the use of equipment and materials," and "confer with the [d]irector in preparation of curriculum."

According to the *Handbook*, a full-time career professional positions as a recreation worker usually requires a college degree with a major in parks and recreation or leisure studies, but a bachelor's degree in any liberal arts field may be sufficient for some jobs in the private sector. A bachelor's degree and experience are preferred for most recreation supervisor jobs. Consequently, the *Handbook* explains that a specific bachelor's degree is not required for entry into a recreation supervisor position.

The AAO wishes to note that the director correctly determined that the *Handbook* explains that a preschool teacher is not required to possess a specific bachelor's degree because only some states require a bachelor's degree in early childhood education, while others require an associate's degree, and still others require certification by a nationally recognized authority.

Counsel's submits the document entitled "Illinois State Board of Education" to establish that the proffered position requires a bachelor's degree. As previously stated, the duties of the proffered position parallel those performed by a recreation supervisor, not a preschool teacher. Nonetheless, this document undermines the claim that a bachelor's degree is required. Because the document relates to nonpublic elementary and secondary school personnel, it actually does not pertain to the petitioning entity – a provider of gymnastics instruction at community gyms. No evidence establishes that the petitioner is a nonpublic elementary school. Next, paragraph 7.00 of the document expressly provides:

teachers shall hold a baccalaureate degree or equivalent formal education. However, a school may employ teachers ... on the basis of demonstrated competence in lieu of a baccalaureate degree or its equivalent.

This passage plainly states that nonpublic elementary schools do not require teachers to hold a baccalaureate degree: equivalent formal education or merely demonstrated competence is sufficient. As such, the petitioner fails to establish the first criterion.

To establish the second criterion; namely, that a specific degree requirement is common to the industry in parallel positions among similar organizations, the record contains biographical backgrounds of staff at two organizations and four job postings.

We find this evidence unpersuasive in establishing the second criterion. [REDACTED]

[REDACTED] information reveals that a specific bachelor's degree is not required for a preschool gymnastics instructor. There are four employees involved in gymnastics. Of the two gymnastics director/instructors, one holds a bachelor's degree in physical education; the other holds a bachelor's degree in primary education. However, the tumbling and preschool gymnastics instructor holds a bachelor's degree in psychology, whereas the gymnastics instructor does not seem possess a bachelor's degree. Similarly, [REDACTED] information merely indicated whether the employee graduated from a university or college; it failed to indicate the degree held. Finally, the AAO wishes to note that the biographic sketches from [REDACTED] fail to describe the duties of their positions. Consequently, we cannot determine whether they are parallel to the proffered position.

The postings from Julie Davis for a preschool teacher and [REDACTED] do not state that the employers require a specific bachelor's degree. The former prefers – but does not require – a degree in education. In addition, the duties of [REDACTED] position are not described. [REDACTED] Center seeks candidates with a bachelor's degree or equivalent experience. Thus, this employer accepts experience in lieu of a bachelor's degree, and furthermore, does not indicate that it requires a baccalaureate degree in a specific specialty.

[REDACTED] vaguely described the duties of its preschool teacher. Thus, the AAO cannot determine whether the job is parallel to the proffered position. The same is true for The Little Gym of Montclair. This posting does not describe the duties of the children's fitness instructor/program director. Moreover, it is unclear whether a candidate must possess a bachelor's degree because the posting describes the "ideal candidate" as possessing a specific baccalaureate degree.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a specific degree.

No evidence is in the record that establishes a past practice of employing candidates with a bachelor's degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

There is insufficient evidence to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner establish that the nature of the specific 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. The AAO has already discussed the deficiency in the submitted evidence. In addition, the *Handbook* shows that the duties of a recreation supervisor parallel those of the proffered position. Accordingly, a specific baccalaureate degree is not required for the proffered position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.