U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 066 50262 Office: NEBRASKA SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [redacted]
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 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 is a gymnastics school and training facility that seeks to employ the beneficiary as a competitive gymnastics trainer. 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)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(l), 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 competitive gymnastics trainer. Evidence of the beneficiary's duties includes, in part: 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, in part: reorganizing, developing, and implementing a high quality competitive gymnastics program to produce regionally and nationally competitive men's gymnasts; assisting with the specialized training of the women's competitive teams on one or more apparatus; devising a progressive training system to evolve aspiring athletes from entry-level activities and programs to high-level statewide, regional, and national competition; and assisting with tumbling and other skills for cheerleaders. The petitioner stated that a candidate must possess a combination of academic education, personal experience as a competitive gymnast, and extensive experience as a gymnastics trainer and director or manager of gymnastics programs. The petitioner seeks to hire the beneficiary, who holds a master's degree in education with a specialization in competitive gymnastics training.

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). The director found unpersuasive the submitted evidence about the credentials of gymnastics coaches, and mentioned that the petitioner failed to establish a past practice of employing candidates with degrees. 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 recreation and fitness workers, and that these positions that do not require a bachelor's degree in a specific specialty.

On appeal, the petitioner 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 petitioner asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in their record of proceedings, the petitioner's claim is not sufficient to enable the AAO to determine whether the instant H-1B petition is parallel to the prior petitions. Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The AAO next 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)).

The petitioner claims that it satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner maintains that the director based his decision on the unrelated occupation of recreation and fitness workers. According to the petitioner, a senior competitive gymnastics trainer requires specialized and qualitatively higher skills, education, and experience compared to a gymnastics trainer, and the petitioner claims that this difference is reflected in the senior competitive gymnastics trainer's higher salary. The petitioner claims that the beneficiary will serve as the director and principal trainer of a men's competitive gymnastics program that is a specialized occupation within the broader gymnastics training industry. The petitioner contends that the director ignored regulations that allow for educational equivalency to be obtained through a combination of education and/or experience.

The petitioner's assertions are not persuasive. In the first place, the AAO wishes to note that there are inconsistencies in the record regarding the title of the proffered position. The labor condition application is for the occupation of "athletic trainer"; the Form I-129 states the job title is "senior gymnastics trainer"; and on appeal and in the petitioner's April 14, 2003 letter the petitioner states that the beneficiary will serve as "director and principal instructor of a developing men's competitive gymnastics program."

Next, in determining 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 careful review of the *Handbook* discloses that the director mistakenly analogized the proffered position to fitness and recreation workers. The AAO finds that the duties of the proffered position more closely resemble those performed by sports instructors, a position that teaches professional and nonprofessional athletes on an individual basis. Sports instructors organize, instruct, train, and lead athletes of indoor and outdoor sports. Because activities are as diverse as weight lifting, gymnastics, and scuba diving, instructors tend to specialize in one or a few types of activities. Like coaches, sports instructors also may hold daily practice sessions. Using their knowledge of their sport, physiology, and corrective techniques, they determine the type and level of difficulty of exercises, prescribe specific drills, and correct the athlete's techniques. Some instructors also teach and demonstrate use of training apparatus, such as trampolines or weights, while correcting athletes' weaknesses and enhancing their conditioning. Sports instructors spend more of their time with athletes working one-on-one, which permits them to design customized training programs for each individual. Motivating athletes to play hard challenges most coaches and sports instructors but is vital for the athlete's success. Many coaches and instructors derive great satisfaction working with

children or young adults, helping them to learn new physical and social skills and to improve their physical condition, as well as helping them to achieve success in their sport.

Like the sports instructor, the beneficiary will work with children and young adults; demonstrate the use of training apparatus; correct athletes' weaknesses and enhance conditioning; and design customized training programs. As such, the duties of the proffered position parallel those of a sports instructor.

The DOL relates that education and training requirements for athletes, coaches, umpires, and related workers 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 sports instructor jobs, schools usually prefer to hire teachers willing to take on the jobs part time. If no one suitable is found, they hire someone from outside. Some entry-level positions for coaches or instructors require only experience derived as a participant in the sport or activity. Many coaches begin their careers as assistant coaches to gain the necessary knowledge and experience needed to become a head coach. Head coaches at larger schools that strive to compete at the highest levels of a sport require substantial experience as a head coach at another school or as an assistant coach. To reach the ranks of professional coaching, it usually takes years of coaching experience and a winning record in the lower ranks. The DOL mentions that public secondary school sports instructors at all levels usually must have a bachelor's degree; however, it does not state that sports instructors at private schools require a bachelor's degree in a specific specialty. Based on the information in the *Handbook*, the petitioner fails to establish the first criterion because a sports instructor position in a private school would not require a specific bachelor's degree.

The petitioner's claim, that the director ignored the regulation as it relates to educational equivalency, is weak. Educational equivalency is considered by CIS when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). According to the *Handbook*, there are degree programs specifically related to coaching such as exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine. The AAO finds that the degree programs are also relevant for a sports instructor position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations – the petitioner submitted evidence about the credentials of gymnastics coaches, and claimed that baccalaureate and higher degree programs serving the gymnastics industry are not available in the United States. According to the petitioner, the industry norm is to accept progressively specialized experience as a substitution for the equivalent of a specific baccalaureate or higher degree.

The petitioner's claims and the submitted evidence are not convincing. Again, a sports instructor position in a private school does not require a bachelor's degree in a specific specialty, and educational equivalency is considered only when no degree program exists in an occupational field. Second, the submitted evidence about the credentials of gymnastics coaches serves to substantiate the DOL's finding that a specific bachelor's degree is not an industry-wide requirement. The AAO reviewed the biographical backgrounds of the 45 gymnastics coaches. Of these, 28 of the coaches do not hold degrees, and of the 17 who do hold a bachelor's or higher degree, the degrees are in a variety of fields such as physical education, teacher's education,

kinesiology/sport science, physical therapy, nursing, graphic design, fine and applied arts, and biomechanics. The most common degree, however, is in physical education. Based on the submitted evidence, a specific degree requirement is not common to the industry in parallel positions among similar organizations because employers do not require gymnastics coaches to hold a bachelor's degree in a specific specialty.

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.

The petitioner contends that it has hired unqualified candidates in the past to fill the proffered position because of the shortage of qualified applicants. No evidence is in the record therefore to establish 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. For example, the biographic sketches of gymnastics coaches illustrate that many coaches do not hold bachelor's degrees. In addition, the *Handbook* shows that the duties of a sports instructor resemble those of 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.