U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 279 53098 Office: NEBRASKA SERVICE CENTER Date: SEP 0 2 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:

[redacted]

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

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 that seeks to employ the beneficiary as a gymnastics coach and instructor. 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 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 gymnastics coach and instructor. 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 instructing and training gymnasts at various levels. Specifically, the beneficiary would make a work-out and lesson plan based on each gymnast's skill level; design a flexibility and strength training program and study the development of muscle tones to determine the level of difficulty; apply knowledge of sports anatomy, mechanics, and pathology; coach for compulsory gymnastics for level 4 though 7, and analyze, determine, and coach optional gymnastics from level 8 through elite according to international standards; and construct gymnastics routines, choreography, and competition line-ups and consider the overall strategy and each athlete's physical character. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in physical education or sports science and have six months experience in gymnastic/rhythmic coaching.

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 stated that the petitioner sought to distinguish recreational gymnastic programs from competitive team training programs by stating that training individual competitive gymnasts and coaching competitive teams requires theoretical and systematic study in physical education as it pertains to sports physiology, psychology, and biomechanics, and certain teaching methods. However, the director stated that it is widely known that most successful gymnastics coach/instructors have experience in the field as well as experience as a competitive gymnast. The director found unpersuasive the submitted opinion letters, stating they had no independent corroborating evidence. The director mentioned that the petitioner submitted no evidence, other than a card issued to a current employee from Iowa Status University indicating it had issued a bachelor's degree in physical education, establishing it normally requires a bachelor's degree for the position. Last, the director stated that there was insufficient evidence to establish that 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 director mentioned that counsel stated that several of the petitioner's athletes are in the top 15 in the nation because of the beneficiary's contribution to the training program; nevertheless, there was no evidence in the record of the beneficiary's training program.

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 Department of Labor's (DOL)

Occupational Outlook Handbook (*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)).

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 duties of the proffered position mirror those performed by coaches and sports instructors. Coaches organize, instruct, and teach amateur and professional athletes in fundamentals of individual and team sports. In individual sports, instructors may sometimes fill this role.

> Coaches train athletes for competition by holding practice sessions to perform drills and improve the athlete's skills and stamina. Using their expertise in the sport, coaches instruct the athlete on proper form and technique in beginning and, later, in advanced exercises attempting to maximize the players' physical potential. Along with overseeing athletes as they refine their individual skills, coaches also are responsible for managing the team during both practice sessions and competitions, and for instilling good sportsmanship, a competitive spirit, and teamwork. During competitions, for example, coaches substitute players for optimum team chemistry and success. In addition, coaches direct team strategy and may call specific plays during competition to surprise or overpower the opponent.

The *Handbook* also states that sports instructors "teach professional and nonprofessional athletes on an individual basis." They 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.

The *Handbook* continued:

> 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 and coach, the beneficiary will work with and motivate children and young adults; demonstrate the use of training apparatus; prescribe specific drills and design customized training programs for each individual; design a flexibility and strength training program and study muscle tones to determine the level of difficulty; apply knowledge of the sport, physiology, and mechanics; coach and instruct amateur and professional athletes; and direct team strategy.

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 *Handbook* 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 of 8 C.F.R. § 214.2(h)(4)(iii)(A) because a coach/sports instructor position in a private gymnastics school would not require a specific bachelor's degree. Naturally, this undermines counsel's assertion that training gymnasts at the competitive level requires gymnastics coaches to possess at least a bachelor's degree in physical education or a related field.

To establish the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a specific degree requirement is common to the industry in parallel positions among similar organizations – counsel contends that the industry standard is to require a bachelor's degree. Counsel emphasizes that the petitioner trains gymnasts at the competitive level and that similar academies and schools require their gymnastics coaches to possess at least a bachelor's degree in physical education or a related field. Counsel submits three opinion letters from authorities in the field: the chairman of the U.S. Elite Coaches Association, president of Midwest Twisters, Inc., and Jan Exner, Rhythmic Program Director of USA Gymnastics.

Although relevant, the opinion letters are not persuasive in establishing the second criterion. The chairman of the U.S. Elite Coaches Association fails to submit independent evidence that would substantiate his opinion that a specific baccalaureate degree is required in the industry for the proffered position. In the letter, Mr. [redacted] Chairman of U.[redacted] stated that he has held the position as Chairman of the [redacted] Association since 1992, and his association has 450 members comprised of national team [redacted] club coaches, NCAA coaches, as well as gymnastics judges and gymnastics school owners. According to [redacted] is organization carries two votes on the U.S. Association of Gymnastics' Board of Directors, which is the national governing body for the sport, and he has personally served as a coach for the U.S. National Gymnastics Teams since 1983 and was selected to serve as the head coach for the United States in three Pan American Championship as well as in competitions. [redacted] stated that he has coached athletes who have competed in three Olympic Trials. As a result of his experience, [redacted] stated that he has had the opportunity to review the ability and credentials of numerous coaches worldwide. [redacted] rther stated:

> I can assure that the need for a [b]achelor's degree in [p]hysical [e]ducation . . . for a coach of a competitive gymnastics team is the standard in the field throughout the United States and in other countries, as well. In working with competitive gymnasts, it is the utmost importance that the [c]oach has the proper theoretical background in [p]hysical [e]ducation gained through university level education. The coursework required for a [b]achelor's degree in [p]hysical [e]ducation includes studies of [a]natomy, [k]inesiology, [p]hysiology of [e]xercise and focuses on the mental aspects of [the] sport, which is equally important when working with children.

[redacted] s statements are pertinent in this proceeding, however, no independent evidence is submitted to corroborate his statement "I can assure that the need for a [b]achelor's degree in [p]hysical [e]ducation . . . for a coach of a competitive gymnastics team is the standard in the field throughout the United States." 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). Equally important, [redacted] never claimed that the industry's professional association has made a degree a minimum entry requirement for a gymnastics coach and instructor position.

The letter from [redacted] the president of [redacted] never stated that the industry required a specific baccalaureate degree for the proffered positio [redacted] state "[i]t is evident in my competitive history that those coaches that had physical education degrees were far better than those without." He also stated:

> As a gym owner I can attest to the fact that those coaches with a college level degree are quite difficult to come by and retain. I am currently seeking additional coaches to add to my competitive staff and would not consider anybody who does not have a [p]hysical [e]ducation degree.. [sic] However, when the opportunity to hire such a coach is available it is considered by most an excellent opportunity.

Finally, the letter from Ms. Jan Exner, the director of the Rhythmic Gymnastics Program for USA Gymnastics, stated:

> Respected gymnastics academies do require at least a baccalaureate degree in [p]hysical [e]ducation or a related field from a recognized university. A principal coach or program administrator generally is required to have a degree in physical or sport related field. The degree requirement is common practice throughout the gymnastics field. Stringent physical requirements for participation in gymnastics and the attendant liability in respect of instruction and instruction programs dictate that those in charge of developing programs and actual instruction have a strong educational background.

[redacted] failed to submit independent evidence that would corroborate her statements. As noted above, 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, supra* at 190. Similar to [redacted] never claimed that the industry's professional association has made a degree a minimum entry requirement for a gymnastics coach and instructor position. Consequently, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

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.

Counsel states that the petitioner satisfies the third criterion: it normally requires a degree or its equivalent in a specific specialty for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*). According to counsel, the petitioner was established in 1980; from August 1981 until June 1992, it employed a candidate holding a bachelor's degree in secondary education with an emphasis on health, physical education, and recreation as a coach/instructor. Counsel states that the petitioner had hired "subcontractor clinicians" following the departure in 1992 of its employee, and counsel relates that the "subcontractor clinicians" held degrees. Counsel submits copies of the degrees held by two of the clinicians. Counsel states that the petitioner hired two other coaches, both holding degrees: one candidate, employed as a gymnastics instructor, held a bachelor's degree in education; the other, who was hired as a gymnastics coach, held a bachelor's degree in physical education. Counsel submits copies of their degrees and the petitioner's recent advertisements for the position of gymnastics coach and instructor.

This evidence is also not persuasive in establishing the third criterion. In the first place, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into

the occupation as required by the Act.[1] To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As previously discussed, the *Handbook* reveals that coach and sports instructor positions in a private gymnastics school would not require a specific bachelor's degree.

In addition, the submitted evidence of newspaper articles weakens the petitioner's claims that its coaches hold specific baccalaureate degrees. For example, the article entitled "Still Olympics 'possibility' for Indiana teen" described how the petitioning entity's coach, [redacted] trained the gymnast for competitions. However, the petitioning entity never stated or submitted evidence that would show that Ms. [redacted] holds a baccalaureate degree in physical education or sports science. An article in the RoundAbout Entertainment Guide of Jefferson County, Indiana, also stated tha[redacted] coached the level 4 team. In the record of proceeding, a letter from [redacted] were the owners, financiers, and business managers" of the petitioning entity. This inconsistent statement does not impute credibility to this evidence. 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, supra at 190.*

The AAO notes that the record also contains a letter from [redacted] the apparent owner for the petitioning entity from 1980 to 1999. This letter stated "[a] clinician without a degree and without credentials would not be able to secure employment or contracts." Howeve[redacted] failed to submit independent evidence that would corroborate his statement.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires 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 in a specific specialty. Counsel submits examples of the beneficiary's training programs and states that, depending on the apparatus, the beneficiary had devised a training program to meet the USA Elite or International Federation of Gymnastics standards. Counsel submits coaching standards on appeal and information about the petitioner and its athletic competitions. Finally, counsel contends that the beneficiary is qualified for the proffered position.

The submitted evidence fails to establish the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The beneficiary's training programs, including the individual gymnastics programs, are akin to the training programs that coaches and sports instructors devise as described in the *Handbook.* For example, the *Handbook* states that coaches instruct athletes on proper form and technique in the beginning and, later, in advanced exercises attempt to maximize the players' physical potential, whereas sports instructors spend more of their time with athletes working one-on-one, permitting them to design customized training programs

[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.

for each individual. Since the *Handbook* mentions that coaches and sports instructors train professional athletes, it is very likely they would be required to meet the USA Elite or International Federation of Gymnastics standards. Accordingly, because the *Handbook* states that coach and sports instructors in a private gymnastics school would not require a specific bachelor's degree, the petitioner fails to establish that the nature of the specific duties of the proffered position 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 in a specific specialty.

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.