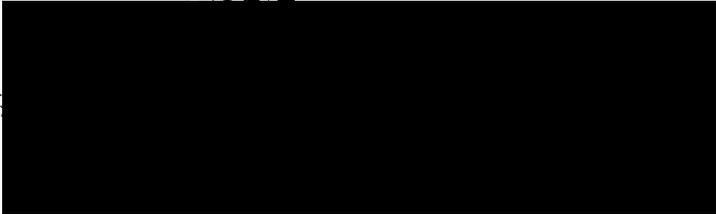




U.S. Citizenship
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Services

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FILE: LIN 04 206 51243 Office: NEBRASKA SERVICE CENTER Date: DEC 02 2005

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: Self-represented

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a multicultural learning center. It seeks to employ the beneficiary as a gymnastics teacher and dance instructor and to classify her 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 ground that the proffered position does not qualify 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B, the petitioner's letter on appeal, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a multicultural learning center, established in 1987, that offers classes in language, culture, and the arts – specializing in Korean culture and education programs – to a variety of students ranging from elementary school age children to adults. In Form I-129 and two accompanying letters the petitioner’s owner indicates that the business is a sole proprietorship with gross annual income of \$110,000. The petitioner states that it wants to hire the beneficiary as a rhythmic gymnastics instructor (an employment contract submitted with the petition identifies the position as a rhythmic gymnastics/dance aerobics instructor) at a wage of \$480.00/week. The duties of the position, aside from dance and gymnastic instruction, include the organization and judging of the school’s sports competition. In response to the RFE the petitioner explained that “[o]ur need is not in high-level gymnastics but in the rhythm dance portion of gymnastics” – in particular, for its gymnastics and rhythm dance class. The beneficiary is qualified for the position, the petitioner states, by virtue of her formal education, which includes a bachelor’s degree in physical education from Seo Jong University in South Korea, conferred on February 13, 1982, and seventeen years of experience as a teacher and coach of dancing and gymnastics.

The director determined that the duties of the proffered position closely resembled those of a coach, as described in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*, and noted the information in the *Handbook* indicating that a bachelor’s degree is not the normal minimum requirement for entry into a coaching position. The petitioner did not establish that it normally requires a degree or its equivalent for the position, the director declared, that a degree requirement is common to the industry in parallel positions among similar organizations, or that the position is so complex or unique that it can only be performed by an individual with a degree. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner asserts that the director misinterpreted the duties of the proffered position. According to the petitioner, the job falls within the *Handbook*’s occupational category of recreation and fitness workers. In support of the appeal the petitioner submits photocopies of the beneficiary’s educational and professional credentials. No further materials have been submitted on appeal.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. *See Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO agrees with the petitioner that the *Handbook*’s broad occupational category of recreation and fitness workers – in particular, the fitness worker component of the occupation – is more applicable to the proffered position in this case – rhythmic gymnastics/dance aerobics instructor – than the occupation of coach. The duties of a fitness worker are described in the *Handbook*, 2004-05 edition, at 393:

Fitness workers instruct or coach groups or individuals in various exercise activities *Fitness trainers* help clients to assess their level of physical fitness and help them to set and reach fitness goals. They also demonstrate various exercises and help clients to improve their exercise techniques. They may keep records of their clients' exercise sessions in order to assess their progress towards physical fitness. *Personal trainers* work with clients on a one-on-one basis in either a gym or the client's home. *Aerobics instructors* conduct group exercise sessions that involve aerobic exercise, stretching, and muscle conditioning. Some fitness workers may perform the duties of both aerobics instructors and fitness trainers. *Fitness directors* oversee the operations of a health club or fitness center. Their work involves creating and maintaining programs that meet the needs of the club's members.

The *Handbook* describes the training and educational requirements of fitness workers, in pertinent part, as follows:

Generally, fitness trainers and aerobics instructors must obtain a certification in the fitness field to obtain employment There are many organizations that offer certification testing in the fitness field

An increasing number of employers require fitness workers to have a bachelor's degree in a field related to health or fitness, such as exercise science or physical education. Some employers allow workers to substitute a college degree for certification, while others require both a degree and certification

Handbook, id., at 394. Thus, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a fitness trainer or instructor position. While a bachelor's degree in a health-related field is viewed with increasing favor by employers of fitness workers, it is not routinely required for entry into the occupation. Thus, a fitness worker does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO determines that the duties of the proffered position also reflect the *Handbook's* occupational category of dancers and choreographers. That occupation is described, in pertinent part, as follows:

[Dancers] use a variety of dance forms that allow free movement and self-expression, including classical ballet, modern dance, and culturally specific dance styles. Many dancers combine performance work with teaching or choreography

Many dancers work with choreographers, who create original dances and develop new interpretations of existing dances . . . [C]horeographers instruct performers at rehearsals to achieve the desired effect. In addition, choreographers often are involved in auditioning performers.

Many dancers stop performing by their late thirties because of the physical demands on the body. However, some continue to work in the field as choreographers, dance teachers and coaches, or artistic directors

Handbook, id., at 252-53. The *Handbook* describes the training and educational requirements of the occupation, in pertinent part, as follows:

Training varies with the type of dance and is a continuous part of all dancers' careers . . . Men often begin their ballet training between the ages of 10 and 15.

Because of the strenuous and time-consuming dance training required, some dancers view formal education as secondary. However, a broad, general education including music, literature, history, and the visual arts is helpful in the interpretation of dramatic episodes, ideas, and feelings

Many colleges and universities award bachelor's or master's degrees in dance, typically through departments of music, theater, or fine arts Many programs concentrate on modern dance, but some also offer courses in jazz, culturally specific ballet, or classical techniques; dance composition, history, and criticism; and movement analysis.

A college education is not essential to obtaining employment as a professional dancer; however, many dancers obtain degrees in unrelated fields to prepare themselves for careers after dance. The completion of a college program in dance and education is essential in order to qualify to teach dance in college, high school, or elementary school. Colleges and conservatories sometimes require graduate degrees, but may accept performance experience. A college background is not necessary, however, for teaching dance or choreography in local recreational programs. Studio schools usually require teachers to have experience as performers.

Handbook, id., at 253. Thus, the *Handbook* indicates that a baccalaureate degree in dance or a related specialty is not the normal minimum requirement for entry into a position as a dancer or choreographer. While a bachelor's degree in dance and education may be required to teach in a school or college setting, it is not required for teachers in a recreational program, like the petitioner's multicultural learning center. Thus, dancers and choreographers do not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into such a position.

For the reasons discussed above, the proffered position – a combination fitness worker/dancer – does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree. Thus, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Since the proffered position is newly created the petitioner has no history of requiring a specialty degree or its equivalent. Accordingly, the position does not qualify as a specialty occupation under the third alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require knowledge usually associated with a baccalaureate or higher degree in a specific specialty. The petitioner has not demonstrated that the duties of the position could not be performed by an experienced dancing, gymnastics, and fitness instructor without baccalaureate level knowledge in a specific specialty. Accordingly, the position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Based on the foregoing discussion, the AAO concludes that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.