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U.S. Citizenship
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Services

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FILE: WAC 04 003 51009 Office: CALIFORNIA SERVICE CENTER Date: MAR 03 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

for *Michael T. Kelly*
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 an exercise and health company that seeks to employ the beneficiary as a brain respiration health educator. 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, counsel submits a brief and additional evidence.

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 brain respiration health educator. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail planning, developing, and designing health education and training programs on Brain Respiration and Dahnhak for corporate customers; conducting classes or training sessions to teach and demonstrate principles, techniques, procedures, or methods of Brain Respiration and Dahnhak; evaluating programs; performing research on relevant topics; developing and/or revising instructional manuals and presentation materials; developing tests, questionnaires, and procedures to measure the effectiveness of curriculum and to determine if program objectives are met; participating in developing marketing and promotional strategies for corporate customers and preparing presentational material; conferring with the marketing department and administrative staff to plan, customize, and develop Brain Respiration and Dahnhak programs for customers; advising instructors and administrative staff in assessment, curriculum development, management of student behavior, and the use of materials and equipment; and observing, evaluating, and recommending changes to strengthen teaching skills in the classroom. The petitioner's September 29, 2003 letter stated that a candidate must possess a baccalaureate degree in natural health sciences, public health, public administration, or a closely related field, and have certification from the Dahn World Brain Respiration Instructor Training program, and the Dahn World 2-year Dahnhak Instructor Training program.

The director determined that the proffered position was not a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the submitted evidence of a one-page matrix indicated that the petitioner requires a candidate to have a bachelor of arts degree and two years of training and education along with certification. This evidence, the director stated, indicated that although the petitioner required baccalaureate-level education along with training, a baccalaureate degree or its equivalent in a specific specialty is not normally the minimum requirement for entry into the proffered position. As such, the director stated that a degree in any field of study along with the petitioner's training program qualifies candidates for the proffered position. The director found the degree requirement was the petitioner's preference rather than an industry standard, and concluded that the petitioner failed to clearly establish that all of its instructors require a degree in a specific field of study as a minimum requirement for entry into the proffered position. The director determined that the proposed duties and stated level of responsibility do not indicate complexity or authority that is beyond what is normally encountered in the occupation.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that the petitioner requires instructors to possess a "bachelor's degree (no requirement of a specific discipline)" and two years of Dahnhak training resulting in certification. Counsel contends that the two years of Dahnhak study for certification is actually postgraduate study in the fields of natural health or holistic medicine, which results in training and education that is equivalent to a degree in a medically or health allied field. Counsel states that the beneficiary will teach specific and complex principles in body-mind training techniques of Dahnhak. Counsel emphasizes that the petitioner has always had a specific degree requirement for the

proffered position: a baccalaureate degree that is followed by two years of Dahnhak training. According to counsel, this has consistently been found to be the equivalent to a U.S. degree in disciplines such as Oriental medicine or natural health sciences. Counsel submits a spreadsheet as evidence to support this statement. Counsel points out that some Dahnhak instructors are beneficiaries of approved H-1B petitions. Counsel states that a baccalaureate degree or its equivalent in a specifically related field is the minimum requirement for entry into the health educator or instructor position.

Upon review of the record, 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.

On appeal, counsel 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 centers in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the AAO cannot determine whether the original H-1B petitions were approved in error.

Further, 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). Although the AAO may attempt to hypothesize as to whether the prior approvals were granted in error, no such determination may be made without review of the original record in its entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 evidentiary record contains a September 29, 2003 letter from the petitioner stating that the proffered position is a specialty occupation because it resembles a health educator, a position that the Department of Labor's (DOL) *Occupational Information Network (O*Net)* describes as requiring a bachelor's degree. This evidence is not persuasive in establishing that the proffered position is a specialty occupation. The DOL replaced the *Dictionary of Occupational Titles (DOT)* with the *O*Net*. Both the *DOT* and the *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The DOL's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *O*Net*.

The petitioner requires a baccalaureate degree and the completion of a two-year training program for the proffered position. Counsel contends that the two years of Dahnhak study for certification is actually postgraduate study in the fields of natural health or holistic medicine, which results in training and education that is equivalent to a degree in a medical or health allied field. The evidentiary record contains letters from the Foundation for International Services that indicate that the two-year training program is equivalent to completion of professional training from a private organization in the United States; this does not indicate that the training program involves baccalaureate-level study. The evidentiary record also contains a document listing course titles and credits for the two-year training program. Nonetheless, there is no evidence in the record describing the content of each course; thus, the AAO cannot conclude that the training program would involve baccalaureate-level study in the fields of natural health, natural health science, or holistic medicine. The court in *Tapis Int'l vs. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) states that regulatory guidelines allow for a bachelor's degree or its equivalent to establish that a particular position is a specialty occupation, and that the term "its equivalent" applies if a specific degree is not available in the particular field. In the instant case, the petitioner requires a baccalaureate degree and completion of the two-year training program. However, as discussed, there is no evidence that shows that the training program actually involves baccalaureate-level study in the fields of natural health, natural health science, or holistic medicine. The petitioner therefore cannot establish that a specific baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, brain respiration health educator.

The *Handbook* discloses that the duties of the proffered position are performed by fitness workers and aerobics instructors. The *Handbook* states:

Fitness workers instruct or coach groups or individuals in various exercise activities. Because gyms and health clubs offer a variety of exercise activities such as weightlifting, yoga, aerobics, and karate, fitness workers typically specialize in only a few areas. *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. . . . *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.

The petitioner's brochures submitted in response to the request for evidence describe it as a company that teaches stretching exercises, deep and natural breathing, and meditation. The AAO notes that the petitioner's job description did not indicate the percentage of time the beneficiary will devote to each job duty. Nonetheless, the beneficiary's duties do not rise beyond those performed by a fitness worker and aerobics instructor because the beneficiary, like a fitness worker and aerobics instructor, will conduct classes and training sessions and will plan, develop, and design health education and training programs for corporate customers.

The *Handbook* reports that there are various educational requirements for recreation workers. The *Handbook* indicates:

Full-time career professional positions usually require 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. In industrial recreation, or "employee services" as it is more commonly called, companies prefer to hire those with a bachelor's degree in recreation or leisure studies and a background in business administration.

Specifically regarding fitness trainers and aerobics instructors, the *Handbook* states:

Generally, fitness trainers and aerobics instructors must obtain a certification in the fitness field to obtain employment. Certification may be offered in various areas of exercise such as personal training, weight training, and aerobics. . . .

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. A bachelor's degree and, in some cases, a master's degree in exercise science, physical education, or a related area, along with experience, usually is required to advance to management positions in a health club or fitness center. . . .

The petitioner's certification requirement is consistent with the *Handbook's* information about fitness trainers and aerobics instructors. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, accountant.

There is no evidence in the record to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2).

The evidentiary record does not establish that the particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the beneficiary's duties are performed by fitness trainers and aerobics instructors, occupations that do not require a specific baccalaureate degree.

The third criterion requires the petitioner to establish that it normally requires a specific degree or its equivalent for the position. The record of proceeding contains a spreadsheet listing the names, positions, and degree equivalency of 16 employees, and credentials evaluations of the employees. The employees possess the equivalent of various U.S. baccalaureate and master's degrees including nursing, political science, home economics, mechanical engineering, business administration, fine arts, foreign language and literature, economics, physical education, oceanography, foreign language (English), biology, and architectural engineering. The credentials evaluator states that the two-year training course for Dahnhak instructors and Dahnhak Program Educations is equivalent to professional training in the natural health sciences field completed at a private organization in the United States. This evidence shows that petitioner does not normally require a specific baccalaureate degree or its equivalent for the position given that employees hold various baccalaureate degrees. The petitioner's certification is the only consistent requirement for the proffered position. As discussed above, there is no evidence that the petitioner's training program actually involves baccalaureate-level study in the fields of natural health, natural health science, or holistic medicine.

Furthermore, 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 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 discussed, the *Handbook* describes the duties of the proffered position as analogous to those of fitness and aerobics instructors, occupations that do not require a specific baccalaureate degree.

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. The *Handbook* describes the duties of the proffered position as analogous to those of fitness and aerobics instructors,

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.

occupations that do not require a specific baccalaureate degree. No evidence in the record shows that the duties of the proffered position rise beyond this level. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.