

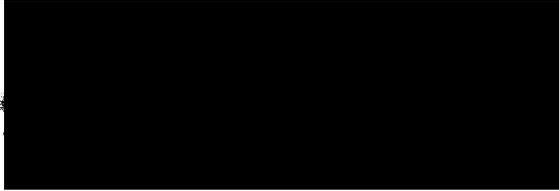
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U.S. Citizenship
and Immigration
Services

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DR

MAY 23 2005

FILE: SRC 04 053 51471 Office: TEXAS SERVICE CENTER Date:

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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 business that seeks to employ the beneficiary as a "Dahnhak and Brain Respiration Instructor." The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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.

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 "Dahnhak and Brain Respiration Instructor." Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 4, 2003 letter in

support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: teaching the principles and techniques of Dahnhak (meditation, vortex dance, brain respiration, stretching and acupuncture, Dahn yoga, Dahn tai chi, taorobics, and breathing techniques); preparing Dahnhak assignments; directing class activities; teaching Dahnhak elements of metaphysical/physical discipline; discussing and demonstrating Dahnhak method of mind and body expression; monitoring character development and personality projection; providing non-medical physical instruction through practical knowledge of Dahnhak; directing Dahnhak exercise classes; and evaluating student progress and determining when techniques have been mastered to allow "graduation" to next level. The petitioner indicated that a qualified candidate for the job would possess a "Bachelor of Arts or Science degree" or an equivalent thereof and two years of specialized training and education with certification as a Dahnhak Instructor.

The director found that the proffered position was not a specialty occupation because it does not require a bachelor's degree in a specific specialty. The director also found that a bachelor's degree in an unrelated discipline and two years of training, which is the petitioner's requirement for the proffered position, is not the equivalent of a baccalaureate degree in the specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is a specialty occupation because the petitioner requires that each of its instructors hold a bachelor's degree in natural health sciences based on a combination of education, training, and experience, and a certificate based on two years of Dahnhak training. Counsel states further:

"The teaching of Dahnhak techniques and principles requires an initial level of education most commonly gained in the liberal arts, because the ability to train students in Dahnhak is not possible without a university degreed level of intellect and knowledge. . . . All of the instructors have an initial university degree, but the completion of the two-year Dahnhak certification program plus progressively advanced experience creates the equivalent of an additional degree, most often in the Natural Health Sciences."

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.

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

The record contains the following documentation related to the proffered position:

- The petitioner's December 4, 2003 letter, in which the petitioner's general manager states that the proffered position is most closely associated with the occupational classifications of Fitness Trainers and Aerobics Instructors, Sports Instructor, and Recreation and Fitness Workers, as defined in the DOL's *O*Net* and *Dictionary of Occupational Titles (DOT)*;
- Counsel's January 23, 2004 letter, in which counsel describes the requirements of the petitioner's instructors as follows: "A bachelor's degree (no requirement of a specific discipline), and [t]wo years of Dahnhak training resulting in certification in the methodology and philosophy of Dahnhak. . . . Bell Rock Development Company always, without exception, has a specific degree requirement for this position. A baccalaureate degree, followed by two years of Dahnhak training, has consistently been found to be the equivalent of a U.S. degree in disciplines such as Oriental Medicine or Natural Health Sciences.";
- The petitioner's 2001 U.S. Corporation Income Tax Return, which reflects no compensation of officers or salaries and wages;
- The petitioner's Form 941, Employer's Quarterly Federal Tax Returns, for the quarters ending on March 31, 2003 and June 30, 2003, reflecting the total wages, tips, and other compensation as \$297,145.65 and \$348,519.94, respectively;
- A list of approved H-1B petitions for the petitioner's instructors;
- A list of the petitioner's instructors and their educational backgrounds; and
- Credential evaluations for the petitioner's instructors.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. The petitioner's comparison of the proffered position with the positions of fitness trainers, aerobics and sports instructors, and recreation and fitness workers is noted. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree, or its equivalent, is required for these positions. It is also noted that counsel's description of the educational requirements of the proffered position in her January 23, 2004 letter - a bachelor's degree (no requirement of a specific discipline) and two years of Dahnhak training resulting in certification in the methodology and philosophy of Dahnhak - is not the equivalent of a bachelor's degree in a related and specific specialty, as correctly stated by the director.

The petitioner's reference to and assertions about the relevance of information from *O*Net* and the *DOT*, in its December 4, 2003 letter, are not persuasive. Neither the *DOT's* SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

Counsel noted that CIS approved other petitions that had been previously filed on behalf of the petitioner's other instructors. The director's decision does not indicate whether she reviewed the prior approvals of the

other nonimmigrant petitions, other than the credential evaluations. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

It is additionally noted that all of the evaluations of the petitioner's instructors are from a company that specializes in evaluating academic credentials, and the evaluations are based upon the alien's education, training and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluations carry no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that each of the petitioner's instructors holds a bachelor's degree in natural health sciences based on a combination of education, training, and experience, and a certificate based on two years of Dahnhak training. As related in the discussion above, the evidence in the record does not support this statement. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *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 In this regard, the petitioner fails to establish that the Dahnhak and Brain Respiration Instructor position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.