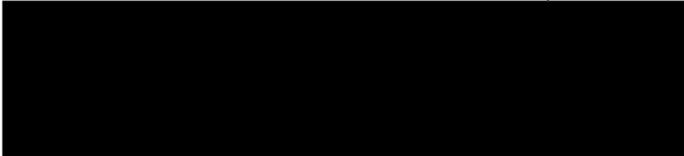


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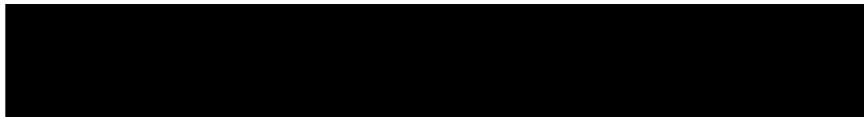


02

JUN 29 2007

FILE: SRC 06 019 52200 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.

James Blunzinger, for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 claims to be a private tennis club and seeks to employ the beneficiary as the director of tennis. 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 on November 10, 2005, concluding that the petitioner failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's denial letter; (3) the director's request for evidence; (4) the petitioner's response to the request for evidence and supporting documentation; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 proposed position.

According to the Form I-129, the petitioner indicated that in the position of director of tennis, the beneficiary will "manage all aspects of tennis operations." In addition, in response to the director's request for evidence, dated October 31, 2005, the petitioner described the beneficiary's proposed position as the director of tennis as follows:

[The petitioner] has one head professional who must possess a wide range of specialized knowledge, skill, and training. This is the position [the beneficiary] would occupy. The duties of this position include three primary areas of expertise. First, the position involves the running of the tennis pro shop. This requires the tennis professional to be able to answer all questions concerning the products in the shop, to assist in stringing rackets, to match racket type to a player's ability and style, and to have adequate knowledge and expertise to order the proper tennis equipment. Second, the position involves the supervision and direction of tennis instruction and tennis clinics. This aspect of the job requires knowledge of how best to organize players by ability and skill and to match them with the proper tennis instructor. In addition, the tennis professional himself must possess a high degree of tennis skill and talent and be able to provide effective instruction. Moreover, he must be able to convey tennis instruction using sport psychology and other techniques taught by the United States Professional Tennis Association (USPTA). Third, the tennis professional must be able to organize and conduct tennis tournaments put on by the USPTA that involves several hundred players. This includes seeding of the players, organizing the brackets and court assignments, and coordinating USPTA umpires and officials. Finally, the tennis professional must be able to handle the daily operations of the club, supervise maintenance of the tennis courts and provide a wide range of member services.

[The beneficiary] meets every aspect of this position because of his training, skill, and experience. He is a great fit for [the petitioner] because he has been here before and has knowledge of our membership. Also, he has several years experience running a tennis shop and tennis tournaments. Moreover, he is the top-rated mens singles player in Texas and brings a great deal of tennis accomplishments to the job. Finally, he has been

certified as a Tennis Professional by the USPTA, has a degree in tennis instruction from Tyler Junior College and has received various specialized training from the USPTA.

The director denied the petition on November 10, 2005, concluding that the proposed position does not qualify as a specialty occupation position. The director noted that the petitioner did not present documentation evidencing that it normally requires a bachelor's degree or its equivalent for the position of director of tennis, or 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 bachelor's degree. The director also noted that the proffered position appears to qualify as a general management position in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, and that the *Handbook* indicates that such positions do not require an individual to obtain a bachelor's degree in order to fill the position.

On appeal, counsel contends that the "knowledge to play and teach tennis techniques at the highest level is the theoretical and practical application of a body of highly specialized knowledge." Counsel further states that the position requires a bachelor's degree or its equivalent in "specific training associated with tennis instruction, management, and sports psychology." Counsel asserts, "it is simply false to suggest that merely the ability to play tennis well qualifies one for the subject position." Counsel also states that the petitioner requires an individual with a bachelor's degree, completion of the Tennis Tech program at Tyler Junior College, and certification from USPTA. Finally, counsel states that the petitioner is "not a large corporation and does not have the type of documentary evidence the Director seems to want." Counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed 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 review of the duties of the proposed position finds them closely aligned to the responsibilities of two occupational groupings discussed in the *Handbook*: (1) fitness workers and (2) athletes, coaches, umpires, and related workers.

In its discussion of the duties of fitness workers, the 2006-2007 edition of the *Handbook* states the following:

Fitness workers lead, instruct, and motivate individuals or groups in exercise activities, including cardiovascular exercise, strength training, and stretching. They work in commercial and nonprofit health clubs, country clubs, hospitals, universities, yoga and Pilates studios, resorts, and clients' homes. Increasingly, fitness workers also are found in workplaces, where they organize and direct health and fitness programs for employees of all ages.

Although gyms and health clubs offer a variety of exercise activities such as weightlifting, yoga, cardiovascular training, and karate, fitness workers typically specialize in only a few areas.

Personal trainers work one-on-one with clients either in a gym or in the client's home. Trainers help clients assess their level of physical fitness and set and reach fitness goals. Trainers also demonstrate various exercises and help clients improve their exercise techniques. Trainers may keep records of their clients' exercise sessions to assess clients' progress toward physical fitness.

Group exercise instructors conduct group exercise sessions that involve aerobic exercise, stretching, and muscle conditioning. Because cardiovascular conditioning classes often involve movement to music, outside of class instructors must choose and mix the music and choreograph a corresponding exercise sequence. Pilates and yoga are two increasingly popular conditioning methods taught in exercise classes. Instructors demonstrate the different moves and positions of the particular method; they also observe students and correct those who are doing the exercises improperly. Group exercise instructors are responsible for ensuring that their classes are motivating, safe, and challenging, yet not too difficult for the participants.

Fitness directors oversee the fitness-related aspects of a health club or fitness center. Their work involves creating and maintaining programs that meet the needs of the club's members, including new member orientations, fitness assessments, and workout incentive programs. They also select fitness equipment; coordinate personal training and group exercise programs; hire, train, and supervise fitness staff; and carry out administrative duties.

Fitness workers in smaller facilities with few employees may perform a variety of functions in addition to their fitness duties, such as tending the front desk, signing up new members, giving tours of the fitness center, writing newsletter articles, creating posters and flyers, and supervising the weight training and cardiovascular equipment areas. In larger commercial facilities, personal trainers are often required to sell their services to members and to make a specified number of sales. Some fitness workers may combine the duties of group exercise instructors and personal trainers, and in smaller facilities, the fitness director may teach classes and do personal training.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

Personal trainers must obtain certification in the fitness field to gain employment, while group fitness instructors do not necessarily need certification to begin working. The most important characteristic that an employer looks for in a new group fitness instructor is the

ability to plan and lead a class that is motivating and safe. Group fitness instructors often get started by participating in exercise classes, and some become familiar enough to successfully audition and begin teaching class. They also may improve their skills by taking training courses or attending fitness conventions. Most organizations encourage their group instructors to become certified, and many require it.

In the fitness field, there are many organizations—some of which are listed in the last section of this statement—that offer certification. Becoming certified by one of the top certification organizations is increasingly important, especially for personal trainers. One way to ensure that a certifying organization is reputable is to see whether it is accredited or seeking accreditation by the National Commission for Certifying Agencies.

Most certifying organizations require candidates to have a high school diploma, be certified in cardiopulmonary resuscitation (CPR), and pass an exam. All certification exams have a written component, and some also have a practical component. The exams measure knowledge of human physiology, proper exercise techniques, assessment of client fitness levels, and development of appropriate exercise programs. There is no particular training program required for certifications; candidates may prepare however they prefer. Certifying organizations do offer study materials, including books, CD-ROMs, other audio and visual materials, and exam preparation workshops and seminars, but exam candidates are not required to purchase materials to sit for the exams. Certification generally is good for 2 years, after which workers must become recertified by attending continuing education classes. Some organizations offer more advanced certification, requiring an associate or bachelor's degree in an exercise-related subject for individuals interested in training athletes, working with people who are injured or ill, or advising clients on whole-life health.

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, but most employers who require a bachelor's degree require both a degree and certification.

People planning fitness careers should be outgoing, good at motivating people, and sensitive to the needs of others. Excellent health and physical fitness are important due to the physical nature of the job. Those who wish to be personal trainers in a large commercial fitness center should have strong sales skills.

These findings do not support a finding that a bachelor's degree is normally required for entry into this occupation. The *Handbook* states that educational requirements vary, and that a range of degrees may be acceptable for entry into the position. As noted previously, CIS interprets the term "degree" to mean not just any degree in any field, but one in a specific specialty that is directly related to the proposed position.

A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into this occupation. Moreover, the fact that "an increasing number of employers" require a degree is not synonymous with the "normally required" standard imposed by the regulation, and certification is clearly not synonymous with the attainment of a bachelor's degree.

In its discussion of the duties of athletes, coaches, umpires, and related workers, the *Handbook* states the following:

Coaches organize amateur and professional athletes and teach them the fundamentals of individual and team sports. (In individual sports, *instructors* sometimes may fill this role.) Coaches train athletes for competition by holding practice sessions to perform drills that improve the athletes' form, technique, skills, and stamina. Along with refining athletes' individual skills, coaches are responsible for instilling good sportsmanship, a competitive spirit, and teamwork and for managing their teams during both practice sessions and competitions. Before competition, coaches evaluate or scout the opposing team to determine game strategies and practice specific plays. During competition, coaches may call specific plays intended to surprise or overpower the opponent, and they may substitute players for optimum team chemistry and success. Coaches' additional tasks may include selecting, storing, issuing, and taking inventory of equipment, materials, and supplies.

Sports instructors teach professional and nonprofessional athletes individually. They organize, instruct, train, and lead athletes in indoor and outdoor sports such as bowling, tennis, golf, and swimming. Because activities are as diverse as weight lifting, gymnastics, scuba diving, and karate, instructors tend to specialize in one or a few activities. Like coaches, sports instructors also may hold daily practice sessions and be responsible for any needed equipment and supplies. Using their knowledge of their sport and of physiology, they determine the type and level of difficulty of exercises, prescribe specific drills, and correct athletes' techniques. Some instructors also teach and demonstrate the use of training apparatus, such as trampolines or weights, for correcting athletes' weaknesses and enhancing their conditioning. As coaches do, sports instructors evaluate the athlete and the athlete's opponents to devise a competitive game strategy.

Coaches and sports instructors sometimes differ in their approaches to athletes because of the focus of their work. For example, while coaches manage the team during a game to optimize its chance for victory, sports instructors—such as those who work for professional tennis players—often are not permitted to instruct their athletes during competition. 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, improve their physical condition, and achieve success in their sport.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

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. Athletes usually begin competing in their sports while in elementary or middle school, and continue through high school and sometimes college. They play in amateur tournaments and on high school and college teams, where the best attract the attention of professional scouts. Most schools require that participating athletes maintain specific academic standards to remain eligible to play. Becoming a professional athlete is the culmination of years of effort. Athletes who seek to compete professionally must have extraordinary talent, desire, and dedication to training.

For high school coaching and sports instructor jobs, schools usually prefer to hire teachers willing to take on the jobs part time. If no one suitable is found, schools 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 knowledge and experience needed to become a head coach. Head coaches at large 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, a person usually needs years of coaching experience and a winning record in the lower ranks.

Head coaches at public secondary schools and sports instructors at all levels usually must have a bachelor's degree. (For information on teachers, including those specializing in physical education, see the section on teachers—preschool, kindergarten, elementary, middle, and secondary elsewhere in the *Handbook*.) Those who are not teachers must meet State requirements for certification to become a head coach. Certification, however, may not be required for coaching and sports instructor jobs in private schools. Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine.

For those interested in becoming a tennis, golf, karate, or other kind of instructor, certification is highly desirable. Often, one must be at least 18 years old and certified in cardiopulmonary resuscitation (CPR). There are many certifying organizations specific to the various sports, and their training requirements vary. Participation in a clinic, camp, or school usually is required for certification. Part-time workers and those in smaller facilities are less likely to need formal education or training.

The findings of the *Handbook* regarding athletes, coaches, umpires, and related workers demonstrate that a bachelor's degree or its equivalent is not normally a requirement for the proposed position. While certification may be "highly desirable," such certification is not equivalent to the attainment of a bachelor's degree or its equivalent in a specific specialty. Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. Counsel has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. As such, the petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's degree in a specific specialty. The AAO finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the fitness worker and athletes, coaches, umpires, and related worker positions described in the *Handbook*. Although counsel for the petitioner asserts that the petitioner requires an employee with a bachelor's degree to fill the position of director of tennis "so that the applicant will have the necessary training and performance history to manage the tennis operations," the petitioner did not submit any documentation corroborating this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion. In response to the director's request for evidence, counsel asserts that the petitioner has "consistently sought out tennis professional who have formal training provided by academia and the USPTA," however, the petitioner does not specify that it exclusively recruits and employs only individuals with a bachelor's degree. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. The *Handbook* does not indicate any usual association between the type of position here in question and at least a bachelor's degree in a specific specialty. Further, the evidence of record does not demonstrate that specific duties to be performed by the beneficiary in the context of the petitioner's business operations possess the requisite specialization and complexity. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

Finally, counsel asserts that the beneficiary was previously approved for H-1B status for a similar job position. However, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute 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). The prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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 did approve a nonimmigrant petition similar to the one at issue here, 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).

On appeal, counsel for the petitioner requested the right to an oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving

unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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.