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U.S. Citizenship
and Immigration
Services

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FILE: EAC 05 178 51391 Office: VERMONT SERVICE CENTER

Date: OCT 29 2007

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, Chief
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 a tennis and health club that seeks to employ the beneficiary as its director of education. 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.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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) consistently interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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.

The petitioner seeks the beneficiary's services as its director of education. Evidence of the beneficiary's duties includes: the petitioner's May 23, 2005 letter in support of the petition and the petitioner's October 12, 2005 response to the director's RFE. In the May 23, 2005 letter submitted by the petitioner's former counsel, the petitioner's CEO described the nature of the petitioning entity and the proposed duties as follows:

[The petitioner] provides tennis instruction and coaching to children, adults and competitive players. [The petitioner] uses the most advanced teaching techniques including video evaluation and state-of-the-art fitness equipment. [The petitioner] offers a variety of programs for all ages and tennis levels including junior programs, [after-school] programs, adult programs and summer program[s]. [The petitioner] also offers [professional-level coaching] to serious students who wish to compete in U.S. Tennis Association (USTA) competition and leagues.

[The beneficiary] will be responsible for planning and coordinating physical education and tennis programs. He will plan, develop and implement weight training, nutritional and exercise programs for students. He will direct the preparation of publicity [to] promote athletic events, supervise and coordinate the activities of our coaching [staff]. [The beneficiary] will prepare budgets and authorize department expenditures, as well as plan and schedule sports events.

In a letter dated October 12, 2005, submitted by the petitioner's current counsel in response to the petitioner's RFE, the petitioner's CEO described the nature of the petitioning entity, in part, as follows:

[The petitioner] will be an exciting, luxurious, and modern sports and fitness facility that will dominate the industry in the Monmouth County, New Jersey metro area. The club will offer a [state-of-the-art], high-end facility to tennis, fitness, and league sports enthusiasts of all ages and skill levels.

[The petitioner] anticipates opening its doors during the first quarter of 2006, but will begin actively recruiting and signing up members in the 3rd and 4th quarters of 2005.¹

As stated by the petitioner's CEO in the October 12, 2005 letter, the proposed duties are as follows:

- Planning and scheduling: setting goals, objectives and developing a detailed method of achieving them in a specified time period including planning and coordinating physical education and tennis programs as well as planning, developing, implementing and scheduling weight training, nutritional and exercise programs (30% of time);
- Directing the preparation of publicity for the promotion of athletic events; organizing tournaments, social, and recreational events; creating and promoting contests and challenges to keep the members motivated and excited; and overseeing marketing to members (25% of the time);
- Hiring, leading, motivating, delegating, directing, evaluating, disciplining, and firing employees; developing and implementing a code of ethics, dress code, and teaching style for all employees; organizing the employees' efforts to reach the objectives successfully and creating an efficient and harmonious atmosphere; supervising and coordinating the activities of the coaching staff (25% of the time); and
- Controlling, coordinating, and implementing budgeting and auditing activities on a quarterly and annual basis; reporting to executives (20% of the time).

The director found that the proposed director of education duties do not require a bachelor's degree in a specific specialty. The director also found that the petitioner had not established that at the time of filing the petition, or at the present time, it had a specialty occupation position available for the beneficiary. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

¹ An October 9, 2007 search of the petitioner's website at <http://www.matchpointclub.com/> finds the petitioner's targeted opening date as 2008.

On appeal, the petitioner's CEO states, in part, that the proffered position meets three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). She states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, the degree requirement is common to the industry in parallel positions among similar organizations, and 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. She states further that the petitioner's RFE detailed professional duties to take place prior to the petitioner's opening, such as assisting the petitioner's executives in selecting proper fitness equipment and technology, developing and scheduling fitness programs and activities, and hiring personnel. Counsel submits the following previously submitted supporting documentation: two opinion letters; two approvals for the beneficiary in the same position for different petitioners; job postings; and the petitioner's business plan, lease, and "Account Quick Report." Counsel also submits a proposal for fitness equipment and a letter of credit.

Preliminarily, the AAO observes that in its response to the director's RFE, the petitioner changed the nature of the position from that of a director of education of a tennis and health club already conducting business to that of a director of education of a tennis and health club under construction.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather changed the nature of the position from that of a director of education of a tennis and health club already conducting business to that of a director of education of a tennis and health club still under construction. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although a review of the Fitness Workers occupational category in the *Handbook*, 2006-07 edition, finds that a bachelor's degree, and in some cases a master's degree, in exercise science, physical education, kinesiology, or a related area, along with experience, is usually required to advance to management positions in a health club or fitness center, the AAO does not find that the proffered position is a specialty occupation. The petitioner has not demonstrated that the beneficiary performs the director of education position described in its May 23, 2005 letter, with duties that entail implementing weight training and nutritional and exercise programs for students, promoting athletic events, and supervising and coordinating the petitioner's coaching staff. Further, although the petitioner's business plan claims that the petitioner anticipates recruiting and signing up members in the 3rd and 4th quarters of 2005, opening its doors during the first quarter of 2006, and raising \$4 million to begin operations, the record contains no evidence in support of these assertions. Of further note, although information on the petition reflects that the petitioner was established in 2005, has 10 projected employees and a projected gross annual income of \$1 million, the petitioner provides no evidence in support of these claims, such as federal income tax returns and quarterly wage reports. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, the record contains opinions from two individuals in the health fitness industry. One letter is from the chairman and owner of a business that designs, constructs, and renovates indoor sports and other facilities. The second letter is from an independent, part-time consultant for fitness facilities, who provides no evidence of having expertise in the field of health fitness. Both writers assert that the proffered position is a professional position and/or requires a related bachelor's degree. The record, however, does not indicate that the writers have adequate knowledge of this matter. The opinions do not include a discussion of the proposed duties and/or the actual work that the beneficiary would perform within the context of this particular petitioner's business. The writers do not demonstrate knowledge of the petitioner's particular business operations. They do not relate any personal observations of those operations or of the work that the beneficiary would perform. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for their conclusions about the educational requirements for the particular position at issue. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinions of the writers are not based on a factual foundation, the AAO does not find them probative in this matter.

The record also contains Internet job postings for health and fitness directors. The listings rely on duties unlike the duties listed by the petitioner. The record does not demonstrate that the proposed duties of the proffered position are as complex as the duties described for the advertised positions, such as leading a fitness staff and personal trainers, and monitoring the ongoing performance of the club's fitness programs. The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

On appeal, the petitioner states 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 CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, 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).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. As observed above, the petitioner has not provided evidence that the proffered position incorporates the complex duties of a director of education of a tennis and health club who oversees fitness staff, programs, and club members, thus requiring a minimum of a bachelor's degree in physical education. The petitioner has not identified any unique duties that are specifically pertinent to the petitioner's business operations as described at the time of filing that would require knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. As counsel does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

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.

The petitioner's CEO states, on appeal, that the beneficiary's duties as its director of education are so specialized and complex as to require a related bachelor's degree. As indicated in the discussion above, the record of proceeding lacks evidence of specific duties in relation to the petitioner's specific business operations as described at the time of filing that would establish such specialization and complexity. 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 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.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that the record contains only copies of the beneficiary's foreign degree, a foreign certification, and a credentials evaluation. The record does not contain a copy of the beneficiary's transcripts or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C).² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, the petition will not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

² It is also noted that the beneficiary's alma mater, *Instituto Superior de Educacion Fisica No. 1* [REDACTED] does not appear on the Electronic Database for Global Education (EDGE) website at [REDACTED]