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U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 03 181 54550 Office: NEBRASKA SERVICE CENTER Date: JUN 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

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.

Marc Johnson

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 a youth athletic/training organization that specializes in gymnastics training for youths between the ages of seven and 17. In order to employ the beneficiary in a position entitled professional gymnastics technician, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation 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).

The director denied the petition on the basis that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a brief that asserts that the director's decision was erroneous, and that the evidence of record establishes that the petition is a specialty occupation.

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the documentary evidence enclosed with the brief as exhibits.

The director's decision to deny the petition was correct. The record contains insufficient evidence for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO reached this decision on the basis of its own independent evaluation of the record, and in this process the AAO did not defer to the reasoning or decisions of the director or the service center. The AAO is never bound by a decision of a service center or district director. *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).

The person working in the proffered position would supervise and coordinate the activities of the petitioner's gymnastic trainers, coaches, and instructors. The petitioner serves "over 3000 national and international athletes each year." It currently employs eight full-time permanent staff members, contracts additional coaches throughout the year, and offers intense gymnastic training programs during 12 summer camp sessions, which are conducted from June thorough July. The petitioner contracts approximately 25 coaches to conduct the summer camp training. The petitoner's catalog supports counsel's observation that the petitioner's coaches "are well recognized specialists within their profession."

According to the letter of support that the petitioner submitted with the Form I-129, the beneficiary would:

1) Conduct training clinics for gymnastic coaches and athletes; may concurrently train and supervise up to 30 coaches.

2) Read and interpret national rules and international competition rules, keeping abreast of all new rules.

3) Conduct training sessions in accordance with the applicable rules for which the coaches are training specific athletes, i.e., Federation of International Gymnastic Rules, USA Gymnastics Jr. Olympic Program Rules.

4) Keep abreast to [sic] new training techniques, teach and evaluate standard and new techniques to coaches and athletes.

5) Organize and supervise gymnastic training sessions.

6) Teach gymnastic skills to coaches and athletes by demonstrating the use of apparatus, and equipment, including beam, floor, uneven bars, vault, still rings, parallel bars, pommel horse, horizontal bars, trampoline, etc.

7) Maintain safe training facility and demonstrate safe use of equipment, including equipment mentioned above.

8) Evaluate injuries for gymnasts, make decisions whether to seek medical treatment[,] and follow rehabilitation orders from medical professionals.

This letter of support also asserted, "The minimum education qualification for this position is a Bachelor's Degree or equivalent to a U[.]S[.] bachelor's degree as determined by a credentials evaluator in physical education, coaching, or exercise and sports science[,] and [an] emphasis in Gymnastics is preferred."

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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.

Accordingly, the regulatory provision at 8 C.F.R. § 214.2(h)(4)(ii) states that "specialty occupation" means one "which [1] 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 [2] 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.

To accord with Section 214(i)(l) of Act, 8 U.S.C. § 1184 (i)(l), and 8 C.F.R. § 214.2(h)(4)(ii), 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 criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) is satisfied where the evidence establishes that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position. The evidence of record here does not reach this threshold.

Counsel contends, in part, that the director "mischaracterized the job offered and disregarded submitted evidence" by confusing the proffered "Professional Gymnastics Technician" position with the "Certified Athletic Trainer" (CAT) positions, which are subordinate. Counsel emphasizes that the "primary duty of this [proffered] position is to train [the petitioner's] staff that directly coach the participants." (Brief, at paragraph 5 of page 2.)

The AAO recognized and took into account counsel's distinction between the proffered position and the CAT positions. However, neither the proposed duties as a whole nor the primacy of the CAT-training duty establishes the gymnastic technician position as one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

The "Job Zone Five" rating that the Department of Labor's (DOL) *O*Net OnLine* material in the record accords to the Coaches and Scouts occupation is sufficient to establish that the position proffered here normally requires at least a bachelor's degree.[1] However, as the *O*Net* Job Zone information does not address the range of majors that would be appropriate or required for any particular occupation, it is irrelevant to the instant issue of whether the proffered position normally requires a degree in a specific specialty.

Counsel correctly recognizes that the approved petitions cited in the record do not have precedential weight. As counsel acknowledged, 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 before it. *See* 8 C.F.R. § 103.2(b)(16)(ii). It is beyond the scope of this proceeding for the AAO to speculate about the evidence that was submitted into the individual records of the approved petitions' proceedings, about the specific grounds upon which CIS approved those petitions, or about the correctness of the approvals. Accordingly, the submissions about prior petition approvals have no impact on this proceeding.

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[1] According to the *O*Net* explanation about Job Zone Five:

> A bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree).

A position does not qualify as a specialty occupation by application of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) solely because the petitioner designates as a hiring requirement a bachelor's or higher degree, or the equivalent, in a specific specialty. The petitioner's designation has no weight unless the degree or equivalent is a realistic prerequisite to performing the position. *See Matter of Ling*, 13 I & N Dec. 35 (Reg. Comm. 1968); *see also Matter of Shin*, 11 I &N Dec. 686 (Dist. Dir. 1966).

Contrary to counsel's assertion, the evidence of record does not establish that a bachelor's degree or equivalent in physical education, coaching, or exercise and sports science is the minimum educational requirement for its gymnastics technician position. 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. [2] To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment 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 Defensor v. Meissner*, 201 F. 3d 384, 388 (5th Cir. 2000).

The facts that none of the persons who have held the proffered position hold one of the degrees specified by the petitioner, and that three of these four people held degrees in education, are substantial evidence that the position is not one that normally requires a degree in a specific specialty. Aside from this, to the extent that the position is described in the record, it does not appear to be one that would normally require at least a bachelor's degree, or the equivalent, in any specific specialty.

Next, the petitioner has not presented evidence that would qualify the proffered position under either of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The evidence does not satisfy the first alternative prong, which confers specialty occupation status on a position if it has a specific-specialty degree requirement that is common to the industry in parallel positions among similar organizations.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the DOL's *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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The *Handbook* does not specifically address positions that concentrate on the supervision and training of gymnastic trainers. However, the *Handbook's* chapter most relevant to this proceeding, "Athletes, Coaches, Umpires, and Related Workers," does not report a requirement for a degree in a specific specialty. Therefore, the

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[2] 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.

AAO accorded no weight to counsel's reliance (at paragraph 2 of page 2 of her letter of response to the RFE) upon the 2002-2003 *Handbook's* statement that "Public secondary school coaches and sports instructors at all levels usually must have a bachelor's degree."

There are no submissions from individuals, firms, or professional associations in the petitioner's industry to the effect that the industry routinely recruits and employs only individuals with a degree.

The record does not substantiate counsel's assertion (at paragraph 2 of page 3 of her letter replying to the RFE) that the record's advertisements for gymnastic coaching positions illustrate that "a bachelor's degree or higher is common to the industry in parallel positions." Only two advertisements were submitted into the record. One is from Salto Gymnastics, and the other from Stanford University. Because the Salto Gymnastics advertisement provides no details about the duties of the Boys' Age Group Coach position, there is an insufficient factual basis for characterizing the position as parallel to the gymnastic technician position. Stanford's advertisement for an Assistant Women's Gymnastics Coach position requires only a bachelor's degree, without specifying any specific major, concentration, or course of studies.

Furthermore, even if both the Salto Gymnastics and Stanford advertisements were for positions that were parallel to the gymnastic technician position and required at least a bachelor's degree in a specific specialty, they would have been insufficient. The advertisements are too few to establish that a degree requirement is common throughout the industry.

Finally, the *O*Net* information in the record does not establish a common industry-wide requirement for a degree in a specific specialty, because the *O*Net* does not provide information on whether degrees required in occupations are limited to specific specialties.

Next, the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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."

In this vein, counsel focuses on the size of the staff and the fact that it would be training athletes "at all levels." Although the record does not establish how many athletes would be trained during any particular time period, counsel notes that the petitioner "serves over 3000 national and international athletes each year." Counsel emphasizes that the gymnastic technician would have to supervise and coordinate the petitioner's "large and diverse staff" to a degree that would ensure that the trainers tailor their instructions to their charges' specific goals and competition levels, in a context where the gymnastic trainees have widely differing experience and talent levels and "compete in diverse categories where the rules differ from category and event to event."

The facts which counsel highlights indicate a requirement for communication and organization skills that are not peculiar to any particular course of studies. They do not illustrate that the proffered position is sufficiently complex or unique to require a person with a baccalaureate degree in a specific specialty. The fact that three of the four persons who have been employed in the proffered position hold degrees in education attests that the position can be performed by persons without degrees associated with highly specialized knowledge in physical education, coaching, exercise and sports science, or any other subject.

The evidence of record does not meet 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.

Counsel asserts that, as a minimum, "the petitioner routinely requires that the Professional Gymnastics Technician holds a bachelor's degree or the equivalent thereof in physical education, coaching or exercise and sport science with and [sic] emphasis in gymnastics." (Brief, at paragraph 2 of page 2.) Also, as evidence that this criterion has been satisfied, counsel refers to the "list of all currently and previously employed Professional Gymnastics Technicians," which appears at the petitioner's letter of response to the RFE. Counsel states that "all" of these employees "held a bachelor's degree or the equivalent in a coaching related field." (Brief, at paragraph 2 of page 3.)

The employee list does not support counsel's assertions. On the contrary, the list establishes that the petitioner has not previously required a bachelor's degree in a specific specialty that is a realistic prerequisite to instructing in gymnastics. As listed, the employment credentials of the four employees who have held the proffered position are: (1) "25 years of gymnastics coaching experience, one year of higher education and extensive professional training certificates"; (2) "bachelor's degree in education"; (3) "bachelor's degree in education"; (3) "Master's degree in education." There is no basis in the record for characterizing degrees in education as degrees in a coaching related field.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*4*) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

It is not self-evident, and the record fails to establish, that the gymnastics and gymnastics training component of the proffered position requires knowledge that is usually associated with a bachelor's degree in any specific specialty. To the contrary, in the "Athletes, Coaches, Umpires, and Related Workers" section of its 2004-2005 edition, the *Handbook,* which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations, indicates that experience in a sport, rather than formal education in a specific specialty, is usually the main source of knowledge required for sports coach, sports instructor, and related positions:

> 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. . . .

Furthermore, the record does not establish that only coursework associated with a degree in a specific specialty would provide whatever communicative, organizational, and interpersonal skills the proffered position may require.

Because the petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the director's decision, it is unclear whether there is in fact a full-time position available to the beneficiary for the validity period requested by the petitioner. The validity period of an approved nonimmigrant worker petition filed on Form I-129 is based, in part, on the employer's stated dates of intended

employment at section 5 of page 2 of the Form I-129. An approved petition may be considered valid only for the period of time that the beneficiary is actually working for the petitioner. A petitioner must immediately notify the CIS of any changes in the terms and condition of employment of a beneficiary which may affect eligibility. If the petitioner no longer employs the beneficiary, the petitioner must notify the service in writing. 8 C.F.R. § 214.2(h)(11)(i)(A). Termination of employment constitutes grounds for revocation of approval of the petition. 8 C.F.R. § 214.2(h)(11)(iii)(A)(*1*).

In this case, the petitioner claimed on the Form I-129 and the certified LCA that the intended employment would be full-time and would last for 3 years. However, this claim is contradicted by the other statements indicating that the petitioner's need for the beneficiary's services exists primarily during the summer season and that there may be gaps in employment throughout the year. The petitioner's owner/director stated, "[w]hile there may be interim periods, [the beneficiary] may contract with the Federation Gymnastics International [FGI], where he will be traveling internationally, coaching as per arrangement with FGI." (Petitioner's letter of response to the RFE, at paragraph 4 of page 2). Likewise, counsel stated, "[the beneficiary] will likely be contracted with FGI during any breaks during the off-season." (Counsel's letter of response to the RFE, at paragraph 5 of page 3). These discrepancies in the nature of the proffered position have not been resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It appears that the terms and condition of the employment as they appear on the Form I-129 do not accurately reflect the actual employment. For this additional reason, the petition may not be approved.

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.