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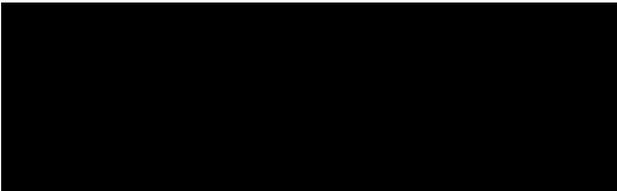


FILE: LIN 04 228 52769 Office: NEBRASKA SERVICE CENTER Date: JAN 27 2006

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a governmental parks and recreation service that also operates a fitness club. It seeks to employ the beneficiary as a membership sales representative/fitness trainer and 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the ground that the proffered position does not qualify as a specialty occupation.

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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is a parks and recreation district of the State of North Dakota that also owns and operates the Courts Plus Fitness Center ("fitness center"). The petitioner states that it has 330 employees, gross annual income of \$14 million, and seeks to employ the petitioner as a membership sales representative and fitness trainer for the fitness club. According to the petitioner, the sales representative duties comprise 75% of the job and the fitness trainer duties comprise 25% of the job.

The sales representative duties (75%) are listed by the petitioner as follows:

Provide potential members with complete information [about the fitness center], as well as provide accurate information over the phone – 25%

- Provide clientele with accurate information.
- Provide continuous contact with clientele insuring all clients are serviced in a professional and pleasant manner.

Assist in making telephone calls to clientele of [the fitness center] – 25%

- Make daily telephone calls to prospective members.
- Provide the opportunity for prospective members to join a quality club with quality programs.

Responsible for daily paperwork (i.e., process memberships) and calculate sales statistics and update sales tracking board – 25%

- Maintain and upkeep of daily membership sales information and statistics documentation in a timely and professional manner.
- Prepare all membership documentation and statistics in a timely and professional manner.

The fitness trainer duties of the position (25%) are listed by the petitioner as follows:

Assist the fitness director in implementing individual and group exercise programs – 10%

- Instruction of fitness activities to clientele. Programs include activities regarding general fitness, special populations, corporate fitness, and sport specific training.
- Provide safe and effective fitness activities for clientele based on accepted fitness standard. Deal with members of the public/clients in a professional and courteous manner.

Assist in making telephone calls to clientele of [fitness center] – 5%

- Make daily telephone calls to recruit clientele to participate in various fitness programs.
- Provide the opportunity for clientele to join a quality fitness program and discuss their specific program needs.

Instruct and supervise clientele in the proper use of weight and cardiovascular equipment and programs – 5%

- Train and educate clientele in the correct use of fitness equipment and programs. Offer assistance and changes to clientele programs, when needed or requested. Beware of potential injuries to clients and when accidents or injuries occur, take appropriate remedial action.
- Ensure correct and proper operations of equipment and programs as mandated through manufacturer's recommendations, program goals and objectives, and accepted industry-wide standards.

Assist in the maintenance of fitness area and exercise equipment – 5%

- Assist in the daily upkeep of fitness areas and equipment.
- Maintain a healthy and safe working environment for clientele through manufacturer's recommended maintenance schedules and established upkeep practices of [the fitness center].

According to the petitioner, the sales representative duties of the proffered position require a baccalaureate degree in marketing, communications, or a related field, while the fitness trainer duties require a baccalaureate degree in exercise science or a related field.

In his decision the director found that the duties of the proffered position reflected those of a recreation and fitness worker, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, and referred to information in the *Handbook* indicating that a bachelor's degree in a specific specialty is not the normal minimum requirement for entry into such positions. The petitioner did not establish that a bachelor's degree requirement is an industry-wide standard for the proffered position, the director declared; nor did the petitioner demonstrate that it has a pattern of hiring individuals for the position who have baccalaureate degrees in a specialized field. Lastly, the director stated that the petitioner failed to show that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. The director concluded that the proffered position did not meet any of the criteria of a specialty occupation enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner asserts that it requires all of its employees in sales and instructor positions to have baccalaureate degrees, and that CIS has already approved a previous H-1B petition it filed for a similar position on behalf of another beneficiary. Documentation has been submitted in support of these assertions.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO determines that the proffered position combines two occupations described in the *Handbook*. The duties described by the petitioner are primarily those of a sales representative, and secondarily those of a fitness worker. Sales representatives are described in the *Handbook*, in pertinent part, as follows:

. . . . Regardless of the type of product they sell, their primary duties are to interest wholesale and retail buyers and purchasing agents in their merchandise, and to address any of the client's questions or concerns Sales representatives spend much of their time traveling to and visiting with prospective buyers and current clients. During a sales call, they discuss the client's needs and suggest how their merchandise or services can meet those needs Obtaining new accounts is an important part of the job. Sales representatives follow leads from other clients . . . and may visit potential clients unannounced

Handbook, 2004-05 edition, at 412. As for the educational requirements of sales representatives, the *Handbook* states as follows:

The background needed for sales jobs varies by product line and market. Many employers hire individuals with previous sales experience who do not have a college degree, but often prefer those with some college education. Increasingly employers prefer or require a bachelor's degree as the job requirements have become more technical and analytical. Nevertheless, for some consumer products, factors such as sales ability, personality, and familiarity with brands are more important than educational background In general, companies are looking for the best and brightest individuals who have the personality and desire to sell.

Id. at 413. The foregoing information indicates that a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into a sales representative position. Familiarity with the product and sales experience are generally more important qualifications for a sales representative than a baccalaureate or higher degree in a specific specialty. Thus, a sales representative does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

As for fitness workers, the *Handbook* describes that occupation as follows:

Fitness workers instruct or coach groups or individuals in various exercise activities *Fitness trainers* help clients to assess their level of physical fitness and help them to set and reach fitness goals. They also demonstrate various exercises and help clients to improve their exercise techniques. They may keep records of their clients' exercise sessions in order to assess their progress towards physical fitness. *Personal trainers* work with clients on a one-on-one basis in either a gym or the client's home. *Aerobics instructors* conduct group exercise sessions that involve aerobic exercise, stretching, and muscle conditioning. Some fitness workers may perform the duties of both aerobics instructors and fitness trainers. *Fitness directors* oversee the operations of a health club or fitness center. Their work involves creating and maintaining programs that meet the needs of the club's members.

Id. at 393. The *Handbook* describes the training and educational requirements of fitness workers, in pertinent part, as follows:

Generally, fitness trainers and aerobics instructors must obtain a certification in the fitness field to obtain employment There are many organizations that offer certification testing in the fitness field

An increasing number of employers require fitness workers to have a bachelor's degree in a field related to health or fitness, such as exercise science or physical education. Some employers allow workers to substitute a college degree for certification, while others require both a degree and certification

Handbook, id., at 394. Thus, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a fitness worker, or fitness trainer, position. While a bachelor's degree in the health or fitness field is viewed with increasing favor by employers, it is not routinely required for entry into the occupation. Thus, a fitness worker does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Based on the foregoing analysis, the AAO determines that the proffered position – which combines the duties of a sales representative and a fitness worker – does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner has submitted the resumes of four individuals – with baccalaureate, or baccalaureate and master's, degrees in specific health- or fitness-related specialties – who it asserts are current employees in similar positions to the proffered position in this case. According to the resumes, all four individuals are in fitness trainer or related positions with no duties of a sales representative nature. Since sales representative duties represent 75% of the proffered position and fitness trainer duties just 25%, it does not appear that any of those four individuals occupies a position similar to the membership sales representative/fitness trainer position proffered to the beneficiary. Moreover, while the petitioner indicates that it has 330 employees, there is no evidence in the record of how many of those employees are in its fitness staff and whether the four individuals whose resumes have been submitted comprise a majority of the fitness staff. Without evidence of the size of the petitioner's fitness staff and the percentage of the staff that the four employees with fitness-related degrees represent, the resumes in the record are not persuasive evidence that the petitioner normally requires a baccalaureate or higher degree or its equivalent for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has also submitted an H-1B approval notice for one of the resume individuals. As discussed above, however, there is no corroborating evidence showing that the position is similar to the membership sales representative/fitness trainer position at issue in this petition. Furthermore, one employee with a specialty degree does not establish that the petitioner normally hires only degreed individuals. Thus, the previous H-1B approval does not demonstrate that the petitioner normally requires a specialty degree or its equivalent for the proffered position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The AAO also notes that 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 petitioner's record of proceeding. *See* 8 C.F.R. § 103.2 (b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See 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). Therefore, the previous H-1B approval for a different employee of the petitioner has no legal bearing on the current H-1B petition, and provides no guideline for the AAO's adjudication of the instant appeal.

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties are so specialized and complex that they require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has not demonstrated that the duties of the proffered position exceed the scope of a typical sales representative and/or fitness trainer, neither of which is an occupation that ordinarily requires baccalaureate level knowledge in a specific specialty.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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