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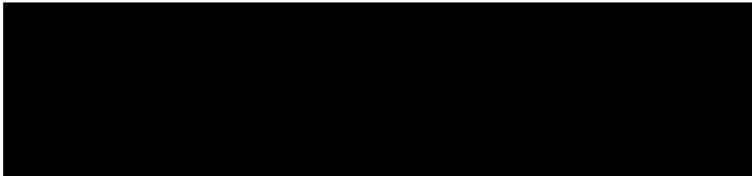
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FILE: SRC 04 060 50896 Office: TEXAS SERVICE CENTER Date: JUN 06 2006

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.

Handwritten signature of Robert P. Wiemann in cursive.

Robert P. Wiemann, Chief  
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 fitness center. It seeks to employ the beneficiary as a physical educator and public health consultant and to classify her 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 record failed to establish that the proffered position qualifies 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 notice of decision; and (5) Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as a ladies fitness center, established in 1998, with four employees and gross annual income of \$501,096. The petitioner is seeking to employ the beneficiary for three years, at an annual salary of \$22,318, as a physical educator and public health consultant. The job was described in the petitioner's initial letter as follows:

[The beneficiary] will promote, maintain, instruct and coach [the petitioner]'s members' physical health by assisting them to adopt health behaviors. [The beneficiary] will coach our members in exercise activities and the fundamentals of the chosen exercise. She will observe participants members and inform them [of] the corrective measures necessary to improve their physical skills. She will promote and encourage healthy lifestyles.

According to the petitioner, the minimum educational requirement for the position is a bachelor's degree in public health. The record shows that the beneficiary earned a master's degree in public health from Loma Linda University, in California, on March 16, 2001.

In response to the RFE the petitioner submitted a more detailed description of its business and the duties of the proffered position. The petitioner stated that its facility had twenty instructors teaching approximately fifty aerobic classes a week, along with eight personal trainers providing individual training sessions. The facility offered programs in nutrition, women's health, and other areas, as well as equipment for cardiovascular endurance and weight training. The duties of the proffered position – physical educator and public health consultant – were listed as follows:

- Promote, maintain and improve individual health by assisting individuals to adopt lifelong health behaviors.
- Provide individual strength training instruction requiring specific knowledge of bone and muscle structure, specifically for women.
- Provide nutrition counseling for health and weight loss purposes to Spanish-speaking individuals by applying knowledge of the health industry as well as knowledge of human behavior and performance.
- Conduct therapeutic and recreational activities, as well as specialty fitness classes such as salsa aerobics, children's gymnastics training, as well as teenage image and fitness program.
- Collect and analyze data to identify individual needs prior to planning, implanting, monitoring, and evaluating programs designed to encourage health[y] life styles.
- Evaluate individual's abilities, needs, and physical conditions, and develop suitable training programs to meet their special requirements based on their needs.
- Explain and enforce safety rules and regulations governing sports, recreational activities, and the use of exercise equipment; instruct participants in maintaining exertion levels in order to maximize benefits from exercise routines; monitor participants' progress and adapt programs as needed.
- Observe participants and inform them of corrective measures necessary for skill improvement.
- Plan physical education programs to promote development of participants' physical attributes and social skills.
- Design and plan age appropriate aerobic choreography, choose appropriate music, and present modified as well as advanced movements for all participants in a cardiovascular as well as a weight bearing fitness class.

The petitioner stated that it currently employed two individuals, with bachelor's degrees in exercise science and health science, in similar positions, and provided the names of three other instructors as well. The petitioner also submitted a series of internet job postings for a physical education instructor/women's basketball coach; a health educator; a fitness specialist; a trainer–education technology; a biology and health instructor; and a group fitness instructor – all of which require a baccalaureate or higher degree in health science, physical education, or a related specialty. In addition, the petitioner submitted an evaluation of the proffered position by a university professor, who declared that the job requires a baccalaureate degree in physical education, kinesiology, health promotion, or exercise science, as well as a list of five instructors working in the petitioner's gym along with their academic degrees or other qualifications.

The director found that the duties of the proffered position resemble the duties of a fitness trainer, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The director referred to information in the *Handbook* indicating that a bachelor's degree in a specific specialty is not normally required for such a position. The internet job postings, the director declared, did not show that the advertising companies are similar to the petitioner or that the posted positions are parallel to the proffered position. Based on the evidence of record, the director concluded that the petitioner failed to establish that a bachelor's degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position, that such a degree requirement is common to the industry in parallel positions among similar organizations, that the petitioner normally requires a specialty degree for the proffered position, or that the proffered position and its duties are so specialized, unique or complex that a baccalaureate degree or equivalent knowledge in a specific specialty is required to perform the job. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner asserts that the proffered position more closely resembles that of a health educator, as described in the DOL *Handbook*, not a fitness trainer. While acknowledging that fitness training is one aspect of the job, the petitioner contends that the position incorporates a broader set of duties including the tailoring of comprehensive healthy lifestyle plans for individual clients and the development and conduct of physical education, recreational, and therapeutic programs for women of all ages. The petitioner claims that a bachelor's degree in physical education, kinesiology, health promotion, or exercise science is required to perform the duties of the proffered position.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* 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 duties of health educators are described in the *Handbook*, 2006-07 edition, as follows:

Promote, maintain, and improve individual and community health by assisting individuals and communities to adopt health behaviors. Collect and analyze data to identify community needs prior to planning, implementing, monitoring, and evaluating programs designed to encourage healthy lifestyles, policies and environments. May also serve as a resource to assist individuals, other professionals, or the community, and may administer fiscal resources for health education programs.

The AAO does not agree with the petitioner's contention that the proffered position is that of a health educator. The duties of a health educator focus on community healthcare and education. While they may be a resource for individuals, health educators are primarily responsible for community-wide programs to promote good health. The duties of the proffered position focus on individualized fitness and group exercise programs for the petitioner's clients. Though the programs may include some healthcare instruction in such areas as nutrition and other aspects of a healthy lifestyle, the primary components of the programs are physical activities and regimens.

The AAO determines that the duties of the proffered position accord with the *Handbook's* description of a fitness worker. That occupation is described in the *Handbook, 2006-07* edition, as follows:

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 . . . fitness workers typically specialize in only a few areas.

*Personal trainers* work one-on-one with clients . . . . [They] help clients assess their level of physical fitness and set and reach fitness goals. They 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 . . . . [I]nstructors must choose and mix the music and choreograph a corresponding exercise sequence . . . . Instructors demonstrate the different moves and positions . . . . and correct those who are doing the exercises improperly . . . .

*Fitness directors* oversee the fitness-related aspects of a health club or fitness center . . . .

Fitness workers in smaller facilities with few employees may perform a variety of functions in addition to their fitness duties . . . . Some fitness workers may combine the duties of group exercise instructors and personal trainers . . . .

With respect to the educational requirements for fitness workers, the *Handbook, id.*, states as follows:

Personal trainers must obtain certification in the fitness field to gain employment, while group fitness instructors do not necessarily need certification to begin working . . . .

. . . .

Most certifying organizations require candidates to have a high school diploma, be certified in cardiopulmonary resuscitation (CPR), and pass an exam . . . .

. . . .

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.

. . . .

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, usually is required to advance to management positions in a health club or fitness center . . . .

As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into a fitness worker position. While a bachelor's degree in a health- or fitness-related field is viewed with increasing favor by employers, it is not routinely required for entry into the occupation. Thus, the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The record includes an evaluation of the proffered position from a professor at the University of Georgia's Department of Kinesiology who declares that the duties of the proffered position are those of a public health educator and that the minimum educational requirement for the position is a baccalaureate degree in physical education, kinesiology, health promotion, or exercise science. The professor bases his assessment on an affidavit from the petitioner describing the nature of its business and the duties of the proffered position as those of a physical educator and public health consultant. There is no evidence in the professor's curriculum vita, or elsewhere in the record, of the professor's authority to speak to the hiring practices of U.S. employers or of his credentials to speak as an expert on the degree requirements of a public health educator outside the academic arena. CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion is not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the opinion letter submitted by the university professor is not persuasive evidence that a baccalaureate or higher degree in a specific specialty, or its equivalent, is the normal minimum requirement for entry into the proffered position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes six internet job announcements for health and fitness positions. One is for a health educator, which is not parallel to the proffered position for the reasons previously discussed, and another is for a biology and health instructor, which is a type of health educator and likewise not parallel to the proffered position. Another of the advertisements is by a community college for a physical education instructor / head women's basketball coach. The community college is not a similar organization to the petitioner and the advertised position, which includes classroom instruction and basketball coaching

duties, is not parallel to the proffered position. Another advertisement is from a manufacturer of fitness equipment seeking a trainer–education technology to conduct training sessions for clients and employees on the use of the fitness equipment. The advertising company is not a similar organization to the petitioner, and the position is not parallel to the proffered position. Of the remaining two advertisements, one is from a corporate athletic club seeking a fitness specialist with a degree in exercise science or a health-related field, and the second is from a network of health and fitness clubs seeking a group fitness instructor with a baccalaureate degree in exercise science, exercise physiology or dance/movement. These are the only two job postings in the record of positions which could be viewed as parallel to the proffered position and from organizations which could be viewed as similar to the petitioner (though they appear to operate on a considerably larger scale than the petitioner). The AAO is not persuaded, however, that two internet job postings are sufficient evidence to establish that a specialty degree requirement 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 asserts that it currently employs two individuals in positions similar to the proffered position, both of whom have specialty degrees. One is identified as Amara Hughes, described as a fitness specialist/aerobic instructor for fitness and strength classes, who has a bachelor’s degree in exercise science from Texas A&M University. The second is identified as Michele Schmidt, described as a fitness specialist/aerobic instructor, who has a bachelor’s degree in health science from the University of Richmond. No corroborating documentation has been submitted, such as pay statements or employee records, to show that either of those two individuals is employed by the beneficiary, and in what capacity. Simply going on record without supporting documentation does not satisfy the petitioner’s burden of proof. *See 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)). Furthermore, the documentation of record intended to prove that those two individuals earned degrees from Texas A&M and Richmond identifies individuals with different last names. Though that may reflect a change in marital status since the degrees were conferred, the petitioner has not explained this discrepancy. (The petitioner has also failed to reconcile its statement in the original petition that it had just four employees with its statement in the response to the RFE that it had twenty aerobics instructors and eight personal trainers.) It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). The petitioner also identifies three other employees with duties that overlap the proffered position – the petitioner states that they all teach classes in fitness, health, and nutrition – and indicates that one has a bachelor of science degree in mass communication and an MBA, which are unrelated to the health and fitness field). As for the other two employees, the petitioner does not indicate whether they have any baccalaureate degrees and, if so, in what specialties. Based on the foregoing analysis of the evidence, the AAO determines that the record fails to establish that the petitioner normally requires a bachelor’s degree in a health- or fitness-related specialty, 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).

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 a depth of knowledge usually associated with the attainment of a baccalaureate degree in a specific specialty. Most of the job duties, as described by the petitioner, focus on individualized fitness and group exercise programs. Those are the duties of a fitness instructor, which the *Handbook* indicates does not require baccalaureate level knowledge in a specific specialty to perform. Though the record includes an evaluation of the proffered position from a university professor, the author relies exclusively on the petitioner's description of the position and does not establish his own credentials or expertise to evaluate the knowledge requirements of the position. Based on the evidence of record, the AAO is not persuaded that the proffered position could not be performed by an individual with less than baccalaureate level knowledge in a health- or fitness-related specialty.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 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.