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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: DEC 01 2011

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 college. It seeks to employ the beneficiary as an Assistant Head Coach Women's Tennis 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 concluding that the petitioner failed to establish that the proffered position is 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 additional evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

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

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 one 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 [(1)] 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 [(2)] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as an Assistant Head Coach Women’s Tennis. The support letter indicates the proffered position would require the beneficiary to be responsible for:

playing a decisive role in assessing and recruiting candidates to the program, determining financial scholarships available to a student based upon their

scholastic achievements, preparing evaluations of the prospective students, maintaining compliance with NCAA and conference rules and regulations governing the student athlete including recruiting activities, student eligibility and financial aid based upon the student athlete's parent's income. She will also be responsible for the training and development of the student athletes by demonstrating technical expertise. [The beneficiary] will be responsible for promoting a positive image of the College through community and professional organizations and through various news media. [The beneficiary] will have the authority to make discretionary decisions with respect to travel, budgetary, transportation and equipment matters.

The petition and supporting letter do not state that the proffered position requires a degree in any specific field, but it is seeking to employ the beneficiary in a specialty occupation. The petitioner submitted documentation evidencing that the beneficiary has a U.S. master's degree in accounting.

The Labor Condition Application (LCA) was submitted for an Assistant Head Coach Women's Tennis to work full-time at the college at an annual salary of \$15,000.

On August 18, 2009, the director requested additional information from the petitioner to establish that the proffered position is a specialty occupation.

Counsel's response provided a more detailed job description of the proffered position and the petitioner's organizational chart. Counsel provided a letter from the [REDACTED] at the petitioner detailing the beneficiary's on court and off court duties with the varsity team, on court and off court duties with junior varsity, off court duties and recruiting duties performed during the past one year worked as an Assistant Women's Tennis Coach under her Optional Practical Training (OPT) status.

Counsel submitted the beneficiary's resume and letters from the beneficiary's former teammate at Auburn University Montgomery (AUM), [REDACTED]

[REDACTED] and [REDACTED] verifying the beneficiary's experience as a tennis player during these periods.

Additionally, counsel submitted a letter from the Ukrainian Tennis Federation verifying that the beneficiary was ranked [REDACTED] for the under age of 18 group for the season that ended in 2000; that at the end of 1999 she was also ranked within the top 50 women in Ukraine; that the beneficiary won the [REDACTED] title in the under 18 age group in [REDACTED] and that she also placed within the top four players during the [REDACTED] national tournaments.

A more detailed job description provided in response to the RFE describes the duties as follows:

1. Organize and implement fundraising activities through clinics by deciding on dates, reserving facilities, procuring insurance, establishing a budget, creating and mailing out a brochure, establishing and creating a database, and conducting

- clinics.
2. Protect the integrity of the Women's Tennis Team and the reputation of Intercollegiate Athletics program of the College by understanding and complying with the National Collegiate Athletic Association (NCAA) rules and regulations as well as applicable conference rules and College policies regarding recruiting activities, student/athlete eligibility, determination, scholarships, and financial aid through the financial aid and admissions office, scheduled practice sessions, and related covered activities.
 3. Play a decisive role in assessing and recruiting candidates to the program, including which students to recruit and offer academic scholarships. This includes making phone calls, and e-mailing top recruits, conducting unofficial visits with general interest prospective students, and logging all contacts and evaluations.
 4. Assume responsibility for the training and development of the student/athletes on the Varsity team by demonstrating technical expertise and teaching the fundamentals.
 5. Assume 100% responsibility for the training and development of the student/athletes on the JV team by demonstrating technical expertise and teaching the fundamentals.
 6. Assume responsibility for inventorying, ordering, organizing, and the set-up of the tennis equipment.
 7. Correspond with parents concerning travel plans and schedules.
 8. Correspond with alumni concerning alumni events.
 9. Oversee the strength training and conditioning program by coordinating with the strength training and conditioning staff, organizing training times and conducting workouts.
 10. Make all travel arrangements for team travel including hotel reservations, transportation arrangements, rooming assignments, requesting travel advances checks, pay for team expenses, and filing our travel expenses reports.
 11. Organize and conduct pre-game warm-up.
 12. Coach doubles and singles teams depending on opponents.
 13. Assume responsibility for coordinating practices.
 14. Provide guidance and mentoring to student/athletes throughout the year through individual players meetings.
 15. Promote a positive image of the Intercollegiate Athletic Program and College through participation in community and professional organizations, representing the College at professional meetings as required, and maintain credible relations with various news media.
 16. Contribute to the overall success of the College's Intercollegiate Athletic Program by performing all other duties and responsibilities assigned by the Head Coach.

Counsel submitted a Prevailing Wage Request the petitioner filed with the Alabama State Employment Service as well as printouts from the Foreign Labor Certification Data Center Online Wage Library. These documents show that the petitioner obtained the prevailing wage for the

proffered position based on O*Net occupation: 27-2022.00 Coaches and Scouts.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

To make its determination whether the proffered position, as described in the initial petition and the petitioner's response to the RFE, qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

Although the job description includes non-coaching and non-scouting duties, the AAO agrees with counsel for the petitioner that the proffered position most closely resembles the position of Coaches and Scouts as generally described in the O*Net based on the main duties described by the petitioner. According to the *Handbook*, the position of Coaches and Scouts in the O*Net is covered in the chapter titled Athletes, Coaches, Umpires, and Related Workers in the *Handbook*. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos251.htm> (last accessed October 27, 2011). Nevertheless and for the reasons discussed in greater detail *infra*, the AAO finds that the position of assistant coach as covered in the *Handbook's* chapter on Athletes, Coaches, Umpires, and Related Workers does not categorically qualify as a specialty occupation.

Here and in accordance with the *Handbook's* descriptions of coaches, the record's descriptions of the proposed duties are limited to generic and generalized functions which, even when read in the context of the evidence submitted in support of the petition, do not convey the educational level of any body of highly specialized knowledge that the beneficiary would apply theoretically and practically. Specifically, the *Handbook's* description of a coach under the section on Athletes, Coaches, Umpires, and Related Workers provides in pertinent part:

Coaches organize amateur and professional athletes and teach them the fundamental skills 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.

College coaches consider coaching a full-time discipline and may be away from home frequently as they travel to competitions and to scout and recruit prospective players.

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.

Coaches organize amateur and professional athletes and teach them the fundamental skills of individual and team sports.

Handbook, 2010-11 ed., available at <http://www.bls.gov/oco/ocos251.htm> (last accessed October 27, 2011). In short, the description provided above encompasses the duties of the proffered position as described by the petitioner and counsel.

For the description of education and training for Athletes, Coaches, Umpires, and Related Workers, the *Handbook* states:

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, these jobs require *immense overall knowledge of the game, usually acquired through years of experience at lower levels*.

Most athletes, coaches, umpires, and related workers get their training from having played in the sport at some level. All of these sports-related workers need to have an extensive knowledge of the way the sport is played, its rules and regulations, and strategies, which is often acquired by playing the sport in school or recreation center,

but also with the help of instructors or coaches, or in a camp that teaches the fundamentals of the sport.

Although there may not be a specific education requirement, head coaches at public secondary schools and sports instructors at all levels usually must have a bachelor's degree. . . . College coaches also usually are required to have a bachelor's degree. Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine. 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 and colleges 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 or experience as an athlete in that sport.

Id. (emphasis added).

While college coaches are usually required to have a bachelor's degree, the *Handbook* does not describe that a bachelor's degree is normally required for an entry-level coach or even state that a degree in a specific specialty is usually required for entry into the occupation. Instead, the *Handbook* indicates that these jobs require immense overall knowledge of the game, usually acquired through years of experience at lower levels. Therefore, the *Handbook* states that an assistant coach does not require a bachelor's degree as a minimum educational requirement and thus is not a specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the beneficiary, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. 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 in the United States, as required by the Act.

The *Handbook's* description of coaches indicates that education and training requirements in these areas vary greatly. However, as stated above, even though the *Handbook* states that college coaches usually are required to have a bachelor's degree, the *Handbook* does not state that the degree must be in a specific specialty and, therefore, the AAO concludes that the *Handbook* does not establish that the proffered position requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as is required under section 214(i)(1)(B) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

Accordingly, the AAO finds that the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. On appeal, counsel for the petitioner submitted two letters from [REDACTED] and [REDACTED] the [REDACTED] at the petitioner [REDACTED]. The [REDACTED] letter states that college coaching is a profession that at most colleges and universities requires no particular degree, and the author supports this assertion with examples that the coach herself has a degree in business and her assistant coaches have degrees in psychology and theology, biology and ethics. The [REDACTED] letter states that the subject matter of a degree does not influence nor is a requirement of coaching within the industry. The author attached a list of coaches with their degrees at NCAA Division I, II and III educational institutions as examples to support his assertion. As such, neither of these letters, including the attachment, contradicts the *Handbook's* report that a degree in a wide variety of fields is acceptable for college coaches. Therefore, they do not demonstrate that the proffered position is a specialty occupation requiring at least a bachelor's degree or the equivalent in a *specific specialty* and, in fact, support the opposite conclusion.

The petitioner has also failed to satisfy 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." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. Neither the petitioner nor its counsel has provided evidence to distinguish the proffered position as unique from or more complex than college coach positions, such as those described in the *Handbook*, that can be performed by persons without a specialty degree or its equivalent.

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. On appeal, counsel asserts that a degree is

generally required by [REDACTED] for its coaches. However, the petitioner did not provide information as to whether assistant coaches at the petitioning college are required to possess bachelor's degrees, whether all current assistant coaches have a bachelor's degree and in what fields their degrees are. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 ('Reg. Comm'r 1972)).

The petitioner did not submit any information regarding its other workers, if any, who fill or previously filled positions similar to the one proffered in this petition. As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty or its equivalent, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).¹

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent. 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 associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the petitioner has not established that it meets the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The AAO does not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the petitioner did

¹ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. See *Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. See § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

not submit sufficient evidence regarding the proffered position to determine that it is a specialty occupation and, therefore, the issue of whether it will require a baccalaureate or higher degree, or its equivalent, in a specific specialty also cannot be determined. Therefore, the AAO need not and will not address the beneficiary's qualifications further.

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. § 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.