

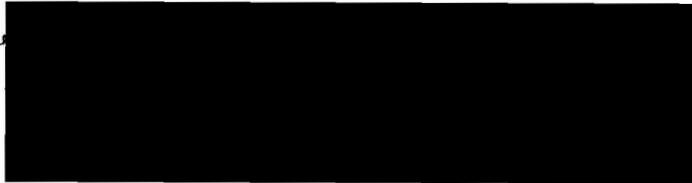
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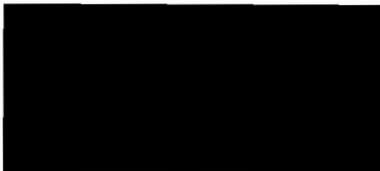
Dj

FILE: LIN 05 032 54129 Office: NEBRASKA SERVICE CENTER Date: **AUG 10 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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The 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 city recreation department that seeks to employ the beneficiary as an athletic trainer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the grounds that the proffered position is not a specialty occupation. On appeal, the petitioner submits a brief.

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

The petitioner is seeking the beneficiary's services as an athletic trainer. Evidence of the beneficiary's duties includes the I-129 petition and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail the following: conduct body composition testing, anthropometric measurements, flexibility testing, sub maxima bicycle tests and general assessments of clients; instruct clients in the positive benefits of various equipment; advise clients on the proper use of equipment; design programs to suit the specific needs of each client; assess and report the progress of clients to coaches and physicians; develop and implement rehabilitative programs in coordination with physicians and coaches; develop training programs to maximize athletic performance; assess athletic injuries and make recommendations for treatment or recommend treatment by physician; assess and treat athletic injuries using available equipment and facilities; develop and implement athletic injury prevention programs specific to the needs of each client; and, massage body parts to relieve soreness, strains, and bruises.

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 director found that the proffered position was not a specialty occupation because the petitioner failed to show that there is a minimum education requirement for athletic trainers. The director observed that the Department of Labor’s *Occupational Outlook Handbook* indicates that, in particular, “[p]art-time workers and those in smaller facilities are less likely to need formal education or training.” The director found that the job advertisements submitted by the petitioner indicated that a baccalaureate degree was preferred, but not required for athletic trainer positions. The director determined, furthermore, that the petitioner had failed to submit sufficient evidence showing that the organizations offering the jobs advertised are similar to the petitioner. The director also found that the evidence submitted by the petitioner to demonstrate that it normally requires a baccalaureate degree for athletic trainers—which consisted of the educational credentials of two employees—was insufficient without further evidence showing that the petitioner employs only these two athletic trainers and has required a baccalaureate degree of athletic trainers it has hired in the past. Finally, the director found that the petitioner failed to submit evidence to establish the other criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the director failed to consider language in the *Handbook* indicating that a bachelor’s degree is a normal minimum requirement for sports instructors. Counsel also asserts that the evidence shows that the petitioner only employs two athletic trainers, partly because the petitioner’s educational requirement for the position has prevented it from finding other qualified candidates in the local labor pool. Counsel also states that the director failed to properly consider information in the job advertisements submitted by petitioner indicating that these jobs require bachelor’s degrees.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or the particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2006-2007 edition, reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO finds that the proffered position is that of a personal fitness trainer. The *Handbook* indicates that there are significant differences between the occupations of athletic trainer and personal fitness trainer. Athletic trainers are health care workers that specialize in the prevention, assessment, treatment, and rehabilitation of musculoskeletal injuries. A bachelor's degree with a major in athletic training from an accredited program is part of the requirement for becoming certified by the Board of Certification, and these accredited programs include many science and health-related courses, such as human anatomy, physiology, nutrition, and biomechanics. Personal fitness trainers, on the other hand, help clients assess their level of physical fitness and set and reach fitness goals. They demonstrate various exercises and help clients improve their exercise techniques. Personal fitness trainers are generally only required to have a high school diploma, be certified in cardiopulmonary resuscitation (CPR), and pass a certification exam. There is no particular training program required for certifications, and there are many organizations that offer certification. Counsel's contention that the proffered position is similar to that of a "sports instructor" is not supported by the record. The duties described by the petitioner include instruction in exercise activities, but not in any particular sports. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO next turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): whether a degree requirement is common to the industry in parallel positions among similar organizations or the particular position is so complex or unique that it can be performed only by an individual with a degree. The evidence submitted by the petitioner to demonstrate that a degree requirement is common to the industry in parallel positions among similar organizations is unpersuasive. As stated above, the AAO finds that the proffered position is not that of an athletic trainer as a healthcare worker. Consequently, the evidence submitted related to athletic trainer positions in the healthcare industry is not relevant. The record shows that the petitioner is in the recreation and fitness industry, and the evidence on record, namely job advertisements for personal trainers at [REDACTED], indicates that "a company recognized personal training certification" is a minimum educational requirement for these positions. In addition, to the extent that they are described in the record, it is not evident that the duties are so complex or unique that they can be performed only by an individual with a degree. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): whether the employer normally requires a degree or its equivalent for the position. The AAO finds that the petitioner has submitted insufficient evidence to demonstrate that it normally requires a degree for the position. The petitioner submitted evidence that it employs two athletic trainers, both of whom possess baccalaureate degrees, but failed to submit evidence, other than counsel's unsubstantiated assertions, that these are the only two athletic trainers (or personal fitness trainers) that it employs or has ever employed. The AAO finds counsel's contention that the petitioner cannot submit further evidence because it does not retain records of past educational requirements or former employees' educational credentials unpersuasive. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine

whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). 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.<sup>1</sup> 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 id.* at 388. **The petitioner, therefore, has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).**

Finally, the AAO examines the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4): whether the nature of the specific duties of the proffered position 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 the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The record does not contain evidence establishing the proposed duties as more specialized and complex than those of a personal fitness trainer, an occupation for which the *Handbook* indicates no usual association with the attainment of at least a bachelor's degree in a specific specialty. The petitioner, therefore, has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As demonstrated in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.

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<sup>1</sup> 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.