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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 06 117 50036 Office: VERMONT SERVICE CENTER Date: NOV 10 2008

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the 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 gymnastics school that seeks to extend its authorization to employ the beneficiary as a gymnastics instructor. The petitioner, therefore, 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, determining that the petitioner had not established 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

Section 214(i)(l) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

> *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. 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 (5th Cir. 2000). 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, as required by the Act.

The petitioner seeks the beneficiary's services as a gymnastics instructor. Evidence of the beneficiary's duties includes the petitioner's March 31, 2003 letter. As stated by the petitioner, the proposed duties are as follows: teach gymnastics principles and techniques to individual students and groups; help the petitioner's young students regulate their body movements; demonstrate the use of the gymnastics apparatus; enforce safety rules; and ensure that all physical activities are performed in a safe and responsible manner.

The director found that the proposed gymnastics instructor duties do not require a bachelor's degree in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the beneficiary was previously approved for the same position and thus the petition for an extension should be approved. Counsel asserts that the petitioner meets all of the criteria listed in 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also states that the petitioner will be competing against top-notch gyms such as Darien YMCA and Dynamic Gymnastics, whose gymnastics coaches all hold a bachelor's degree in physical education or a related field. Counsel states that the petitioner normally requires a bachelor's degree for the proffered position, and that the proposed duties, which entail overseeing the entire gymnastics program, are so specialized and complex as to require a related bachelor's degree. Counsel cites *Unico American Corp. v. Watson*_F. Supp._. CV No. 896958 (C.D. Cal. March 19, 1991), to state that CIS should give deference to the employer's view, should consider fully the employer's evidence and should not rely simply on standardized government classification systems. Counsel also cites another court decision that dealt with membership in the professions. As supporting documentation, counsel submits copies of the following: the CIS policy memorandum regarding the extension of previous approved petitions; the cited court decisions; the previously submitted letter, dated August 7, 2006, from the gymnastics director of Darien YMCA; a July 27, 2007 letter from the vice president of Dynamic Gymnastics; a letter from the petitioner's

owner; the petitioner's website information; letters from the petitioner's clients; and photos of the beneficiary with his students.

In his July 25, 2007 letter submitted on appeal, the petitioner's president states: "We are now entering the next phase of our business plan. That phase will include fielding a team by 2008 and competing in the very same arenas as Darien, Next Dimension, Dynamic, and various other top-notch gyms. All of these gyms have taken a similar path as [the petitioner's], and employed "specialty" coaches from Romania, Ukraine, Russia, and many other former eastern block countries to reach their desired level of achievement."

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 turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*): 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 a 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 *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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not find that the proffered position is a specialty occupation. A review of the training requirements for the Athletes, Coaches, Umpires, and Related Workers occupation category in the *Handbook*, 2008-09 edition, finds that education and training requirements for athletes, coaches, umpires, and related workers vary greatly by the level and type of sport. Although the *Handbook* does not specifically address gymnastic instructor positions for children's gymnastics at private schools, it specifically distinguishes between the sports instructors that are employed by public secondary schools and the sports instructor jobs in private schools. Although head coaches at public secondary schools and sports instructors at all levels usually must have a bachelor's degree, part-time sports instructors and those in smaller facilities are less likely to need formal education or training. In this case, the petitioner is a private gymnastics school with three employees. Upon review of the record in its entirety, the AAO is unable to find that the position requires the services of an individual with a bachelor's degree or higher in a specific discipline. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

Counsel cites *Unico American Corp. v. Watson*_F. Supp._. CV No. 896958 (C.D. Cal. March 19, 1991), the unpublished decision of a federal district court in California, to state that CIS should give deference to the employer's view, should consider fully the employer's evidence and should not rely simply on standardized government classification systems. Counsel, however, has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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).

Moreover, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Counsel also cites a decision that dealt with membership in the professions, not membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act, 8 U.S.C. § 1184(i). That statutory language effectively supersedes the cited decision.

Regarding parallel positions in the petitioner's industry, counsel submits copies of letters from a number of individuals regarding the petitioner's bachelor degree requirement. One of the letters, which is dated August 7, 2007 and was previously submitted in response to the director's RFE, is from the gymnastics director of Darien YMCA, who states that for the past five years, the petitioner "has served as a feeder program for our highly competitive team" and that "[t]raining young gymnasts requires knowledge that is associated with a Bachelor's degree in Physical Education." She also states that Darien YMCA's four competitive team gymnastic coaches all hold such a degree.

Another letter submitted on appeal, dated July 27, 2007, is from the vice president of Dynamic Gymnastics, who states: "I believe it is standard in clubs offering developmental and competitive gymnastics programs to have individuals who train and coach the athletes to possess a Bachelor's degree in coaching, physical education, or a related field. The curriculum provides them with the basic principles necessary to provide instruction in the variety of areas required to achieve success in competitive gymnastics."

The record also contains a previously submitted letter, dated September 7, 2006, from the owner of Next Dimension Gymnastics, LLC, who states: "The industry minimum standard requires a professional with a degree, specifically in physical fitness. I can attest that my gym also meets this standard, as do all the United States Gymnastics gyms in Connecticut and around the nation."

No evidence was submitted in support of the assertions from the representatives of the businesses similar to the petitioner's. Nor do they rely on industry surveys, data or other documentation to reach the conclusion that the position requires a bachelor's degree in a field related to physical education. 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. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that there is no specific

degree requirement for entry into the field. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record also contains a previously submitted letter, dated August 7, 2006, from the "Vice President Program" of the United States Gymnastics Federation/USA Gymnastics, who states: "While USA Gymnastics is currently working diligently to provide educational opportunities for gymnastics professionals in order to develop USA coaches with the type of expertise [the beneficiary] possesses, we are still in need of additional gymnastics in the United States to help us achieve our goals." The writer, however, does not include any mention of a United States Gymnastics Federation/USA Gymnastics policy requiring instructors to possess a related bachelor's degree. Nor does the writer provide any evidence that the proffered position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(iii)(A). Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the proffered position involves duties with the requisite level of complexity or uniqueness; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

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 submits an updated printout of the petitioner's website to show that the petitioner's two Romanian gymnastics coaches/instructors hold sports-related degrees, and that the petitioner's co-owner, who also serves as an assistant coach to the beneficiary, holds a degree in marketing. As discussed above, the petitioner has not established that it requires a bachelor's degree in a specific specialty for the proffered position. Moreover, the petitioner did not submit sufficient documentation to establish the academic credentials of its other Romanian coach/instructor. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *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)). In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. 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. 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not

establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(3)*.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(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.

Counsel states, on appeal, that the proposed duties are highly specialized and complex. 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 in a specific specialty. Further, as indicated earlier in this decision, the United States Gymnastics Federation/USA Gymnastics does not include any mention of a United States Gymnastics Federation/USA Gymnastics policy requiring gymnastics instructors to possess a related bachelor's degree due to the specialized and complex nature of the duties associated with the position. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)*(4)*.

Counsel also asserts that the beneficiary was previously approved for the same position and thus the petition for an extension should be approved. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior case. In the absence of all of the corroborating evidence contained in other record of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

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. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied,* 485 U.S. 1008 (1988).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Beyond the decision of the director, the petitioner has not established the beneficiary is eligible to perform the duties of a specialty occupation. The record contains an evaluation of the beneficiary's educational credentials from the director of the U.S. Academy of Gymnastics in Riverside, Connecticut. The record, however, does not contain any evidence that the evaluator is from a service that specializes in evaluating foreign educational

credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.