

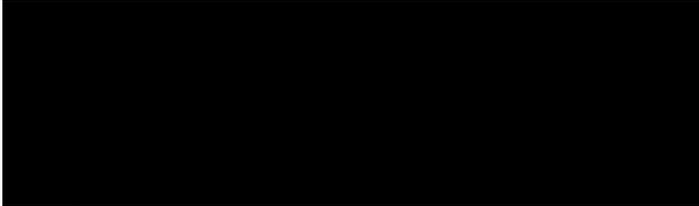
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U.S. Citizenship
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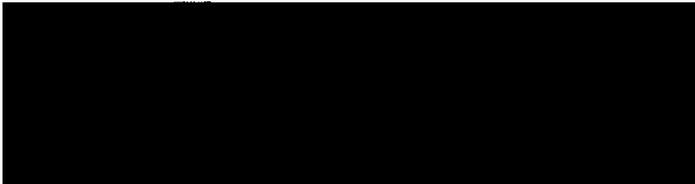
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FILE: WAC 03 024 50204 Office: CALIFORNIA SERVICE CENTER Date: 5/22/05

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an exercise and health facility providing instruction in the methodology of Dahn Hak meditation and exercise. It seeks to employ the beneficiary as a master fitness instructor and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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

In Form I-129 and an accompanying letter from its president, Jun Seung Kim, the petitioner described itself as a U.S. subsidiary of a Korean company that “provides unique, proprietary instruction in the ancient Korean practice of ‘Dahn Hak,’ a comprehensive holistic approach to collective humankind consciousness.” The petitioner is seeking to employ the beneficiary as a master fitness instructor at one of its regional facilities in Phoenix, Arizona. The duties of the position were listed as follows:

- Teach the principles and body-mind training techniques of Dahn Hak, including but not limited to: do-in exercise (Meridian Gym); dynamic breathing meditation (Hang Gong); Ji-Gam and other energy sensing practices; conscious meditation; stress reduction and mental/emotional control techniques; self-healing principles; Dahn Gong (Dahn martial arts).
- Evaluate student progress and make recommendations for certification.
- Act as a team leader during training programs including providing direction to assistant trainers, volunteers and interns.
- Assess, monitor and report about the progress of student trainer interns and volunteers.
- Obtain feedback from participants in all programs and use the data collected to create innovations, modifications and adjustments to training curricula or modules.
- Be an active participant in the education and training team of Bell Rock.

The petitioner described the qualifications of the position as a bachelor of arts (B.A.) or sciences (B.S.) degree and two years of specialized training and education with certification as an instructor in Dahn Hak methodologies and science. The beneficiary was qualified for the job, the petitioner asserted, by virtue of his two degrees from Yonsei University in Seoul, South Korea – a bachelor of science in mechanical engineering in February 1991 and a master of engineering in mechanical engineering in February 1993 – followed by a two-year training course culminating in his certification as a Dahn Hak instructor and program educator by the Dahn Hak Do Association. In response to the RFE the petitioner submitted a more detailed description of the duties of the master fitness instructor, which were listed in the director’s decision and are incorporated by reference into the instant decision.

The director determined that the proffered position did not meet any of the criteria of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director found that the duties of the master fitness instructor reflected the duties of recreation and fitness workers as described in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*, and quoted language from the *Handbook* indicating that a bachelor’s degree in a specific specialty is not the normal, industry-wide requirement for entry into the position. The director was not persuaded by the evidence that the duties of the position and its level of responsibility were beyond that normally encountered in the occupational field, or that the job could not be performed by an experienced individual without a bachelor’s degree. After reviewing other evidence in the record, the director concluded that the petitioner had failed to establish that the proffered position required a bachelor’s degree or its equivalent in a specific specialty, that such a degree requirement is common to the industry in parallel positions among similar organizations, that the petitioner normally required a degree for the proffered position, or that the duties of the position are so specialized and complex that baccalaureate level knowledge in the specialty is required to perform them.

On appeal counsel asserts that “[v]irtually every Dahn Hak instructor has a minimum of a bachelor’s degree (or the equivalent) and has also completed Dahn World’s two-year instructor training program.” Some have also taken Dahn World’s additional six-month instructor training course in the specialized

area of “brain respiration.” According to counsel, the proffered position qualifies as a specialty occupation because a bachelor’s degree or its equivalent in the natural health sciences field is the normal minimum requirement for entry into the position of master fitness instructor and the duties are so specialized and complex that they require a baccalaureate degree and the additional two-year instructor training course. Counsel asserts that CIS has approved other H-1B petitions for master fitness instructor and other [REDACTED] instructor positions.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. See *Shanti, id.*, at 1165-66.

The AAO agrees with the director that the proffered position falls under the *Handbook*’s broad occupational category of recreation and fitness workers. The excerpts quoted in the decision referred almost exclusively to recreation workers, however, whereas the master fitness instructor at issue in this petition accords much more closely with the fitness worker component of the occupation. As described in the *Handbook*, 2004-05 edition, at 393:

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

The *Handbook* goes on to describe the training and educational requirements of fitness workers, in pertinent part, as follows:

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

An increasing number of employers require fitness workers to have a bachelor’s degree in a field related to health or fitness, such as exercise science or physical education.

Some employers allow workers to substitute a college degree for certification, while others require both a degree and certification

Handbook, id., at 394. Thus, the *Handbook* indicates that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a fitness trainer or instructor position. While a bachelor's degree in a health-related field is viewed with increasing favor by employers of fitness workers, 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).

As for the second alternative criterion of a specialty occupation, the petitioner has submitted four internet job announcements for fitness instructors or fitness trainers, three of which require a bachelor's degree in a health science field and the fourth of which requires either a degree or work experience. Thus, the internet postings are consistent with the information in the *Handbook* that not all fitness worker positions require a specialty degree. (A fifth internet posting is for an assistant fitness director, which has more managerial duties and is not a parallel position to the master fitness instructor at issue in this petition.) Moreover, the petitioner in this case has clearly stated that a degree in a specific health-related specialty is not required to become a master fitness instructor of Dahn Hak. Rather, a degree in any field of science, plus the two-year instructor training program, is required for entry into the proffered position. Accordingly, the record does not establish that a degree requirement in a specific specialty is common to the 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 record does not show that the petitioner normally requires a degree or its equivalent in a specific specialty for the proffered position. On its description of the proffered position submitted in response to the RFE the petitioner stated that the master fitness instructor must have a B.A. or B.S. degree and complete the two-year [REDACTED] training course. The job description did not indicate that the B.A. or B.S. degree had to be in any specific specialty. On appeal the petitioner has altered its statement of the minimum degree requirement for a master fitness instructor by indicating that it normally requires a degree "in a field related to natural health sciences." That is clearly not the petitioner's practice, however, since the petitioner is currently seeking to hire the beneficiary, whose baccalaureate and master's degrees are in the unrelated field of engineering. Accordingly, the master fitness instructor does not 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. As far as the record shows, the knowledge required to perform the services of a master fitness instructor is gained almost exclusively in the non-degree two-year training course in Dahn Hak methodologies.

Counsel refers to a series of service center decisions in which H-1B petitions filed by the petitioner for identical or similar instructor positions were apparently approved. If the referenced petitions were

approved based on evidence similar to the evidence submitted in this proceeding, the approvals would have been erroneous. CIS is not required to approve petitions when 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). Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the petitioner's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Only published precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Unpublished decisions are not binding. Thus, the cases cited by counsel have no legal bearing on the AAO's determination of the instant case.

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

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

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