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U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 04 009 53246 Office: CALIFORNIA SERVICE CENTER Date: FEB 08 2005

IN RE: Petitioner:
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:



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, Director
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 gymnastics training facility with 15 employees. It seeks to hire the beneficiary as a physical education teacher. The director denied the petition because he determined the proffered position did not meet any of the criteria required for classification as a specialty occupation.

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

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job 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 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 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 states that it is seeking the beneficiary’s services as a physical education teacher to teach gymnastics. Evidence of the beneficiary’s duties includes: the Form I-129, with a September 22, 2003 letter of support from the petitioner; and counsel’s response to the director’s request for evidence, including a second letter from the petitioner dated December 2, 2003.

In its initial filing, the petitioner stated the duties of the proffered position to be as follows:

- Develop a physical education curriculum designed to lead athletes from the beginning levels of gymnastics and tumbling to an elite level;
- Teach classes using gymnastic and training apparatus, such as trampolines and weights;
- Instruct classes in beginning or advanced gymnastics, determining type and level of difficulty of exercises and prescribed movements, applying knowledge of physiology and corrective techniques;
- Create and teach a weight training class; and
- Create a database of all students that will be used to track their history and progress.

To make its determination whether the employment just described 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 or its equivalent is the normal minimum requirement for entry into the particular position; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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.Min. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director found the proffered position to be closely aligned to the occupation of athletes, coaches, umpires and related workers, as discussed in the 2002-2003 edition of the DOL *Handbook*, and further concluded that the occupation did not impose a baccalaureate or higher degree, or its equivalent, as a minimum requirement for entry into the profession. Following a review of the 2004-2005 edition of the *Handbook*, the AAO also finds the duties of the proffered position to be those of a sports instructor, placing it within the occupational title of athletes, coaches, umpires and related workers. In pertinent part, the *Handbook* states:

Sports instructors teach professional and nonprofessional athletes on an individual basis. They organize, instruct, train and lead athletes of indoor and outdoor sports.... Because activities are as diverse as weight lifting, gymnastics, and scuba diving, and may include self-defense training such as karate, instructors tend to specialize in one or a few types of activities.... Using their knowledge of their sport, physiology, and corrective techniques, they determine the type and level of difficulty or exercises, prescribe specific drills, and correct the athlete's techniques. Some instructors also teach and demonstrate use of training apparatus, such as trampolines or weights, while correcting athletes' weaknesses and enhancing their condition....

Coaches and sports instructors sometimes differ in their approach to athletes because of the focus of their work.... Sports instructors spend more of their time with athletes working one-on-one, which permits them to design customized training programs for each individual....

The AAO also concurs with the director's finding that the occupation of sports instructor does not require the attainment of a baccalaureate or higher degree or its equivalent for entry into the profession. The *Handbook's* discussion of the educational requirements for such positions 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, jobs require immense overall knowledge of the game, usually acquired through years of experience at lower levels....

For sports instructors, certification is highly desirable for those interested in becoming a tennis, golf, karate, or any other kind of instructor. Often, one must be at least 18 years old and CPR certified. There are many certifying organizations specific to the various sports, and their training requirements vary depending on their standards. Participation in a clinic, camp, or school usually is required for certification. Part-time workers and those in smaller facilities are less likely to need formal education or training.

Counsel contends that the proffered position is not a coach or sports instructor but should be viewed as similar to a physical education teacher in a school system, since the duties of the position are those of a physical education teacher. The AAO does not agree. The proffered position is not, as counsel asserts, comparable to that of a general education teacher who, to perform his or her duties, is required to have a bachelor's degree and to have completed an approved teacher training program. In the instant case, the petitioner is a business seeking an individual to teach gymnastics to its customers. Such instructors, as clearly indicated in the *Handbook*, fall within an occupation that is distinct from that of a teacher working within a school system and need no baccalaureate or higher degree, or its equivalent, to seek employment.

Based on its determination that the proffered position is that of a sports instructor and having found the *Handbook* to identify no baccalaureate or higher degree requirement for employment, the AAO concludes that the position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To determine whether the petitioner can establish that its position meets the second criterion -- that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty -- the AAO has reviewed the Internet materials provided by counsel in response to the director's request for evidence. However, these materials, which include a job posting from a national youth services organization and biographies of staff members at other gymnastics facilities, do not document that a degree requirement is common to the petitioner's industry.

The Internet announcement advertising teaching jobs, including an opening for a physical education teacher, at a national youth services organization states that a college degree is required for employment. However, the announcement comes from a business unrelated to the petitioner's industry and cannot, therefore, serve as evidence of an industry norm. The AAO additionally notes that the announcement fails to indicate that the required degree must be in a specialty directly related to the advertised positions, as required for a specialty occupation.

The on-line biographies of persons working as instructors in other gymnastics businesses also fail to respond to the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which stipulate that a petitioner must establish that the degree requirement is common to its industry in parallel positions. While the submitted biographies are those of persons working in gymnastics businesses, they either do not specify the individuals' job responsibilities or describe positions that do not appear parallel to that offered by the petitioner. Additionally, the AAO notes that the website of one of these gymnastic businesses states it hires instructors based on "their patience, experience, love of teaching and their desire to work with children and adults." Academic requirements are not addressed. Finally, several of the biographies offered by counsel do not indicate that the individual instructor has a baccalaureate or higher degree in a field related to gymnastics.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In the instant case, counsel, in response to the director's request for evidence, submitted a letter from the petitioner stating its practice of requiring its teachers and coaches to have the minimum of a bachelor's degree, as well as the petitioner's announcement for its proffered position. On appeal, counsel specifically notes that the petitioner has required past and current employees in positions similar to that of the proffered position to hold bachelor's degrees in related fields. However, neither the statements of the petitioner or counsel, nor the petitioner's job announcement, establish that the petitioner normally requires a degree or its equivalent for the proffered position.

In its December 2, 2003 letter, the petitioner stated that it required its teachers and coaches to possess the minimum of a bachelor's degree, listing one employee as having a degree in health education, three with degrees in physical education, two others with degrees in fine arts and a previous employee with a degree in biomechanics. For the petitioner to establish eligibility under this criterion, it must prove that it normally requires a bachelor's degree in a related field. However, the petitioner offered no documentation to support its statements regarding the academic backgrounds of its teaching staff, nor any discussion as to how degrees such as health education and fine arts were directly related to the teaching of gymnastics. Further, the AAO's review of the petitioner's website did not substantiate the petitioner's statements regarding its employment practices, as only three current employees could be identified as having degrees. One employee was found to have degrees from U.S. academic institutions; the other individuals appeared to have degrees from foreign colleges or universities that were not identified.

The AAO also notes that counsel's assertions on appeal regarding the petitioner's specific degree requirements are not supported by the record. The job announcement submitted by the petitioner in response to the director's request for evidence states only that job applicants for the proffered position must have bachelor's degrees. It does not specify that the degrees must be directly related to the teaching of gymnastics, per CIS requirements. The job announcement undermines not only counsel's statements regarding the nature of the degrees acceptable to the petitioner, but also the petitioner's ability to establish that it normally requires a degree in a related specialty for its proffered position.

The fourth criterion requires the petitioner to establish that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree in the specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has again reviewed the duties of the proffered position, as described by the petitioner in its initial filing and in response to the director's request for evidence, to determine whether they reflect a higher degree of knowledge and skill than would normally be required of a gymnastics instructor or, perhaps, represent an amalgam of jobs that require different skills and qualifications.

On appeal, counsel asserts that the job duties described by the petitioner show the complexity and specialization that would normally be associated with the attainment of a baccalaureate or higher degree, emphasizing that the position requires the beneficiary to teach classes using gymnastic and training apparatus, to apply a knowledge of physiology and corrective techniques, to create and teach a weight training class and work with a database to track students' gymnastic progress. However, nothing described by counsel appears to fall outside the range of duties that would normally be handled by a sports instructor, a profession in which individuals are expected to have significant knowledge and experience in their areas of expertise. Lacking any evidence that the proffered position is more complex or specialized than other such positions, the AAO finds the petitioner has also failed to establish that its position qualifies under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For reasons related in the preceding discussion, 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.