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FILE: SRC 04 094 53005 Office: TEXAS SERVICE CENTER Date: NOV 02 2005

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*

Robert P. Wiemann, Director  
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 "private club and fitness club" that seeks to employ the beneficiary as a fitness trainer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 because the proffered position is not a specialty occupation and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

The AAO will first address the director's conclusion that the position is not 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 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 a fitness trainer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 10, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: administering fitness evaluations; evaluating abilities of individuals in order to determine a suitable training program for members of the club, including healthy individuals, seniors, post-cardiac rehabilitation patients, stroke patients, and orthopedic patients; teaching and demonstrating use of gymnastic equipment, including mechanical exercisers, free weights, and Pilates apparatus; conducting exercise orientations; monitoring members' exercise program and progress; identifying specifics of client motivation and issues of client responsibilities; providing ongoing guidance to members and conducting fitness re-evaluations; developing and instructing group exercise classes in aerobics, step, Pilates, and other modalities; and performing timely and effective floor work with members, building relationships, and providing assistance. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in exercise science or an equivalent thereof.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further 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 a fitness trainer for high-quality fitness centers and programs, such as the petitioner, requires a related bachelor's degree and, therefore, qualifies as a specialty occupation. Counsel states further that the proposed duties are so complex as to require a related bachelor's degree. Counsel submits expert opinions, letters from similar fitness centers, job postings, and a random sampling of college programs that offer a bachelor's degree in exercise science, as supporting documentation. Counsel also cites to the *Handbook*, the *Dictionary of Occupational Titles (DOT)*, and the DOL's wage survey, which assigns fitness trainers and aerobics instructors to "Zone 3," (referring to the DOL's *O\*Net*), to state that a degree is common to the industry for parallel positions in similar organizations.

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 *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 concur with counsel that the proffered position is a specialty occupation. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree,

or its equivalent, is required for recreation and fitness worker jobs. Furthermore, although the petitioner's manager states in a letter, dated February 24, 2004, that the beneficiary would administer fitness evaluations for seniors, individuals who are post-operative from cardiac, orthopedic, and other procedures, and individuals with diabetes and other medical conditions, evaluate their abilities in order to determine a suitable training program, and monitor their progress, the petitioner's "Dear Member" letter, dated October 17, 2003, indicates that its "Special Needs Personal Training" for members "who are recovering from surgeries, have just been released from physical therapy and require additional assistance, or have medical conditions considered high risk and are in need of special attention" is offered by the petitioner's physical therapist. As such, it is not clear how the beneficiary could realistically assume the petitioner's physical therapist's duties of these "special needs" members without the training and licensing required for a physical therapist position. The record contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record contains letters from a university professor, a president of an institute that offers education and certification in exercise science, representatives of similar businesses, and two health care professionals who state, in part, that positions such as the proffered position require a bachelor's degree in exercise science or an equivalent thereof. The writers, however, provide no evidence to support their assertions. 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)).

Counsel's reference to and assertions about the relevance of information from *O\*Net* and the *DOT* are not persuasive. Neither the *DOT's* SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

Counsel's observation that various institutions offer degrees in exercise science is noted. The AAO cannot assume, however, that the additional training that the baccalaureate program provides is solely related to the alleged complexity of the proffered position. 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)).

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for various fitness-related positions. There is no evidence, however, to show that the advertised positions are parallel to the instant position. The majority of the advertisements are for fitness-related positions that require a related bachelor's degree in addition to various certifications. The petitioner has not demonstrated that the proffered position is as complex as the positions described in the advertisements. Furthermore, as the majority

of the advertisements do not contain comprehensive position descriptions, it cannot be determined that the advertised positions are parallel to the proffered position. Thus, the advertisements have no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (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 states that the proffered position is a new position. The petitioner, therefore, has not established the criteria set forth 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.

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. 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).

As related 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 director also found that the beneficiary was not qualified to perform a specialty occupation because the beneficiary's experience and training were not equivalent to a baccalaureate degree in a related field. On appeal, counsel states, in part, that the record contains a work experience evaluation report and evidence of the beneficiary's work experience that demonstrate she holds the equivalent of a bachelor's degree in exercise science. As discussed above, no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for recreation and fitness workers. Fitness trainers and aerobics instructors generally must obtain a certification in the fitness field to obtain employment. In this case, the record indicates that the beneficiary has several years of related employment experience. As such, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petition may not be approved, however, because the proffered position is not a specialty occupation. Regarding counsel's statement that the record contains a work experience evaluation report from a company that specializes in evaluating academic credentials, the evaluation is based upon the beneficiary's work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). 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.