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20 Mass. Ave. N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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*Dr*

FILE: LIN 04 061 50429 Office: NEBRASKA SERVICE CENTER Date: OCT 17 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, Director  
Administrative Appeals Office

**DISCUSSION:** The 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, a company engaged in an unspecified business, seeks to employ the beneficiary as a physical fitness 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 on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

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 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.

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 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 proposed position.

In determining whether a proposed position qualifies as a specialty occupation, CIS does not rely simply upon the position’s title. The specific duties of the proposed 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 beneficiary and make a determination as to whether the proposed position in fact qualifies for classification 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s denial letter; (3) the director’s request for evidence (RFE); (4) the petitioner’s RFE response and supporting documentation; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner presented no information regarding the duties of the proposed position in the initial submission. In response to the director’s request for evidence, the petitioner offered a breakdown of the percentages of time to be devoted to each activity. According to the petitioner, the beneficiary would spend forty percent of his time providing “a fitness program personally tailored for individual participants,” forty percent of his time “prepar[ing] programs for fitness instructions and supervise [participants] during fitness instructions,” and would spend the remaining twenty percent of his time “interview[ing] participants regarding [their] medical condition and physical profile[s] to set the correct physical instructions.”

The director denied the petition, finding that the proposed position does not qualify for classification as a specialty occupation. The director also found the beneficiary unqualified to perform the duties of a specialty occupation.

On appeal, counsel does not address the issue of whether the proposed position qualifies as a specialty occupation, one of the two reasons for the director’s denial. Rather, counsel submits an English translation of a foreign language document in an apparent attempt to prove that the beneficiary qualifies to perform the duties of a specialty occupation (which was the second reason for the director’s denial). However, the beneficiary’s qualifications to perform the duties of the proposed position are inconsequential, as the position does not qualify as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

A review of the duties of the proposed position finds them closely aligned to the responsibilities of recreation and fitness workers. As discussed in the *Handbook*:

People spend much of their leisure time participating in a wide variety of organized recreational activities, such as aerobics, arts and crafts, the performing arts, camping, and sports. Recreation and fitness workers plan, organize, and direct these activities in local playgrounds and recreation areas, parks, community centers, health clubs, fitness centers, religious organizations, camps, theme parks, and tourist attractions. Increasingly, recreational and fitness workers are also found in workplaces, where they organize and direct leisure activities and athletic programs for employees of all ages.

Fitness workers instruct or coach groups or individuals in various exercise activities. Because gyms and health clubs offer a variety of exercise activities such as weightlifting, yoga, aerobics, and karate, fitness workers typically specialize in only a few areas. *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. . . . *Fitness directors* oversee the operations of a health club or fitness center.

The *Handbook* reports the following educational requirement for individuals seeking employment in this field:

Education requirements for recreation workers range from a high school diploma—or sometimes less for many summer jobs—to graduate degrees for some administrative positions in large public recreation systems. Full-time career professional positions usually require a college degree with a major in parks and recreation or leisure studies, but a bachelor's degree in any liberal arts field may be sufficient for some jobs in the private sector. . . .

Specialized training or experience in a particular field, such as art, music, drama, or athletics, is an asset for many jobs.

Generally, fitness trainers and aerobics instructors must obtain certification in the fitness field to obtain employment. Certification may be offered in various areas of exercise such as personal training, weight training, and aerobics. . . .

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. . . .

These findings do not support a finding that a bachelor's degree is required for entry into this occupation. The *Handbook* states that educational requirements vary, and that a range of degrees may be acceptable for entry into the position. As noted previously, CIS interprets the term "degree" to mean not just any degree in any field, but one in a specific specialty that is directly related to the proposed position. A bachelor's degree in a specific specialty, however, is not a minimum requirement for entry into this

occupation. Moreover, the fact that “an increasing number of employers” require a degree is not synonymous with the “normally required” standard imposed by the regulation. Consequently, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the two job postings submitted by counsel in response to the director’s RFE. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

No evidence has been submitted to establish that any of these four postings are from organizations similar in size or scope of operations to the petitioner. Town Sports International is the largest network of health and fitness clubs in the northeastern United States, and no information is submitted regarding Benchmark Medical. The petitioner has submitted no evidence regarding its own size, corporate structure, or scope of operations; in fact, the petitioner did not even complete the Form I-129.

Moreover, the job posting from Benchmark Medical undermines the assertion that the proposed position qualifies for a specialty occupation under this prong, as it does not state that a bachelor’s degree is required. Rather, it states that a “4 year degree is a plus.” A bachelor’s degree in a specific specialty, is therefore, not a minimum requirement for this position.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those set forth in the *Handbook*, which does not state that a degree is required. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions described in the *Handbook*.

Therefore, the petitioner cannot establish that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner’s ability to meet this criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. However, no such evidence has been submitted to demonstrate that the proposed position qualifies under this criterion.

Accordingly, the proposed position does not qualify as a specialty occupation under 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), which requires a demonstration that 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 of the proposed position 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. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. As the *Handbook* reveals, such organizations do not normally impose a bachelor's degree requirement. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. Accordingly, the AAO will 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.