

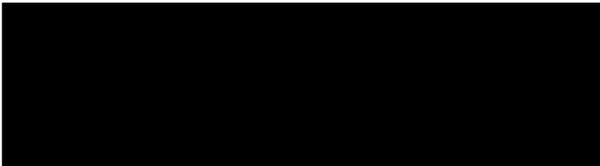
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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Dr

FILE: LIN 05 183 51456 Office: NEBRASKA SERVICE CENTER Date: ~~03~~ 04 2007



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
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 tennis and fitness center that seeks to employ the beneficiary as a director. 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 because the proffered position is not a specialty occupation and the beneficiary has violated her nonimmigrant H-4 status.

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) counsel's response to the director's request; (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.

Pursuant to 8 C.F.R. § 248.3(g), there is no provision for an appeal from the denial of a change of status. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for a change of status, this issue will not be reviewed.

The issue before the AAO is whether the 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 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) consistently 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 director. Evidence of the beneficiary’s duties includes: counsel’s June 16, 2005 letter in support of the petition and counsel’s November 21, 2005 response to the director’s request for evidence. In his response to the RFE, counsel submitted the following job description for a “high performance tennis and fitness director” position:

- Start, develop, and grow new programs serving club members to improve their well-being. (30% of time) The programs that have been recently introduced are:
 - a) Cardio Tennis Program (high-paced program with heart rate monitoring);
 - b) High-performance Program for talented juniors; and
 - c) Competition Training Center for talented junior players.

- Perform, supervise and evaluate tennis lessons and fitness activities for club members with medical problems. (20% of time)
 - a) Improve physical condition and endurance of members recovering from cardiovascular disease such as heart attack or high blood pressure;
 - b) Resume playing tennis after joint or muscle surgery; and
 - c) Help members with weight problems.

- Prevent tennis injury such as tennis elbow, shoulder, lower back, and knee injury. (20% of time)
 - a) Correct technique of tennis strokes to achieve proper biomechanics;
 - b) Recommend flexibility exercise; and
 - c) Include strength training, anaerobic and aerobic training into regular physical activity to minimize risk of injury.

- Assist senior members to participate in different club activities. (10% of time)
 - a) Tennis private-lesson evaluations of their movement ability;
 - b) Tennis group lessons for senior players; and
 - c) Individualized workout sessions according to their health condition.

- Help juniors to participate in competitive tournament play. (20% of time)
 - a) Assist with selection and registration of appropriate tournament event;
 - b) Communicate with parents of junior players to help them understand their child's tennis performance and needs; and
 - c) Evaluate and help to maximize their tennis performance.

The director found that the proposed duties fall within the scope of a sports instructor. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, under the category of Athletes, Coaches, Umpires, and Related Workers, 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 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 asserts, in part, that the proffered position is similar to that of an athletic trainer, and is not a sports instructor position. Counsel also asserts that the proposed duties, which entail overseeing trainers and staff, knowledge of nutrition and kinesiology, cardiovascular programs, and physical therapy, are so specialized and complex as to require a background in sports medicine or medicine. For supporting documentation, counsel submits letters from industry experts.

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 find that the proffered position is that of an athletic trainer, who works under the supervision of a licensed physician, and in cooperation with other health care providers. See *Handbook*, 2006-07 edition, under Athletic Trainers. In this case, information on the petition reflects that the petitioner was established in 1969, has 2,650 employees and a gross annual income of \$70,000,000. Counsel's assertion on appeal that the beneficiary would be overseeing trainers and staff, is noted. The record, however, indicates that the petitioner owns and operates several tennis/fitness centers. As the record does not contain an organizational hierarchy of the tennis/fitness center where the beneficiary would perform the proposed duties, the exact nature and level of authority of the proffered position is unclear. 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). The petitioner has not provided sufficient evidence that substantiates the incumbent in the proffered position must possess a bachelor's degree in a specific discipline. Of further note, although information on the petition reflects that the petitioner was established in 1969, has 2,650 employees and a gross annual income of \$70,000,000, the petitioner provides no evidence that its current and former directors hold a bachelor's degree in a related field. Again, simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, the record contains opinions from various individuals in the health fitness industry. The majority of the writers assert that the proffered position is a professional position and/or requires a related bachelor's degree. The record, however, does not indicate that the writers have adequate knowledge of this matter. The opinions do not include a discussion of the proposed duties and/or the actual work that the beneficiary would perform within the context of this particular petitioner's business. The writers do not demonstrate knowledge of the petitioner's particular business operations. They do not relate any personal observations of those operations or of the work that the beneficiary would perform. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for their conclusions about the educational requirements for the

particular position at issue. CIS 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, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinions of the writers are not based on a factual foundation, the AAO does not find them probative in this matter.

The record does not include sufficient evidence from firms, individuals, or professional associations regarding an industry standard. 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. As observed above, the petitioner has not provided evidence that the proffered position incorporates complex duties that require an athletic trainer, who works under the supervision of a licensed physician, and in cooperation with other health care providers. The petitioner has not identified any unique duties that are specifically pertinent to the petitioner's business operations that would require 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. As counsel does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

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 asserts, on appeal, that the proposed duties, which entail overseeing trainers and staff, knowledge of nutrition and kinesiology, cardiovascular programs, and physical therapy, are so specialized and complex as to require a background in sports medicine or medicine. The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the exact nature of the proffered position. As indicated in the discussion above, the record of proceeding lacks evidence of specific duties in relation to the petitioner's specific business operations, that would establish such specialization and complexity. 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. 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. 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.

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