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U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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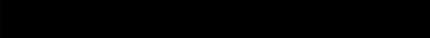
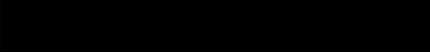


**U.S. Citizenship
and Immigration
Services**



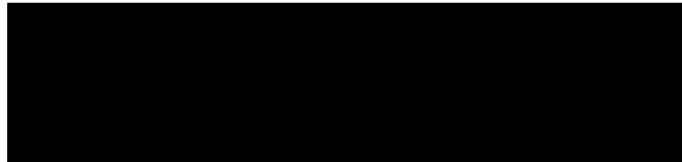
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DATE: **APR 13 2011** FILE:  Office: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, 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 Catholic non-profit high school in [REDACTED] that seeks to employ the beneficiary as its aquatics director and coach. Thus, the petitioner 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).

In denying the petition, the director determined that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner submits Form I-290B along with a brief and additional evidence in support of the petitioner's claimed eligibility for the benefit sought.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) documentation submitted in response to the director's request; and (4) Form I-290B accompanied by counsel's brief and additional evidence.

The primary issue in this matter is whether the proffered position is 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.

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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS 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. 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 is a Catholic non-profit high school that seeks to employ the beneficiary as its aquatics director and coach. In a letter of support dated June 4, 2010, the petitioner claimed that the job duties of the beneficiary in the proffered position would be as follows:

1. As the Aquatics Director, [the beneficiary] is solely responsible for the operation and management of the Aquatics Center and all activities that take place at the Aquatics Center including the supervision of all employees and coaches.
2. As the Coach of [the petitioner's] Varsity Boys and Girls Water Polo Teams, [the beneficiary] will be responsible for all matters relating to practice and team competition.
3. In addition to his primary responsibilities as Aquatics Director and Coach, [the beneficiary] will be teaching one or more courses commencing with the 2010-2011 academic year.

The petitioner concluded by stating that the required qualifications for the proffered position include (1) a bachelor's degree from an accredited United States university or foreign equivalent; (2) a Teaching Credential or Master's Degree; and (3) prior experience playing college water polo or prior experience coaching college water polo.

The petitioner also submitted an attachment to the Form I-129, in which it provided additional details regarding the beneficiary's past experience and qualifications. As touched upon briefly in the support letter dated June 4, 2010, the petitioner expanded on the beneficiary's claimed teaching role, explaining that the beneficiary would begin teaching swimming courses in the 2010-2011 academic year and would eventually teach business administration courses in the 2011-2012 academic year.

Finding that the record contained insufficient evidence of eligibility, the director issued an RFE on September 28, 2010. The director requested a more detailed description of the duties of the proffered position, as well as evidence demonstrating that the position met the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), and she provided specific examples of evidence that would support the petitioner's contentions. In addition, the director requested information pertaining to the petitioner's operations and business.

In a response dated October 26, 2010, the petitioner addressed the director's request. The petitioner provided additional details regarding the proffered position. Regarding the beneficiary's teaching duties, it confirmed that the beneficiary would not commence such duties until the spring semester of the 2010-2011 academic year. The petitioner indicated that the beneficiary would devote 60% of his time to his duties as aquatic director and 40% of his time to his duties as coach. Specifically, the petitioner indicated that the beneficiary

would work as the coach of its varsity boys and girls water polo teams in the fall, and work as the coach of the Water Polo Club during the winter, spring, and summer.

The petitioner also submitted a more detailed description of the duties of the proposed position as Exhibit 5 of the response to the RFE. In relevant part, this document stated that the specific duties of the position are as follows:

- Coach of the [petitioner's] Varsity Boys Water Polo Team and Varsity Girls Water Polo Team
- Oversees the coach or coaches of the [petitioner's] Junior Varsity Boys and Girls Water Polo Teams
- Oversees the coach or coaches of the [petitioner's] Varsity Boys, Varsity Girls, Junior Varsity Boys and Junior Varsity Girls Swim Teams
- Is the President and the Head Coach of the Water Polo Club which runs throughout the year with the exception of the High School Water Polo season
- Teaches physical education swimming classes (if requested)
- Oversees summer swim lesson program
- Oversees the lunch time lap swimming program at [the petitioner]
- Personally responsible for the cleaning and maintenance [of] the Aquatics Center and surrounding areas.

In addition, the petitioner submitted documentary evidence in the form of job postings for positions it claimed were similar to that of the proffered position, as well as evidence pertaining to the career and background of its current aquatics director, . The petitioner indicated that since the aquatics center was only recently completed in 2007, was the only aquatics director employed by the petitioner to date. Finally, the petitioner submitted documentary evidence such as corporate paperwork, tax documents, and profiles of its educational institution as requested by the director.

On December 9, 2010, the director denied the petition. The director found that the duties of the proffered position do not require a bachelor's degree. Citing the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the proffered position was most akin to the profession of coach as defined in the section entitled "Athletes, Umpires, Coaches and Related Workers." The director quoted the relevant parts of this section and concluded that there was no evidence to demonstrate that a bachelor's degree or its equivalent was required for the proffered position. The director also found that there is no standard means of preparing for the position of aquatics director, thereby strengthening the conclusion that a degree in a specific specialty is not required. Finally, the director addressed the remaining criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A), finding that the petitioner failed to establish any of the criteria contained therein.

On appeal, counsel for the petitioner submits Form I-290B accompanied by a brief, and contends that the director's findings were erroneous. Counsel makes numerous arguments on appeal, which will be addressed in greater detail within the body of this decision. Primarily, counsel contends that the director erred by

focusing solely on the coaching duties of the proffered position, and claims that the other duties of the position, such as recruiting, hiring, and firing coaches, as well as creating marketing plans and budgets for the aquatics center, were ignored when assessing the position as a specialty occupation. In addition, counsel claims that it was erroneous for the director to discount the thirteen job postings submitted in support of the contention that a degree requirement is common for similar positions.

Upon review of the record, the AAO concurs with the director's decision and finds that the petitioner has established none of the four supplemental eligibility criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position is a specialty occupation.

The AAO will first consider the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. Factors often considered by USCIS 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)).

In determining whether a position qualifies as a specialty occupation, USCIS 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 *Handbook* for information about the duties and educational requirements of particular occupations.

The petitioner contends that it seeks to employ the beneficiary as a coach, a teacher, and as the director of its aquatics center. As a preliminary matter, the AAO will first address the petitioner's claim that the beneficiary will be employed as a teacher. According to the petitioner's letter dated October 26, 2009 submitted in response to the RFE, the beneficiary will commence teaching swimming classes in the spring semester of the 2010-2011 academic year, and commence teaching business classes in the fall semester of the 2011-2012 academic year. However, the requested start date for the beneficiary is October 1, 2010.

Since the beneficiary's teaching duties would not commence until the spring semester of the 2010-2011 academic year, which most likely begins in January or February of 2011, the petitioner cannot rely upon these future teaching duties as a basis for classifying the proffered position as a specialty occupation. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The beneficiary would not be assuming a teaching role until several months after the commencement of his employment with the petitioner. Therefore, the teaching duties included in the description of the proffered position will be discounted for purposes of this analysis.

It is also noted that an affidavit from the petitioner's Vice Principal, [REDACTED] is submitted on appeal, which confirms the courses the beneficiary would begin teaching in the fall semester of 2011 (commencing in August). However, for the reasons set forth above, this affidavit will not be considered, since it pertains to a basis for future eligibility of the beneficiary, and not the eligibility of the beneficiary on October 1, 2010, the requested start date of his employment.

Counsel for the petitioner argues that that the proffered position is not composed solely of coaching duties, and points out the additional duties of the beneficiary as aquatics director. The AAO agrees that other duties are incorporated into the description of the proffered position, and will discuss these duties and the *Handbook's* description thereof below.

The AAO will first review the section pertaining to coaches and the petitioner's statements pertaining to this section. As claimed by counsel on appeal, the *Handbook* indicates that public secondary-school head coaches and sports instructors at all levels usually must possess a bachelor's degree. Though he argues that the proffered position is not simply that of a coach, counsel concludes that the proffered position qualifies as a specialty occupation based on the *Handbook's* statements pertaining to the degree requirement in public schools.

The *Handbook* describes coaches as organizing, instructing, and teaching amateur and professional athletes in fundamentals of individual and team sports. They also select, store, issue, and inventory equipment, materials, and supplies. These duties clearly are akin to those of the proffered position of coach of the water polo teams at the petitioner's school as well as the [REDACTED] Water Polo club, and therefore, the AAO finds that the director's reliance on this section of the *Handbook* when assessing the proffered position as a specialty occupation was appropriate.

With respect to the educational requirements for a coach position, the *Handbook* reports:

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.

Education and training. Most athletes, coaches, umpires, and related workers get their training from having played in the sport at some level. All of these sports-related workers need to have an extensive knowledge of the way the sport is played, its rules and regulations, and strategies, which is often acquired by playing the sport in school or recreation center, but also with the help of instructors or coaches, or in a camp that teaches the fundamentals of the sport.

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Although there may not be a specific education requirement, head coaches at public secondary schools and sports instructors at all levels usually must have a bachelor's degree. For high school coaching and sports instructor jobs, schools usually prefer, and may have to hire teachers willing to take on these part time jobs. If no suitable teacher is found, schools hire someone from outside. College coaches also usually are required to have a bachelor's degree. Degree programs specifically related to coaching include exercise and sports science, physiology, kinesiology, nutrition and fitness, physical education, and sports medicine. Some entry-level positions for coaches or instructors require only experience derived as a participant in the sport or activity.

* * *

Most public high school coaches need to meet State requirements for certification to become a head coach. Certification, however, may not be required for coaching and sports instructor jobs in private schools. College coaches may be required to be certified. For those interested in becoming scuba, tennis, golf, karate, or other kind of instructor, certification is highly desirable and may be required. There are many certifying organizations specific to the various sports, and their requirements vary. Coaches' certification often requires that one must be at least 18 years old and certified in cardiopulmonary resuscitation (CPR). Participation in a clinic, camp, or school also usually is required for certification. Part-time workers and those in smaller facilities are less likely to need formal education or training and may not need certification.

The occupation of coach clearly conforms to the qualification requirements imposed by the petitioner on the incumbent of the proffered position. According to the *Handbook*, coaches "get their training from having played in the sport at some level," and they "need to have an extensive knowledge of the way the sport is played, its rules and regulations, and strategies. . . ." The petitioner claims that the incumbent must have: (1) played water polo at the college level; and (2) coached water polo at the college level. When reviewing the statements of the petitioner and counsel, wherein they claim that the beneficiary has acquired knowledge of water polo from his experience on a college team and from his assistant coaching experience at the [REDACTED], it is further evident that the proffered position, and the qualifications of coach as described by the *Handbook*, are comparable.

However, the fact that the petitioner's self-imposed qualification requirements are akin to those of the *Handbook* does not automatically render the proffered position a specialty occupation. As discussed above, the regulation at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) requires a showing that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The *Handbook* states that public secondary-school head coaches usually must have a bachelor's degree, and head coaches at other institutions do not require a baccalaureate-level degree. However, the *Handbook* does not indicate that a degree in a specific specialty is required for entry into the proffered position. Moreover, the *Handbook* indicates that "some entry-level positions for coaches or instructors require only experience derived as a participant in the sport or activity." Therefore, a bachelor's degree in a specific specialty is not required for the position of coach.

Counsel contends on appeal that this finding is erroneous, noting that the position of coach requires specialized knowledge. Counsel further asserts that its requirements that the incumbent possess experience as both a player and college-level coach of water polo, as well as a bachelor's degree, satisfies the regulatory requirement that the bachelor's degree be directly related to the specialty occupation.

Counsel's assertions are not persuasive in establishing the first criterion under 8 C.F.R. § 214.2(h)(4)(iii)(A). Although the *Handbook* reports that public secondary-school head coaches usually require a bachelor's degree, a degree in a specific specialty is not required. More importantly, however, is the fact that the petitioner is not a public secondary school but rather a Catholic secondary school, and therefore comparison to the requirements of coaches at public secondary schools is inappropriate.

Counsel also asserts on appeal that the document entitled "Administrative Handbook for Schools – Catholic Schools Office [REDACTED] – August 2008" submitted in response to the RFE indicates that a Catholic secondary school teacher must have a bachelor's degree and appropriate credentials for the State of [REDACTED]. As discussed previously, the petition did not demonstrate that the beneficiary would be performing teaching duties upon commencement of his employment with the petitioner in October 2010. Nevertheless, even if the beneficiary were teaching at the petitioner's school while simultaneously coaching its water polo team, the administrative handbook cited above does not require a degree in a specific specialty.

Based on the above discussion, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of coach under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Although counsel asserts on appeal that the proffered position is not merely that of a coach, counsel makes no claim that the proffered position is more akin to other occupational categories discussed by the *Handbook*. Regardless, the AAO has considered counsel's claims and, upon review of various sections of the *Handbook*, has concluded that the proffered position also appears to encompass parts of the occupational category described as recreation workers.

The occupation of recreation workers is described by the *Handbook*, in relevant part, as follows:

As participation in organized recreational activities grows, *recreation workers* will be needed to plan, organize, and direct these activities in local playgrounds and recreation areas, parks, community and senior centers, nursing homes and other senior housing, camps, and tourist attractions. These workers lead groups in activities such as arts and crafts, sports, performing arts, camping, and other special interests. They make sure that participants abide by the rules of the camps and recreational facilities and that safety practices are adhered to so that no one gets injured. Recreation workers also are found in some businesses or business groups, where they direct leisure activities for employees, such as softball or bowling, and organize sports leagues.

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Workers who provide instruction and coaching primarily in one activity, such as art, music, drama, swimming, or tennis, are called *activity specialists*. These workers can work in camps or anywhere else where there is interest in a single activity.

Recreation leaders are responsible for a recreation program's daily operation. They primarily organize and direct participants, schedule the use of facilities, keep records of equipment use, and ensure that recreation facilities and equipment are used properly. In addition, they may lead classes and provide instruction in a recreational activity.

Recreation supervisors oversee recreation leaders and plan, organize, and manage recreational activities to meet the needs of a variety of populations. These workers often serve as liaisons between the director of the park or recreation center and the recreation leaders. Recreation supervisors with more specialized responsibilities also may direct special activities or events or oversee a major activity, such as aquatics, gymnastics, or one or more performing arts.

Directors of recreation and parks develop and manage comprehensive recreation programs in parks, playgrounds, and other settings. Directors usually serve as technical advisors to State and local recreation and park commissions and may be responsible for recreation and park budgets.

As counsel correctly notes, the proffered position is not merely that of a coach, but also of the aquatics director of the newly-opened center, which is open to students as well as users outside of the student body. According to the statements of counsel and the petitioner, the beneficiary will devote 60% of his time to these duties, which were described as being solely responsible for the operation and management of the aquatics center and all activities that take place at the aquatics center, including the supervision of all employees and coaches.

A close review of the duties of the proffered position in relation to the occupation of recreation workers yields numerous similarities. For example, the section addressing activity specialists is relevant, since it encompasses “workers who provide instruction and coaching primarily in one activity, such as art, music, drama, *swimming*, or tennis.” (Emphasis added). Moreover, the remaining sections also encompass some of the stated duties of the proffered position. According to the *Handbook*, recreation leaders “organize and direct participants, schedule the use of facilities, keep records of equipment use, and ensure that recreation facilities and equipment are used properly. In addition, they may lead classes and provide instruction in a recreational activity.” Recreation supervisors “oversee recreation leaders and plan, organize, and manage recreational activities to meet the needs of a variety of populations,” and such supervisors “also may direct special activities or events or oversee a major activity, such as *aquatics*, gymnastics, or one or more performing arts.” (Emphasis added).

Upon review of the duties of aquatics director, this aspect of the position also corresponds to recreation leaders and supervisors, since the beneficiary directs one major activity (aquatics) and is responsible for the supervision of all employees or coaches, similar to the responsibilities of recreation supervisor. Recreation

leaders also ensure that facilities and equipment are used properly, which is similar to the responsibility bestowed on the aquatics director of the petitioner. Finally, directors of recreation are responsible for budgets, another duty claimed to be the responsibility of the aquatics director of the petitioner.

The educational requirements of recreations workers as discussed by the *Handbook* are as follows:

The educational and training requirements for recreation workers vary widely with on the type of job. Full-time career positions usually require a college degree. Many jobs, however, require demonstrated knowledge of the activity or can be learned with only a short period of on-the-job training.

Education and training. The educational needs for people entering into this occupational field vary widely depending on the job and level of responsibility. For activity specialists, it is more important to have experience and demonstrated competence in a particular activity, such as art or kayaking, than to have a degree. Camp counselors often are older teenagers or young adults who have experienced camping as a child and enjoy the camping experience. A degree is less important than the counselor's maturity level, ability to work well with children and teens, and ability to make sure that they stay safe.

Those working in administrative positions for large organizations or public recreation systems may need a bachelor's degree or higher. 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. In industrial recreation, or "employee services" as it is more commonly called, companies that offer recreational activities for their employees prefer to hire those with a bachelor's degree in recreation or leisure studies and a background in business administration.

The *Handbook* states that some positions in this category require a bachelor's degree or higher. Similar to the occupation of coach, however, the *Handbook* does not indicate that a degree in a specific specialty is required for entry into the proffered position. Moreover, the *Handbook* indicates that a "bachelor's degree in any liberal arts field may be sufficient for some jobs in the private sector," the sector most closely related to the proffered position. Therefore, while the proffered position also encompasses duties of a recreation leader, specialist, director, and activity specialist, a bachelor's degree in a specific specialty is not required for any of these positions.

Therefore, a review of both the duties of a coach and the various categories of recreation workers demonstrates that, while the proffered position encompasses duties of both occupational specialties, neither requires an incumbent to hold at least a bachelor's degree, or its equivalent, in a specific specialty. Based on the above discussion, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In this matter, while the petitioner submitted thirteen job postings in support of the contention that a degree requirement is common within the petitioner's industry, none of the postings satisfy the regulatory requirements. Twelve of the thirteen posts are for the position of aquatics director, manager or coordinator, with only one posting for the position of coach.

The postings submitted from the YMCA of [REDACTED] require simply a bachelor's degree or four year degree, without specifying a specific specialty. Moreover, none of these five institutions are a private secondary school, and therefore represent organizations not similar to the petitioner. The remaining eight job postings, all of which are for the position of aquatics director/manager/coordinator, require at least a bachelor's degree in physical education, recreation, or related fields specified in the announcements. However, as initially noted while discussing the five postings above, none of these eight postings are from private secondary schools. Instead, they are for positions at YMCAs, cities, parks, and colleges; all organizations that differ vastly in size, scope and mission from that of the petitioner.

Finally, the petitioner submitted an announcement from the [REDACTED] School District, indicating that the new aquatics director for its aquatics center holds a BA from the [REDACTED]. While this announcement pertains to an aquatics center located in a middle school, which is more akin to the petitioner's organization than the organizations in the postings discussed above, there is no discussion or statement by the [REDACTED] School District that a bachelor's degree in a specific specialty was a prerequisite for the appointed candidate. The posting does not state in what specialty the new director holds his degree, nor does it state that it required the new director to possess a degree in a specific specialty.

These organizations advertising for positions similar to the proffered position accept a range of academic qualifications, including anything from significant experience to a four-year degree in an unspecified discipline to a preference for a degree in a specific discipline or a requirement for a four-year degree in a specific discipline. The petitioner has not established, based on the submitted advertisements for positions similar to the proffered position, that a degree requirement in a specific discipline is common to the industry. The petitioner has not established that similar organizations routinely employ and recruit only degreed individuals with a major in a specific discipline. Even if it had, a small sampling of job postings is generally insufficient evidence to refute the statistics-based findings in the Bureau of Labor Statistics *Handbook* that at least a bachelor's degree in a specific specialty is not a minimum entry requirement for the proffered position in the United States.

It should be noted that, on appeal, counsel submits for the first time three letters: two from Aquatics Directors/Coaches and one from a Professor at various colleges/universities in support of the contention that a degree requirement is common to the industry in parallel positions among similar organizations. The

regulation, however, states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); see also *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Moreover, the petitioner fails to submit evidence to address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2): that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Although counsel on appeal contends that five of the boys who played on the petitioner's 2009 varsity water polo team went on to play for collegiate water polo teams, largely a result of the efforts of the previous aquatics director and coach, this statement is insufficient to establish eligibility in this matter. Merely claiming that college coaches are more likely to respond in recruiting situations to a high school coach who has a college degree and college athletic experience, without evidence to support such a contention, will not establish that the proffered position is complex or unique. 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 Obaighena*, 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). Consequently, the submitted evidence fails to establish that the proffered position is so complex or unique that it can be performed only by an individual with a degree under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Furthermore, as already discussed in this decision, the beneficiary's duties would not require a bachelor's degree in a specific specialty.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to establish that it normally requires a degree or its equivalent for the position. The petitioner claims that its aquatics center was newly-built in 2007, and that it previously employed only one aquatics director/coach.

In response to the RFE, the petitioner provided an excerpt from the staff directory, which stated that was joining the team for his first season as head coach. It stated that he had previously served as the Aquatics Director for the petitioner, and that he graduated from the in 2002 with a bachelor of science degree in a unspecified discipline before earning his master's degree in sports science from the . No additional evidence pertaining to educational credentials or employment with the petitioner was submitted.

The RFE issued by the director on September 28, 2010 specifically requested evidence in the form of transcripts, pay records, and quarterly wage reports in support of the contention that the petitioner had a

history of employing degreed individuals in the proffered position. No such documentation was submitted. On appeal, however, counsel contends that it did in fact respond to this request in the form of the [REDACTED] announcement, and submits on appeal copies of [REDACTED] degree certificates.

The AAO notes that while the director did not discuss the [REDACTED] announcement in the decision, it did correctly note that no corroborating evidence was submitted to support a hiring practice of degreed individuals for the proffered position. A press release from an unrelated entity discussing the background of [REDACTED] is insufficient to establish an employment history in this matter. The record contains no documentation to prove that [REDACTED] ever worked for the petitioner as claimed in the record. As noted by the director, evidence of his employment could be in the form of pay records, quarterly wage reports, or other documentary evidence demonstrating that he was a former employee of the petitioner in the claimed position. Although counsel submits copies of his degree certificates on appeal, the petitioner failed to submit the requested evidence prior to adjudication. As discussed previously, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). Even if the degree certificates were deemed acceptable, they still do not demonstrate that [REDACTED] worked for the petitioner or that the petitioner *routinely* hired degreed individuals for the proffered position.

Further, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).¹

¹ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As already discussed in this decision, the *Handbook's* information and the evidence in the record show that the proffered position does not rise to the level of an occupation that would require a bachelor's degree in a specific specialty. Despite counsel's contentions on appeal that sufficient evidence has been submitted throughout the record to establish the complexity of the proffered position, neither the descriptions of the proffered position and its duties nor any other evidence in the record of proceeding establishes the degree of specialization and complexity required by this criterion.

On appeal, counsel submits numerous support letters from various persons, including a former member of Congress, and the senior vice-presidents of local banks. While these letters certainly attest to the good character and reputation of the beneficiary, these opinions are not evidence that the proffered position is a specialty occupation and cannot be deemed sufficient to satisfy the petitioner's burden of proof in these proceedings.

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.

Beyond the decision of the director, the petitioner has failed to demonstrate that the Labor Condition Application (LCA) contained in the record corresponds with the petition. The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. *See* 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of an LCA application with the DOL when submitting the Form I-129. The LCA submitted with this petition is certified for the occupation of aquatics director and coach. As the petitioner claims that the beneficiary will also assume teaching duties, it cannot be found that the LCA accompanying this petition would fully correspond to the petition since the occupation for which the LCA is certified is not that of a teacher. For this additional reason, the petition may not be approved. *See* 20 C.F.R. § 655.705(b).

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.