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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

Date: **MAY 17 2013**

Office: CALIFORNIA SERVICE CENTER

FILE: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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.

On the Form I-129 visa petition, the petitioner describes itself as a "Gymnastics, dance and karate classes" business. To employ the beneficiary in what it designates as a "Team Athletic Trainer" position, the petitioner endeavors to classify him 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, finding that the petitioner failed to establish that (1) it would employ the beneficiary in a specialty occupation position, and (2) the beneficiary is qualified to work in the proffered position pursuant to the salient regulations. On appeal, counsel asserted that the director's bases for denial were erroneous and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director did not err in her decision to deny the petition on the specialty occupation issue. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's submissions on appeal.

The AAO will first address the specialty occupation basis of denial. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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 regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] 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 [(2)] 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 providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and 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. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a

specific specialty" as "one that relates directly to the duties and responsibilities of a particular 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 directly related to the duties and responsibilities of the particular position, 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. *See generally 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 Labor Condition Application (LCA) submitted to support the visa petition states that the proffered position is a team athletic trainer, and that it corresponds to Standard Occupational Classification (SOC) code and title 29-9091.00 Athletic Trainers from the Occupational Information Network (O*NET).

With the visa petition, counsel submitted evidence showing that the beneficiary received a bachelor's degree in physical education and sports from [REDACTED] in Romania. The submitted evaluation states that the beneficiary has the equivalent of a U.S. bachelor's degree in physical education.

Counsel also submitted a letter, dated June 9, 2011, from the petitioner's president. That letter states that the beneficiary would "work with [the petitioner's] head coaches for all boys' and girls' gymnastics teams in planning the strength and flexibility components of the team workouts in such a way as to avoid injury and maintain peak physical fitness." It further stated, "[The beneficiary] will train athletes in the areas of vaulting, tumbling, strength, endurance, and flexibility." As to the requisite educational qualification of the proffered position, that letter states: "The minimum qualification for this key position is a bachelor's degree in physical education."

On August 22, 2011, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation, and evidence that the beneficiary has an "athletic trainer's license or holds some form of registration."

In response, counsel submitted, *inter alia*, (1) a description of the proffered position, (2) counsel's own letter, dated October 3, 2011; and (3) nine vacancy announcements. The vacancy announcements will be addressed below.

The description of the proffered position contains the following list of duties:

- Develop and implement the flexibility and strength training sessions[.]
- Prepare the team members for each practice and competition by exercising, preventative taping and bandaging techniques, and overseeing the team warm-up and flexibility period.
- Oversee maintenance of athletic equipment to ensure the safety.
- Responsible for the operation and maintenance of the treatment area. Secure bid proposals, order and maintain inventory control of all sports medicine supplies.
- Responsible for the accurate and thorough keeping of injury records for all team members.
- Work the team members' physicians in the rehabilitation of any injured team member following athletic injury or surgery.

In her October 3, 2011 letter, counsel cited the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* chapter on Athletic Trainers for the proposition that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. Counsel also provided information about the gymnastics classes the petitioner offers and asserted that the evidence submitted demonstrates that the proffered position is a specialty occupation position.

The licensure issue was not addressed by counsel or the petitioner.

The director denied the petition on March 8, 2012, finding, *inter alia*, as was noted above, that the petitioner had not demonstrated that the proffered position qualifies as a position in a specialty occupation by virtue of requiring a minimum of a bachelor's degree in a specific specialty or its equivalent. More specifically, the director found that the petitioner had satisfied none of the supplemental criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the appeal brief, counsel again asserted that the evidence provided demonstrates that the proffered position is a specialty occupation position and cited the *Handbook* as support for that proposition.

The AAO will now discuss the application of the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this record of proceeding.

The AAO will first discuss the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position.

The AAO recognizes the *Handbook*, cited by counsel, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ In the "Athletic Trainers" chapter, the *Handbook* provides the following description of the duties of those positions:

Athletic trainers specialize in preventing, diagnosing, and treating muscle and bone injuries and illnesses. They work with people of all ages and all skill levels, from young children to soldiers and professional athletes. They work under the direction of a physician, as well as other healthcare providers.

Duties

Athletic trainers typically do the following:

- Apply protective or injury-preventive devices such as tape, bandages, and braces
- Recognize and evaluate injuries
- Provide first aid or emergency care
- Develop and carry out rehabilitation programs for injured athletes
- Plan and implement comprehensive programs to prevent injury and illness from athletics
- Do administrative tasks, such as keeping records and writing reports on injuries and treatment programs

Athletic trainers are usually one of the first healthcare providers on the scene when injuries occur. Athletic trainers work under the direction of a licensed physician and with other healthcare providers. They often discuss specific injuries and treatment options or evaluate and treat patients as directed by a physician. Some athletic trainers meet with a team physician or consulting physician regularly. An athletic trainer's administrative responsibilities may include regular meetings with an athletic director or other administrative officer to deal with budgets, purchasing, policy implementation, and other business-related issues.

Athletic trainers should not be confused with fitness trainers and instructors, including personal trainers. For more information, see the profile on fitness trainers and instructors.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Athletic Trainers," <http://www.bls.gov/ooh/healthcare/athletic-trainers.htm#tab-2> (last visited May 8, 2013).

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2012 – 2013 edition available online.

Some of the claimed duties of the proffered position appear to be consistent with the duties of athletic trainers; however, the duties as described by the petitioner are not limited to preventing, diagnosing, and treating injuries, which is a summary of an athletic trainer position's duties. Rather, a large portion of the duties of the proffered position, as described both in the petitioner's president's June 9, 2011 letter and in the description of the proffered position submitted in response to the RFE, are related to leading workouts to build strength and flexibility. Further, the June 9, 2011 letter states that the beneficiary would train gymnasts in vaulting and tumbling. The duties of the proffered position are generally consistent with the duties of a coach, rather than an athletic trainer position.² The *Handbook's* chapter pertinent to "Coaches and Scouts" states the following about those positions:

Coaches teach amateur and professional athletes the skills they need to succeed at their sport. Scouts look for new players, evaluating athletes' strengths and weaknesses as possible recruits. Many coaches also scout out new talent.

Duties

Coaches typically do the following:

² Even assuming, *arguendo*, that the proffered position is an athletic trainer position, the visa petition would be denied as the petitioner has failed to establish that the beneficiary is qualified for such a position.

The *Handbook* states the following about the educational requirements of Athletic Trainer positions:

For most jobs, athletic trainers need a bachelor's degree in athletic training from an accredited college or university; however, master's degrees are also common. The Commission on Accreditation of Athletic Training Education (CAATE) accredits most programs. All programs have both classroom and clinical components. Courses include science and health-related courses, such as anatomy, physiology, nutrition, and biomechanics.

Athletic trainers may need a higher degree to be eligible for some positions, especially trainers in colleges and universities, or to increase their advancement opportunities.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Athletic Trainers," <http://www.bls.gov/ooh/healthcare/athletic-trainers.htm#tab-4> (last visited May 8, 2013).

The *Handbook* states that most athletic trainer positions require a minimum of a bachelor's degree in athletic training; however, the *Handbook* does not indicate that a bachelor's degree in Physical Education is an acceptable substitute. Therefore, even if the petitioner had demonstrated that the proffered position is an athletic trainer position, the visa petition would be denied as the petitioner has failed to establish that the beneficiary, who holds the equivalent of a bachelor's degree in physical education, is qualified for such a position.

- Plan, organize, and conduct practice sessions
- Analyze the strengths and weaknesses of individual athletes and opposing teams
- Plan strategies and choose team members for each game
- Provide direction, encouragement, and motivation to prepare athletes for games
- Call plays and make decisions about strategy and player substitutions during games
- Plan and direct physical conditioning programs that enable athletes to achieve maximum performance
- Instruct athletes on proper techniques, game strategies, sportsmanship, and the rules of the sport
- Keep records of athletes' and opponents' performance
- Identify and recruit potential athletes; arrange for and offer incentives to prospective players

* * * *

Coaches teach professional and amateur athletes the fundamental skills of individual and team sports. They hold training and practice sessions to improve the athletes' form, technique, skills, and stamina. Along with refining athletes' individual skills, coaches also are responsible for instilling in their players the importance of good sportsmanship, a competitive spirit, and teamwork.

Many coaches evaluate their opponents to determine game strategies and to establish specific plays to practice. During competition, coaches may call specific plays intended to surprise or overpower the opponent, and they may substitute players for optimum team chemistry and success.

Many high school coaches are primarily teachers of academic subjects who supplement their income by coaching part time. For more information, see the profile on high school teachers.

Coaches who work with athletes in individual sports are often called sports instructors rather than coaches.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Coaches and Scouts," <http://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm#tab-2> (last visited May 8, 2013).

The *Handbook* describes the educational requirements of coach positions as follows:

How to Become a Coach or Scout

Coaches and scouts must have immense knowledge of the game, which they usually get through their own experiences playing the sport at some level. Although some jobs require a bachelor's degree, some entry-level coaching positions require only experience as an athlete or competitor in the sport. Scouting jobs often require experience playing a sport at the college or professional level, which makes it possible to locate young talent.

Education and Training

Although there is no 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 are sometimes required, to hire teachers to take on these part-time jobs. If no suitable teacher is found, schools hire a qualified candidate from outside the school.

College coaches must usually 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 from participating in the sport or activity.

Scouting jobs often require experience playing a sport at the college or professional level. This familiarity makes it possible to spot young players who have exceptional athletic ability and skills.

Most scouts begin working as part-time talent spotters in a particular area or region.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2012-13 ed., "Coaches and Scouts," <http://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm#tab-4> (last visited May 8, 2013).

The *Handbook* does not state that a baccalaureate (or higher degree) in a specific specialty, or its equivalent, is normally the minimum requirement for entry into this occupation. The *Handbook* indicates that *some* individual coaching positions require a bachelor's degree, including most such positions at colleges. That *some* such positions require a bachelor's degree is not an indication that a bachelor's or higher degree is normally the minimum requirement for entry into coaching positions, especially in positions that are not at colleges.

Further, although the *Handbook* states that coaches at the college level must usually have a bachelor's degree, it does not indicate that such positions require a bachelor's degree *in a specific specialty*.

The *Handbook* does not indicate that coaching positions, at any level of any sport, normally require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, the AAO finds that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge of physical conditioning and gymnastics, but do not establish any particular level of formal, post-secondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 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 calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, 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 determining whether there is a common degree requirement, factors often considered by USCIS 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook*, or any other authoritative, objective, and reliable resource, reports a standard industry-wide requirement of at least a bachelor's degree in a specific specialty or its equivalent. Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

As noted above, in support of its assertion that the degree requirement is common to the petitioner's industry in parallel positions among similar organizations, the petitioner submitted copies of nine advertisements as evidence that its degree requirement is standard amongst its peer organizations for parallel positions. Those announcements are for positions with the following titles: Personal

Trainer; Athletic Trainer; Athletics, PBA (Certified Athletic Trainer); Asst. Personal Fitness/Asst. Athletic Trainer; Athletic Trainer, Faculty Member; and Adjunct Athletic Trainer. The advertisements establish at best that a bachelor's degree is generally required for most of the positions posted, but a bachelor's degree or the equivalent in a *specific specialty* is not.

One of those positions is with an athletic club. One position is with a health care company and one is with a medical center. Others are with the

Another is with an unidentified private university in New York. The AAO notes that for the petitioner to establish that another organization is similar to the petitioner, it must demonstrate that the petitioner and the other organization share the same general characteristics. Such factors may include the nature or type of organization, and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing, to list just a few elements that may be considered. Only the position with the athletic club might possibly be characterized, given more information, as a position with a company in the petitioner's industry and otherwise similar to the petitioner.

Although each of those vacancy announcements contains some description of the duties of the positions offered, none is sufficiently detailed and sufficiently similar to the description of the duties of the proffered position that they could be found to be positions parallel to the proffered position.

Another vacancy announcement states, "Master's degree . . . preferred." That a master's degree is preferred does not indicate that a master's degree, or even a bachelor's degree, is required. Further, that announcement contains no suggestion that the degree, even if it were required, must be in a specific specialty. That announcement does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

Another vacancy announcement states, "A bachelor's degree in an appropriate discipline or equivalent combination of education and experience . . . is required." It does not indicate what degree subjects would be considered acceptable or what combination of education and experience would be considered, by the hiring authority, to be equivalent to such a degree. It does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

One vacancy announcement states that it requires a bachelor's degree in athletic training. Another announcement states that it requires, "[an] Entry level Degree in Athletic Training (BS or MS)." Another states that the position it announces requires "[a] Bachelor's degree in Athletic Training." Yet, another states that it requires a master's degree in athletic training. Those vacancy announcements appear to state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent. However, none of the advertising organizations has been shown to be similar to the petitioner.

One announcement appears to require either a bachelor's degree in athletic training or a bachelor's degree in physical education. The record contains no evidence that those two subjects are so closely

related that they should be deemed to constitute a specific specialty. Furthermore, the advertising organization has not been shown to be similar to the petitioner.

The final announcement states that it requires a bachelor's degree, but not that the degree must be in any specific specialty. That vacancy announcement does not state a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent.

In summary, none of the vacancy announcements provided have been shown to be for a parallel position within a similar organization in the petitioner's industry, and to require a minimum of a bachelor's degree in a specific specialty or its equivalent.

Further, even if all of the vacancy announcements unequivocally indicated a bachelor's degree or the equivalent in a specific specialty to be a prerequisite for the vacancies they announce, the petitioner has failed to demonstrate what statistically valid inferences, if any, can be drawn from nine announcements with regard to the common educational requirements for entry into parallel positions in similar organizations.³

As the vacancy announcements provided do not establish that the petitioner has satisfied the requirement of the first alternative prong of 8 C.F.R. 214.2(h)(4)(iii)(A)(2), further analysis of the specific information contained in each of the vacancy announcements is unnecessary. That is, not every deficiency of every vacancy announcement has been addressed.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or its equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

³ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from nine job postings with regard to determining the common educational requirements for entry into parallel positions in gymnastics clubs or similar organizations. *See generally* Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of athletic trainer or coach for a gymnastics club or similar enterprise in the sports industry required a bachelor's or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that may have been consciously selected could credibly refute the findings of the *Handbook* published by the Bureau of Labor Statistics that such a position may not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner establishes that the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree in a specific specialty or its equivalent.

The record contains no evidence that would differentiate the work of the proffered position from the work of coaching positions in general. The description of the proffered position in the petitioner's president's June 9, 2011 letter states that the beneficiary would work with head coaches to plan strength and flexibility workouts, and would train athletes in vaulting, tumbling, strength, endurance, and flexibility. Those appear to be functions common to gymnastics coaching positions in general, and have not been shown to be more complex or unique than the duties of other coach positions, some of which, the *Handbook* indicates, do not require a minimum of a bachelor's degree in a specific specialty or its equivalent.

The description of the duties of the proffered position does not specifically identify any tasks that are so complex or unique that only a specifically degreed individual could perform them. Additionally, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties counsel claims are so complex or unique. While some related courses may be beneficial in performing some of the proposed duties, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position. The record lacks sufficiently detailed information to distinguish the proffered position as more complex or unique from other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Thus, the petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is satisfied if the petitioner demonstrates that it normally requires a degree or its equivalent for the position.⁴ In the August 22, 2011 RFE, the service center requested that the petitioner submit evidence to establish that it has a past practice of hiring people with a minimum of a bachelor's degree in a specific

⁴ While a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in a specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F. 3d at 387. In other words, if a petitioner's degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty occupation. *See* § 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii) (defining the term "specialty occupation").

specialty or its equivalent to fill the proffered position. More specifically, that RFE requested that the petitioner:

Indicate the number of persons employed in similar positions. Further, submit documentation to establish how many of those persons have a baccalaureate degree or higher and the particular field of study in which the degree was attained. Documentation should include copies of transcripts and pay records or Quarterly Wage Reports for the employees claimed to hold a baccalaureate degree in the specific field of study.

In her October 3, 2011 letter submitted in response to the RFE, counsel stated:

Past Employment Practices: While there are a number of employees with the minimum of a bachelor's degree or higher employed by the petitioner, there is only one other employee performing similar duties with a bachelor's degree in the specific specialty:

[REDACTED] – Bachelor of Sports Science, [REDACTED]
[REDACTED] Attached please find a copy of the petitioner's quarterly wage reports which includes Ms. [REDACTED]'s information.

Although the RFE specifically requested documentation, to include transcripts, pertinent to the education of anyone who worked in the proffered position for the petitioner, no such evidence was provided pertinent to [REDACTED] whom counsel stated is the only person working for the petitioner who is performing duties similar to those of the proffered position. As the record contains no evidence pertinent to the educational qualifications of anyone who has worked for the petitioner in the proffered position, the petitioner has not provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁵

Finally, the AAO will address the alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner establishes that the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty or its equivalent.

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. Developing and implementing flexibility and strength training sessions, preparing the team members for practice and competition by taping and bandaging, overseeing the team warm-up and flexibility training, overseeing maintenance of athletic equipment, operating and maintaining a treatment area, ordering and maintaining inventory for sports medicine

⁵ The AAO observes that counsel's assertion that [REDACTED] has a bachelor's degree is not 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).

supplies, and keeping injury records, and working with physicians to rehabilitate team members after injury or surgery, contain no indication of a nature so specialized and complex that they require knowledge usually associated with attainment of a minimum of a bachelor's degree in a specific specialty or its equivalent.

In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of coaching positions that are not usually associated with at least a bachelor's degree in a specific specialty or its equivalent. Therefore, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

The remaining issue upon which the decision of denial was based is the director's finding that the petitioner has not demonstrated that the beneficiary is qualified to work in the proffered position. Specifically, the director found that the petitioner has not demonstrated that the beneficiary has the license required for the proffered position or that the beneficiary is exempt from licensure.

Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." The regulations on the licensure requirements for H-1B and other H nonimmigrant classifications are at 8 C.F.R. §§ 214.2(h)(4)(v)(A) – (E).

Pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license "prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation."

In the August 22, 2011 RFE, the service center stated:

According to [the *Handbook*] an athletic trainer is required to be licensed or hold some form of registration. Submit a copy of the beneficiary's athletic trainer's license or hold some form of registration. [sic] If the beneficiary is not in the possession of a permanent unrestricted license, submit a temporary license, interim permit or other authorization issued by the agency that authorizes the beneficiary to practice the profession. If the petitioner contends that the beneficiary is exempt from the usual licensing requirements, provide a letter from the appropriate State Licensing agency attesting to the beneficiary's exemption.

If the state where the beneficiary will work allows an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation, provide evidence of such and a copy of the senior or supervisor's license to practice as a member of the profession.

As noted above, the petitioner and counsel did not address this issue in response to the RFE. Further, the petitioner and counsel failed to provide the evidence requested pertinent to this issue.

In the decision of denial, the director found that the petitioner failed to demonstrate that the beneficiary has the license required for practice in the proffered position, or to demonstrate that the beneficiary is exempt from licensure. On appeal, counsel stated:

Attached as Exhibit H is an attestation by Petitioner in relation to licensure requirement noted in the denial decision as another basis for denial. At no point prior to the issuance of the denial decision was Petitioner given an opportunity to address the licensure issue. Indeed, because Petitioner submitted documentation evidencing that it met three of the four listed criteria [of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)] proving that the proffered position is a specialty occupation requiring the minimum of a bachelor's degree, there had been no need for Petitioner to even address whether or not the Beneficiary possessed the appropriate license or was exempt from licensure. As attested to by Petitioner, it has, in fact, never required licensure for its Trainers and the Beneficiary does not possess a license.

The AAO observes that, although the petitioner claimed, on the LCA and elsewhere, that the proffered position corresponds to a 29-9091.00 Athletic Trainer position, the evidence submitted does not support that assertion, and the AAO has not found the proffered position to be such an athletic trainer position. Given that it has not been found to be such a position, the petitioner is not obliged to show that the beneficiary is licensed to work as an athletic trainer. That portion of the decision of denial is withdrawn.

However, the failure of the petitioner to demonstrate that the proffered position qualifies as an athletic trainer position raises an issue that was not addressed in the decision of denial.⁶

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(I) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

⁶ If the petitioner were to prevail on the issue of the proffered position being an athletic trainer position, then the petitioner would, of course, be obliged to demonstrate either that the beneficiary has the requisite license or that no license is required.

While the U.S. Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

The LCA submitted is certified for an athletic trainer position. The proffered position, however, has not been shown to be an athletic trainer position. As such, the evidence does not show that the LCA submitted corresponds to the visa petition. The visa petition must be denied for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.