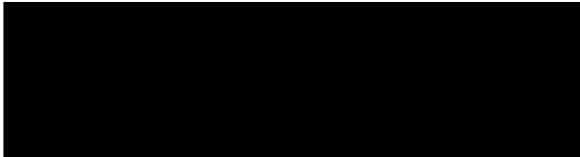


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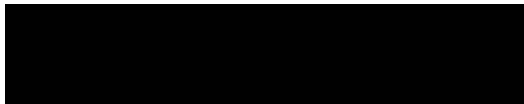
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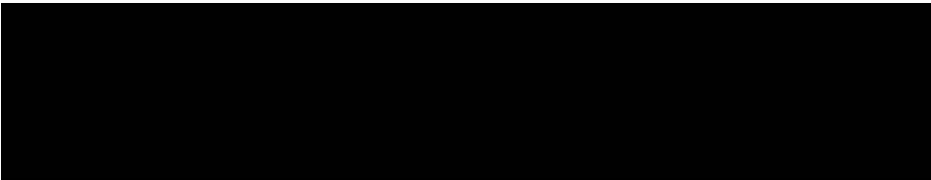
FILE: SRC 04 230 50924 Office: TEXAS SERVICE CENTER Date: **OCT 27 2008**

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a tennis coaching facility that seeks to employ the beneficiary as a tutor. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or

- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

According to counsel’s December 6, 2004 response to the director’s request for additional evidence, the petitioner has partnered with a local private school to create a program to allow exceptional and motivated students to leave school early so as to pursue their serious commitment to tennis. Counsel stated the following:

It is not unusual for the more dedicated players to have a modified or non-traditional school schedule which requires them to conduct their studies during non-school hours. [The petitioner] is dedicated to providing these students not only with top-notch training, but an opportunity to excel in their education as well. To that end, [the petitioner] plans to hire an in-house tutor to become competitive with other programs while serving students’ needs.

[The petitioner] also provides private lessons to players [in] the Men’s Tennis Program at Texas A&M University—Corpus Christi. While providing educational instruction or tutoring is not part of the University’s program, [the petitioner] has an interest in making sure these students succeed. Many of the students will continue on with their tennis career after college. However, if they do not maintain a certain grade-point average, they will not be able to remain in the tennis program and this could detrimentally affect their tennis career.

Having an on-site tutor would be a tremendous asset, would help further [the petitioner’s] reputation as a professional tennis training facility[,] and would help draw some of the younger junior players that they are seeking to interest.

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

Counsel contends that the duties of the proposed position are analogous to those of teachers, and submits information from the *Handbook* and the DOL’s *Dictionary of Occupational Titles (DOT)* and *Standard Occupational Classification (SOC)* regarding the duties and educational requirements for such positions.

However, the AAO does not agree with counsel’s characterization of the duties of the proposed position. The beneficiary would not work in a classroom, and there is no evidence that she would introduce her own subject material. Rather, she would tutor the petitioner’s tennis students in academic subjects,

providing individual attention in order to reinforce the concepts and subjects introduced by their teachers at school.

According to the *Handbook*, at page 219, teacher assistants tutor and assist children in learning class materials using teachers' plans, providing students with individualized attention. They provide instructional reinforcement through such tutoring and work with students individually or in small groups.

While many duties typically performed by teacher assistants, such as recording grades and keeping attendance records, are not part of the duties of the proposed position, the AAO finds that the *Handbook's* discussion of the tutoring functions of a teacher assistant's duties are generally descriptive of the duties of the position proposed here.<sup>1</sup>

In its discussion of the educational requirements for teacher assistants, the *Handbook* offers the following information:

Educational requirements for teacher assistants vary by State or school district and range from a high school diploma to some college training. . . .

A number of 2-year and community colleges offer associate degree or certificate programs that prepare graduates to work as teacher assistants. However, most teacher assistants receive on-the-job training. Those who tutor and review lessons with students must have a thorough understanding of class materials and instructional methods, and should be familiar with the organization and operation of a school.

As such, the *Handbook* explains unequivocally that a bachelor's degree is not the normal minimum requirement for entry into the proposed position. The *Handbook's* findings do not support counsel's contention that a bachelor's degree is required for entry.

The AAO does not find persuasive the information cited by counsel from the *DOT* and *SOC*. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Its assessment (the SVP rating) is meant only to indicate the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and does not specify the particular type of degree, if any, that a position would require. For the same reason, the information from the *SOC* is unpersuasive as well. Accordingly, the AAO accords no weight to this information.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings

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<sup>1</sup> While not determinative, the proposed salary of \$7 per hour supports the AAO's conclusion that the proposed position is more analogous to a teacher assistant than to a teacher.

submitted by the petitioner, which counsel contends establish the petitioner's degree requirement as the normal minimum entry into the position. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

First, counsel has submitted no evidence to demonstrate that any of these job postings are from companies similar to the petitioner, a tennis coaching facility with an unspecified enrollment, number of employees, and annual income. There is no evidence that the advertisers are similar to the petitioner in size and scope of operations, business efforts, and expenditures. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel submits no information regarding the business operations of the Rainbow Rehabilitation Centers, Inc., Partners in Achievement, or the Huntington Learning Center, and it does not appear as though they are tennis coaching facilities from their advertisements. Pankl Aerospace Systems manufactures engineered aerospace and military components for helicopters and fixed-wing aircraft. Club Z In-Home Tutoring, XPE Incorporated, the Sylvan Learning Centers, McCully's Educational Resource Center, Tutoring Club, the Reading & Language Arts Center, Score at the Top Learning Centers, Professional Tutors of America, and the unnamed company advertising its vacancy through Academic Careers Online are all tutoring companies. None of these advertisers require a degree in a specific specialty, as is required in order to establish the position as a specialty occupation.

No information was submitted regarding the unnamed company in Austin, Texas advertising for a tutor, or the unnamed company advertising its vacancy through the Texas Workforce Commission.

Although information was submitted that the IMG Academies, the Graziano Tennis Academy, the International Tennis Academy USA, Inc., the Heritage Academy, the Weil Tennis Academy, and the East Palo Alto Tennis Program offer tutoring for their students, counsel submitted no evidence to document that any of those organizations require their tutors to possess degrees. Nor has any evidence been submitted to demonstrate that, although these organizations are tennis facilities, they are similar to the petitioner in size and scope of operations, annual expenditures, staff credentials, etc. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Thus, while relevant to this proceeding, these job postings submitted by the counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish the proposed position as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the teacher assistant position described in the *Handbook*.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

However, no such evidence has been presented, and counsel concedes that this is a newly-created position. Accordingly, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) cannot be satisfied.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty occupation. A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of teacher assistants, who normally provide tutoring services to students, and who are not normally required to possess at least a bachelor's degree, or its equivalent, in a specific field.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied.

The petition may not be approved for an additional reason. Beyond the decision of the director, the AAO has determined that the record, as presently constituted, does not establish that the beneficiary qualifies to perform the duties of a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above, which

requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The first criterion requires a showing that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary earned her degree abroad, so she does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university. However, no evidence has been submitted to satisfy this criterion. Although the director specifically requested an evaluation of any foreign education in her November 9, 2004 request for additional evidence, no evaluation was submitted.

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so she does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education,

specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as no evaluation has been submitted.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) as, again, no evaluation has been submitted.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>2</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country;  
or

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<sup>2</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).



- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The beneficiary's resume traces her work history from 1990 through August 26, 2004,<sup>3</sup> the date the petition was filed. The AAO's next line of inquiry is therefore to determine whether at least twelve years of this work experience included the theoretical and practical application of specialized knowledge required by the specialty, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in the specialty, and whether the beneficiary achieved recognition of expertise in a specialty as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The record contains no evidence to establish that the beneficiary's previous work experience included the theoretical and practical application of specialty knowledge required by the specialty, that it was gained while working with peers, supervisors, or subordinates who held degrees, or that she achieved recognition of expertise in the specialty as described at section (v) of 8 C.F.R. § 214.2(h)(iv)(D)(5).

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation or that the beneficiary qualifies to perform the duties of a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

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<sup>3</sup> Although this is a fourteen-year period, the AAO notes that the beneficiary also earned a high school diploma and college degree during this time. It is therefore unclear whether the employment from 1990 through 1997 was actually full-time employment.