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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUN 18 2013 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 stated that it is a provider of social services to disabled people. To employ the beneficiary in what it designates as a community and social service specialist position, the petitioner endeavors to classify her 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, as the petitioner is not a nonprofit organization related to or affiliated with an institution of higher education, it is not exempt from either (1) the numerical cap on H-1B visa petitions or (2) the ACWIA fee. On appeal, counsel admitted that the visa petition misstates the petitioner's status as a nonprofit organization, but asserted that the petitioner should be permitted to amend the visa petition.

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 Form I-129 is signed by counsel, indicating that he prepared that visa petition. It was accompanied by a Form G-28 Notice of Entry of Appearance, duly executed by the petitioner and counsel, indicating that counsel then represented the petitioner.

Part B of the Form I-129 H-1B Data Collection Supplement pertains to whether a petitioner is exempt from the numerical cap on H-1B visa petitions. At Question 2 of Part B, the petitioner answered "Yes" to the following question:

> Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)?

Part C of that same form pertains to whether a petitioner is exempt from the ACWIA fee. At Question 2 of Part C, counsel checked a box answering "Yes" to the same question. The petitioner thus reiterated its claim that it is a nonprofit related to or affiliated with an institution of higher education.

On April 14, 2011, the service center issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner is a tax exempt nonprofit organization and that it is related to or affiliated with an institution of higher learning.

In response to that RFE, counsel submitted a letter, dated May 25, 2011, in which he stated:

> The [petitioner] is a for-profit corporation. It would appear that there was some confusion in obtaining the information on this point. The undersigned questioned the staff member who obtained the information from the company representative and seemed to believe the answer to her inquiry was that [the petitioner] was a non-profit. The company representative recalls saying they were working on becoming a non-profit, but did not say they had obtained [that status] at the time of preparing the petition. In fact, they are working on becoming a non-profit but have not done so as yet. Ex. A attached also confirms that [the petitioner is] a for-profit company as at 5/23/2011 according to the State of Florida Division of Corporations. We regret the error in completing the form[;] no one noticed it when reviewing before signing. If our client needs to do something further to amend the petition, please advise and it shall be done.

The director denied the petition on September 12, 2011, finding, as was noted above, that the petitioner is not a nonprofit organization or entity related to or affiliated with and institution of higher education and, therefore, is not exempt from the numerical cap on H-1B petitions or the ACWIA fee.[1]

On appeal, counsel reiterated his assertion that the misstatement of the petitioner's status was unintentional. Counsel also stated:

> The error in the petition does not rise any higher in significance than a typographical error, and USCIS should have exercised good customer service by realizing this is a small social service agency with little experience in the nature of corporate law nor the complexities of immigration forms.

As a preliminary matter, it must be noted that counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(h)(2)(i)(E) state in pertinent part:

> The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition.

The request to amend the original petition on appeal is, therefore, rejected. The AAO will now turn to the issue of whether the director erred in denying the petition on the grounds identified, *supra*,

The visa petition in this matter was filed for an employment period to commence on December 1, 2010. The Fiscal Year 2011 (FY11) runs from October 1, 2010 through September 30, 2011. The instant petition is therefore subject to the FY11 H-1B cap, unless exempt. Counsel has withdrawn

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[1] The director's decision was principally based on counsel's subsequent admission that the petitioner is not, in fact, a nonprofit organization as claimed in the H-1B petition.

the assertion he initially made that the visa petition is exempt from the H-1B cap as a nonprofit organization or entity related to or affiliated with an institution of higher education.

On January 27, 2011, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY11 as of the previous day, January 26, 2010.

The service center issued an RFE in this matter on April 14, 2011, stating:

> You indicate that you are exempt from the annual limitation on H-1B visas because you are a nonprofit entity related to or affiliated with an institution of higher education. However, the evidence submitted in support of the petition is insufficient to establish that you qualify as a cap exempt organization.

The service center then accorded the petitioner an opportunity to provide evidence in support of its claim of exemption from the annual cap.

In response, in a letter dated May 25, 2011 and submitted to USCIS on May 26, 2011, counsel admitted, "The [petitioner] is a for-profit corporation," rather than a non-profit, as counsel stated on the Form I-129 visa petition. The record contains no indication that, prior to the receipt of that response, USCIS was aware that the petitioner's status as a non-profit had been misstated on the visa petition.

The regulation at 8 C.F.R § 214.2(h)(8)(ii)(B) states, in pertinent part:

> Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.

The final receipt date in FY11 was January 26, 2011. The determination that the petitioner and its counsel had incorrectly stated the petitioner's status as a non-profit, by which the petitioner was actually found to be subject to the cap, was made on September 12, 2011, a date after the final receipt date for H-1B cap subject petitions filed in FY11. Title 8 C.F.R. § 214.2(h)(8)(ii)(B) makes clear that the instant visa petition must be denied, as (1) the petitioner initially claimed to be exempt from the H-1B cap; and (2) USCIS determined that the petitioner was in fact subject to the numerical limits after the final receipt date for H-1B cap subject petitions filed in FY11. Accordingly, the visa petition must be denied and the appeal will be dismissed on this basis.

With regard to the director's second basis for denial, the regulation at 8 C.F.R § 214.2(h)(19)(i) states that a non-exempt employer: "must include the additional fee required in § 103.7(b)(1) of this chapter, if the petition is filed for . . . [a]n initial grant of H-1B status under section 101(a)(15)(H)(i)(b) of the Act."

The petitioner in the instant case is a non-exempt employer filing under for H-1B status under that section but did not include the additional fee as required by 8 C.F.R. § 214.2(h)(19). The visa petition will also be denied as not accompanied by the required fee.

The record suggests additional issues that were not addressed in the decision of denial but that, nonetheless, also preclude approval of this visa petition.

First, an inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also* 8 C.F.R. § 103.2(b)(1). The appeal will be dismissed and the petition denied for this additional reason.

Further, section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 a particular position 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.

Upon review, the record does not contain any evidence, nor even any assertion, that the proffered position requires a minimum of a bachelor's degree in a specific specialty or its equivalent. While the beneficiary appears to be a highly educated individual, this evidence is irrelevant to establishing that the position in which she would serve requires, as a minimum for entry, a bachelor's or higher degree in a specific specialty directly related to the duties and job responsibilities of that position. Accordingly, the 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 director's decision will be affirmed and the petition will be denied 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.