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

DATE: NOV 2 5 2013 OFFICE: CALIFORNIA SERVICE CENTER FILE:

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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
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 professional accounting corporation that seeks to employ the beneficiary as a financial analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) 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 failed to demonstrate that the beneficiary qualifies for exemption from the Fiscal Year 2013 H-1B cap pursuant to section 214(g)(5)(C) of the Act, 8 U.S.C. § 1184(g)(5)(C), as one who, in the words of the Act, "has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) . . . ."

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's letter denying the petition; and (5) the Form I-290B and supporting documentation.

The primary issue before the AAO is whether the petitioner has provided sufficient evidence to establish eligibility for the petition to be counted against the "U.S. master's or higher" cap. Based upon a complete review of the record of proceeding, the AAO agrees with the director and finds that the evidence fails to establish that the petition is eligible for the "U.S. master's or higher" cap.

Section 214(g) of the Act provides in pertinent part the following:

> (1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-
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> (A) under section 101(a)(15)(H)(i)(b), may not exceed---
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> * * *
>
> (vii) 65,000 in each succeeding fiscal year. . . .

In general, section 214(g)(5) of the Act provides that:

> The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who---

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Pursuant to section 101(a) of the Higher Education Act of 1965, the term "institution of higher education" is defined as follows:

> [A]n educational institution in any State that--
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> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate; or persons who meet the requirements of section 1091(d) of this title;
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> (2) is legally authorized within such State to provide a program of education beyond secondary education;
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> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
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> (4) is a public or other nonprofit institution; and
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> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Thus, section 214(g)(5)(C) of the Act indicates that the general H-1B cap does not apply to a nonimmigrant alien that holds a master's degree or higher from a **United States** institution of higher education meeting the five criteria delineated in section 101(a) of the Higher Education Act of 1965, as described above.

The petitioner filed the Form I-129 on June 8, 2012. The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter, "H-1B Supplement"), at Part C, Numerical Limitation Information, reads as follows:

> 1. Specify how this petition should be counted against the H-1B numerical limitation (a.k.a. the H-1B "Cap"). *(Check one):*
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> ☐ a. CAP H-1B Bachelor's Degree
> ☐ b. CAP H-1B U.S. Master's Degree or Higher
> ☐ c. CAP H-1B1 Chile/Singapore
> ☐ d. CAP Exempt

In this matter, by requesting an employment start date of October 1, 2012, the instant petition is subject to the Fiscal Year 2013 (FY 2013) limitation on H-1B beneficiaries. While a regular H-1B cap number was still available at the time the instant petition was filed, the petitioner checked box b at Part C, question 1, indicating that the beneficiary has a U.S. master's degree or higher, and thereby claimed an exemption from the numerical limitation contained in section 214(g)(1)(A)(vii) of the Act pursuant to section 214(g)(5)(C) of the Act.

The numerical limitation for the "advanced degree" cap exemption was reached on June 7, 2012. *See* "USCIS Reaches Fiscal Year 2013 H-1B Cap," available on the USCIS Internet site at http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ee9f3f93131e7310VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Nov. 20, 2013). For fiscal year 2013, Congress provided that 65,000 H-1B numbers will be available for visas issued or status provided. *See* section 214(g)(1)(A) of the Act. The regular statutory cap of 65,000 was reached on June 11, 2012, three days after the instant petition was filed. *Id.*

Under Part C, question 2, the petitioner indicated that the beneficiary was awarded a "MASTERS IN BUSINESS ADMINISTRATION" on January 1, 2009, from [redacted] located in [redacted] California. The petitioner further claimed in its May 30, 2012 letter of support that the beneficiary also holds a "Mater [sic] of Science" degree from [redacted] The petitioner also submitted copies of the beneficiary's transcripts for both degrees as well as a copy of his diploma granting him a master's degree in business administration.

The director found the initial evidence insufficient to establish eligibility under the U.S. master's degree or higher cap, and issued an RFE on January 2, 2013. The petitioner was asked to submit, *inter alia*, probative evidence that [redacted] qualified as an institution of higher education as defined in 20 U.S.C. § 1001(a).

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[1] The petitioner submitted a copy of a transcript indicating the beneficiary graduated from [redacted] with a Master of Science in Computer Science degree on September 5, 2011.

In response, the petitioner submitted numerous documents, including (1) copies of its federal tax returns, (2) a company profile, (3) an organizational chart, (4) a letter from the Accrediting Council for Independent Colleges and Schools (ACICS), (5) copies of the beneficiary's educational credentials and evaluation reports, (6) proof of tuition payments, (7) copies of his student ID and bus pass, (8) copy of course catalog and handbook; and (9) copies of SEVIS I-20 forms.

The director denied the petition on April 8, 2013. In that decision, the director found that the beneficiary's Master's degrees from failed to satisfy section 214(g)(5)(C) of the Act because they were not issued by a U.S. institution as defined in 20 U.S.C. 1001(a).[2]

In the instant case, the petitioner has represented that the beneficiary holds two degrees from The petitioner asserts on appeal that the beneficiary's degrees satisfy the applicable criteria in this matter because has been approved by USCIS "under the Foreign Student's F-1 program."

The language of section 214(g)(5)(C) of the Act, however, is not concerned with the F-1 visa program; rather, it clearly states that an institution of higher education under this section must be accredited by a nationally recognized accrediting agency or be granted preaccreditation status by such as agency. The petitioner has not provided any evidence to establish that meets the five criteria delineated in section 101(a) of the Higher Education Act of 1965 to be properly considered a "United States institution of higher education." To the contrary, the letter that the petitioner submits from ACICS dated July 20, 2012 simply states that the university is "eligible to continue with the application process." As correctly noted by the director, there is no indication that the university has been granted preaccreditation or that an application for accreditation has even been filed.

Further, Page 6 of the university handbook submitted in response to the RFE clearly indicates that the university is a "for-profit corporation registered with the California Secretary of State . . . ," which directly contradicts the provision requiring the qualifying institute of higher education to be "a public or other nonprofit institution." The AAO thus finds that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap. Accordingly, the director's denial of the petition will not be disturbed.

Having made that determination, the AAO turns next to the petitioner's alternate argument that the petition should not have been adjudicated as a cap-exempt case since it was filed before the Fiscal Year 2013 numerical cap was reached in spite of the fact that the petitioner sought such exemption on the Form I-129. According to counsel, the director possessed evidence that the beneficiary

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[2] The AAO notes that section 101(a)(5) of the Higher Education Act of 1965, 20 U.S.C. § 1001(a)(5), specifically states that "[f]or purposes of this chapter . . . the term 'institution of higher education' means an educational institution in any State that . . . is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association. . . ."

qualified for an H-B visa, on the basis of his undergraduate education, prior to the date on which the cap was reached, and asserts that the fact that the petition was not adjudicated until after the cap closed should not prejudice the petitioner or the beneficiary.

The AAO disagrees. The Code of Federal Regulations at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads in pertinent part as follows:

> When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, [U.S. Citizenship and Immigration Services (USCIS)] will make numbers available to petitions in the order in which the petitions are filed . . . . Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. 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 . . . .

As noted above, 8 C.F.R. § 214.2(h)(8)(ii)(B) provides that "[p]etitions 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 . . . ." The actual determination date for the beneficiary's ineligibility for this claimed U.S. master's or higher degree exemption is the date of this decision.[3] Consequently, as the AAO is hereby determining that the petition is not exempt from the standard 65,000 numerical limitation and as a regular FY 2013 cap number is no longer available to be assigned to the beneficiary, the petition must be denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B).[4]

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[3] For the sake of argument, even if the determination should have been made by the director, as the director issued the service center decision on April 8, 2013, any determination relative to the H-1B cap exemption would still have been made after the final receipt date of regular cap-subject H-1B petitions. In other words, the April 8, 2013 decision is the earliest date that USCIS would have determined that the petition was not exempt from the numerical limitation contained in section 214(g)(1)(A) of the Act.

[4] It is recognized that the petitioner filed the instant petition claiming the U.S. master's or higher H-1B cap exemption one day after that exemption's final receipt date of June 7, 2012. There is no evidence in the record, however, to support a finding that the instant petition was receipted by USCIS as a regular H-1B filing and assigned one of the 65,000 visa numbers then still available for FY 2013 filings. Based on the date the final receipt dates were announced, i.e., June 12, 2012, it appears instead that the instant petition was receipted as a U.S. master's or higher H-1B cap exempt filing as requested by the petitioner and assigned one of the 20,000 visa numbers permitted for FY 2013. Accordingly, as it was more likely than not receipted as a FY 2013 U.S. master's or higher cap filing and as a determination that the beneficiary was ineligible for the exemption claimed was made after June 11, 2012, the petition must be denied as there are no remaining FY 2013 H-1B visa numbers available to be assigned to the beneficiary.

Accordingly, the appeal will be dismissed and the petition will be denied on this basis.

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
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> (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;
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> (*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;
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> (*3*) The employer normally requires a degree or its equivalent for the position; or
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> (*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 sufficient evidence that the proffered position of financial analyst requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation . . . ." Furthermore, there must be sufficient, corroborating evidence in the record that demonstrates not only actual, non-speculative employment for the beneficiary, but also enough details and specificity to establish that the work the beneficiary will perform for the petitioner will more likely than not be in a specialty occupation. While the petitioner claims that the beneficiary will perform the duties of a financial analyst and submitted print-outs from its website and a brochure advertising a variety of financial services, the petitioner did not submit any corroborating evidence relevant to the claimed duties of the proffered position. Given the lack of detail and corroborating evidence, the AAO cannot determine that the proffered position substantially reflects the duties of financial analyst. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is

seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1) and 103.2(b)(12). The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the petitioner has failed to present sufficient, credible evidence of the actual job duties the beneficiary will perform, it has therefore failed to demonstrate that the occupation more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. *See* INA § 214(i)(1). The petitioner also has not shown through submission of documentary evidence, that it meets any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Rather, while the petitioner claims that it requires a financial analyst and that it requires a bachelor's degree in either "accounting, commerce, finance, or other such field, with reasonable knowledge of computer applications and relevant training," it has not credibly shown that the work requires such a degree. Thus, the petitioner has not met its burden of proof in this regard, 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.

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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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