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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: **AUG 18 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

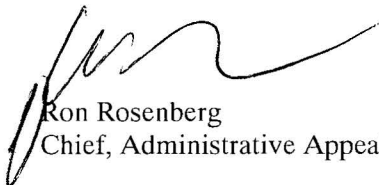
SELF-REPRESENTED

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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on January 20, 2009. On the Form I-129 visa petition, the petitioner describes itself as a youth and sports education nonprofit organization established in 1984. In order to employ the beneficiary in what it designates as a grants administrator position, the petitioner seeks 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on April 6, 2009, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. On appeal, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that it satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. The numerical limitation does not apply to a nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "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," or "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization." Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000).

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On April 8, 2008 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 FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009.

The petitioner filed the Form I-129 on January 20, 2009 and requested a starting employment date of January 14, 2009. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2008 and requesting a start date during FY09 must be rejected. However, because the petitioner indicated on the Form I-129 that it is a nonprofit research organization or government research organization, and thus exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director when it was initially received by the service center. The director denied the petition on August 16, 2013 and the decision is now before us on appeal.

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act.

II. FACTUAL AND PROCEDURAL HISTORY

On the Form I-129 H-1B Data Collection Supplement (page 13), the petitioner checked the box for "Yes," in response to the question, "Are you a nonprofit research organization or a governmental research organization, as defined in 8 C.F.R. 214.2(h)(19)(iii)(C)?" for both Part B (Fee Exemption and/or Determination) and Part C (Numerical Limitation Exemption Information).

In its letter of support dated December 15, 2009, the petitioner provided, in part, the following description of its organization:

[The petitioner was] founded in 1984 to provide an array of programs designed to foster positive environments for youth while also creating the vital foundations for successful lives. Organized and operated exclusively for charitable, religious and educational purposes within the meaning of Section 501(c)(3), Internal Revenue Code.

[The petitioner] has been a long standing advocate for youth that are at-risk. Our vision of an organization that would be a safe haven and place of learning; we were founded on the premise that given the opportunity; all youth would have an increased chance of becoming successful in their life endeavors.

In support of the petition, the petitioner provided a Labor Condition Application (LCA); a copy of the petitioner's job posting for the proffered position; the beneficiary's resume; an evaluation of the beneficiary's foreign education; and copies of the beneficiary's foreign diploma and transcript. No evidence regarding the petitioner's nonprofit designation or the petitioner's research programs was provided.

The director found the initial evidence insufficient to establish that the petitioner qualifies as a nonprofit research organization, and issued an RFE on February 9, 2009. The petitioner was asked to submit probative evidence that the petitioner is a nonprofit research organization as defined by 8 C.F.R. § 214.2(h)(19)(iii)(C).

On March 18, 2009, the petitioner responded to the RFE by submitting a letter and additional evidence. Specifically, the petitioner provided a one-page "Solicitation, Offer and Award" document from the U.S. Department of Education, and a letter confirming the petitioner's status as exempt from federal income tax pursuant Internal Revenue Code Section 501(c)(3).²

In the letter provided in response to the RFE, the petitioner stated that it has "one specific division of [the] company dedicated to research on the youth development and survival skills for youth." The petitioner indicated that the "Administering Agency" is the "Department of Education." The petitioner further appeared to report that it "inaugurat[ed]" this "educational research project" in 2003. No additional information regarding the petitioner's research activities was provided.

Although the petitioner requested that the petition be exempt from the H-1B cap and fee requirements, the director determined that the petitioner had "not provided sufficient documentation to show that it is an institution of higher education, an affiliated or related nonprofit entity, or a nonprofit research or governmental research organization." Finding that the petitioner had not established that it was exempt from either the fee or the numerical cap, the director denied the petition on April 6, 2009.

The petitioner subsequently submitted an appeal of the denial of the H-1B petition. In support of the Form I-290B, the petitioner provided a brief and additional evidence. On the Form I-290B, the petitioner states that 8 C.F.R. § 214.2(h)(19)(iii) allows a petitioner "to demonstrate that it is an affiliated or related non profit entity," and that the petitioner "sustained the burden of proof [regarding its] research status." In support of these assertions, the petitioner provided a brief with the following statement:

Pursuant to C.F.R. 214(h)(19)(iii)(B) allows [the petitioner] to demonstrate that it is an affiliated or related nonprofit entity.

Our organization is contracted with the Department of Education to conduct educational research on the development of young (male) adults as it relates to their education in a socially, economically deprived and underserved community.

[The beneficiary], recruited as a Grants Administrator, has other duties to perform indicated by the clause "**and other duties as assigned**" that will be further discuss[ed] herein with. See EXHIBIT "A" Job Description.

² The letter appears to have been issued by the Internal Revenue Service; however, the copy provided is incomplete and the full letterhead, including the name of the organization that issued the letter, is not visible.

We are contracted with Department of Education, , [sic] 550 12th Street, SW 7th Floor, Washington, DC, 20202; "no child left behind", See Exhibit "B", Research Contract.

In light of the professional nature of the employment and need for this services [sic], we request that the appeal be granted.

(Emphasis in original).

In addition to this brief, the petitioner submitted a revised description of the duties of the proffered position; a document entitled "Amendment of Solicitation/Modification of Contract"; and a document that appears to be a partial "question and answer" publication regarding federal Request for Proposals (RFP) ED-05-R-006.

III. LAW AND ANALYSIS

The petitioner claimed on the Form I-129 that it is a "nonprofit research organization or governmental research organization" and thus exempted from the numerical cap and additional fee requirements. The following definition of "nonprofit research organization or governmental research organization" is provided in the regulation at 8 C.F.R. § 214.2(h)(19)(iii)(C):

A nonprofit research organization is an organization primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

The petitioner in the instant matter has not claimed to be an entity of the United States Government. Thus, at issue is whether the petitioner has established that it is a "nonprofit research organization" pursuant to the above definition. In a support letter dated December 15, 2009, the petitioner indicated that it was "founded to provide an array of programs designed to foster positive environments for youth while also creating the vital foundations for successful lives." However, the petitioner did not provide documentation regarding its programs and services. In response to the RFE, the petitioner submitted a one-page "Solicitation, Offer and Award" document from the U.S. Department of Education. This document appears to suggest that the petitioner may have been

awarded a grant or contract by the U.S. Department of Education. On appeal, the petitioner submitted a "question and answer" document that suggests that the grant or contract that the petitioner was possibly awarded may have contained a research component.

The petitioner in this matter bears the burden of proving eligibility for the benefit sought. *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). We carefully examined each piece of evidence in the record; however, from the evidence provided, we are unable to ascertain the specific nature of the petitioner's services. The petitioner did not provide information regarding its programs and activities (such as brochures, newspaper articles, or letters from community members or sponsoring organizations). Nor did the petitioner provide details regarding its contract with the Department of Education to "conduct educational research on the development of young (male) adults as it relates to their education in a socially, economically deprived and underserved community." We note that the "Solicitation, Offer and Award" document indicates that it had an associated 24-page contract and an 11-page work statement; however, neither of these documents was provided to USCIS. Therefore, we are unable to ascertain the nature of the work to be performed under the contract. Further, the petitioner has not submitted evidence to establish what portion of the petitioner's time and resources are dedicated to research activities, and what portion of the petitioner's time and resources are dedicated to other programs and services. From the evidence provided, we are unable to conclude that the petitioner's "*primary mission* is the performance or promotion of basic research and/or applied research" (emphasis added). Therefore, we find that the petitioner has failed to establish that it qualifies as a "nonprofit research institution."³ We thus observe that the instant petition is not exempted from the additional fee or numerical cap for H-1B visas under this portion of the regulations.

On the Form I-290B, the petitioner also indicated that it would "demonstrate that it is an affiliated or related non profit entity." As noted above, section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "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"

³ Additionally, we observe that the petitioner has submitted insufficient evidence to establish that it is a nonprofit entity pursuant to 8 C.F.R. § 214(h)(19)(iv), which defines a nonprofit organization or entity as:

- (A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and
- (B) Has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.

While the petitioner provided a copy of a letter regarding its tax exempt status, the document provided is a partial copy, and does not indicate the name of the organization that issued the document. We decline to speculate as to whether the letter was issued by a competent authority.

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--

- (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;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (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;
- (4) is a public or other nonprofit institution; and
- (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.

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of the American Competitiveness and Workforce Improvement Act of 1998, defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions:

An affiliated or related nonprofit entity. A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

By including the phrase "related or affiliated nonprofit entity" in the language of AC21 without providing further definition or explanation, Congress likely intended for this phrase to be interpreted consistently with the only relevant definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). It is presumed that Congress is aware of USCIS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Reducing the provision to its essential elements, we find that 8 C.F.R. § 214(h)(19)(iii)(B) allows a petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes one or more of the following:

- (1) The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation;
- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.⁴

Upon review of the record of proceeding, the petitioner has not mentioned, or offered any evidence, of a relationship or affiliation with an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965. The petitioner had represented that it is the recipient of a contract from the U.S. Department of Education. However, this connection does not qualify as an affiliation with an institution of higher education as described above. Therefore, we find that the petitioner has not established that it qualifies for an exemption from the additional fee or the H-1B numerical cap as a "related or affiliated nonprofit entity."

The petitioner has not provided sufficient evidence to establish that the instant petition seeks an H-1B visa for a nonimmigrant alien who "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," or "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization." Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000). We thus find that the evidence of record does not establish that the beneficiary is exempt from the H-1B visa cap or additional fee. Accordingly, the director's denial of the petition will not be disturbed.

IV. BEYOND THE DECISION OF THE DIRECTOR

As the instant petition is numerically barred, we need not examine the issue of whether the proffered position qualifies as a specialty occupation under the relevant statutory and regulatory

⁴ This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". The Department of Labor explained in the supplementary information to its ACWIA regulations that it consulted with the former INS on the issue, supporting the conclusion that the definitions were intended to be identical. See 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

guidelines. However, we observe that the proffered position does not appear to qualify as a specialty occupation.

The petitioner's claim that a bachelor's degree in "business administration" is a sufficient minimum requirement for entry into the proffered position is inadequate to establish that the proposed position qualifies as a specialty occupation. Rather, such a claim is tantamount to an admission that the position is not in fact a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. *Cf. Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988).

To demonstrate that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007). For this additional reason, the petition will be denied.

V. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the 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, 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. at 128. Here, that burden has not been met.

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