



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 11 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:

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 submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on March 23, 2009. On the Form I-129 visa petition, the petitioner describes its type of business as "Health Care Recruitment for Hospitals" established in 1973. In order to employ the beneficiary in what it designates as a "Registered Nurse – Pediatric Specialty " position, the petitioner seeks 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on May 11, 2009, finding that its approval was barred by the numerical limitation, or "cap," on H-1B visa petitions. In addition, the director found that the proffered position was not a specialty occupation.

On appeal, counsel for the petitioner asserts that the beneficiary is exempt from the H-1B cap and that the evidence provided is sufficient to show that the proffered position qualifies as a specialty occupation. Counsel submits an eight-page brief in support of these contentions.

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 and supporting documents. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

## 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. 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 March 23, 2009 and requested a starting employment date of May 25, 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, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met the cap exemption criterion at section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), as a

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

beneficiary who, in the words of the Act, "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity." Thus, the petition was adjudicated by the director as a cap exempt case, even though the petition was filed after April 8, 2008. The director denied the petition on May 11, 2009.

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 or that the proffered position qualifies as a specialty occupation.

## II. FACTUAL AND PROCEDURAL BACKGROUND

On the Form I-129 H-1B Data Collection Supplement (page 11), Part C (Numerical Limitation Exemption Information), the petitioner checked the box "Yes" in response to the question, "Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as such institutions of higher education as defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. section 1001(a)?"

In a letter dated March 20, 2009, counsel for the petitioner claimed that the petitioner was a healthcare management and recruitment company that recruits nurses in the Philippines, the UAE, India, Canada and the United States. Specifically, counsel explained that the petitioner "hires the nurses and contracts them to its client hospitals across the United States."

Regarding the proffered position, counsel explained that the petitioner required the services of the beneficiary as a nurse in the Pediatric Critical Care Unit, also referred to as the Pediatric Intensive Care Unit (PICU), at [REDACTED]. Counsel further claimed that [REDACTED] is the primary teaching hospital for the [REDACTED] in [REDACTED] Texas. Counsel concluded by stating that the petition in this matter is cap-exempt because all of the beneficiary's work will be performed at [REDACTED] which she asserts is a cap-exempt institution.

In further support of the petition, the petitioner submitted additional evidence including: (1) a Labor Condition Application (LCA); (2) evidence pertaining to the beneficiary's qualifications, including copies of the beneficiary's nursing license, diploma, transcripts, evaluation of foreign academic credentials, and CGFNS certificate; (3) a copy of an Agreement for Contract Services between the petitioner and [REDACTED] dated June 1, 2004; (4) a copy of the beneficiary's employment contract dated August 9, 2006; (5) a detailed job description for the proffered position, identified as "Clinical Nurse II;" (6) a copy of the Clinical Practices Policy for [REDACTED] (7) a copy of an expert opinion evaluation from [REDACTED], Ph.D.; and (8) a copy of a memorandum from [REDACTED] Executive Associate Commissioner, Office of Field Operations, to Regional Directors, Service Center Directors, Director, Administrative Appeals Office, and Deputy Executive Associate Commissioner, Immigration Services Division, *Guidance on Adjudication of H-1B petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002) (hereinafter referred to as the Williams memo).

On April 2, 2009, the director issued a request for evidence. Specifically, the director noted that the evidence of record was insufficient to establish that the petitioner qualifies for an exemption to the



H-1B cap or that the proffered position was a specialty occupation. The director outlined the evidence to be submitted.

In a response dated April 23, 2009, counsel addressed the director's requests. Included in the response was a copy of a memorandum from [REDACTED] Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Regional Directors and Service Center Directors, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313)*, HQPRD 70/23.12 (June 6, 2006) (hereinafter referred to as the Aytes memo). Counsel referred to the Aytes memo, noting that a beneficiary employed by a for-profit entity and employed at a non-profit entity that is affiliated with an institute of higher education can receive a cap exemption, under the memo, if the beneficiary will perform job duties at the qualifying institution and that there is a logical nexus between the work predominantly performed by the beneficiary and the normal mission of the qualifying entity.

Counsel further claimed that [REDACTED] the proposed worksite of the beneficiary, was affiliated with both the [REDACTED] and the [REDACTED] ). In support of this contention, counsel submitted a copy of an affiliation agreement between [REDACTED] and the [REDACTED] ) of the [REDACTED] on behalf of [REDACTED]. The petitioner also submitted a copy of an Affiliation Agreement between [REDACTED] and [REDACTED], with amendment. Counsel concluded that these documents established eligibility for cap exemption in this matter.

In further support of the petition, counsel resubmitted previously-submitted documents, and submitted additional documentary evidence including a copy of the employment agreement between the petitioner and the beneficiary as well as information about and letters from [REDACTED] and [REDACTED].

On May 11, 2009, the director denied the petition, finding that the evidence of record was insufficient to establish that the petitioner was a nonprofit organization or entity related to or affiliated with an institution of higher education. Specifically, the director found that the evidence of record did not establish that the beneficiary would be directly involved with a cap exempt institution of higher education, specifically stating that the petitioner failed to demonstrate that the beneficiary would be predominantly employed onsite at [REDACTED]. In addition, the director found that the proffered position of registered nurse was not a specialty occupation.

On appeal, counsel for the petitioner contends that the director's interpretation of the petitioner as a third-party employer is inconsistent with the Aytes memorandum. Counsel asserts that the director's findings were erroneous, noting that the petitioner was not obligated to demonstrate that the beneficiary must be predominantly employed onsite at [REDACTED]. Rather, counsel contends that the petitioner was required to show that the place of the beneficiary's employment, in this case [REDACTED] was a qualifying institution. Counsel further asserts that the proffered position is in fact a specialty occupation by virtue of its focus on the area of pediatric nursing.

### III. LAW AND ANALYSIS



### A. H-1B Cap Exemption

The petitioner claimed on the Form I-129 that the beneficiary "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity."

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 . . . ."

For purposes of H-1B cap exemption for an institution of higher education, or a related or affiliated nonprofit entity, the H-1B regulations adopt the definition of institution of higher education set forth in section 101(a) of the Higher Education Act of 1965. Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an 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;
- (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;
- (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.

The governing statute, 8 U.S.C. § 1184(g)(5)(A), contains no definitions for determining if an employer qualifies as a "related or affiliated nonprofit entity" of an institution of higher education under 20 U.S.C. § 1001(a).

As noted by counsel, USCIS provided guidance in the June 2006 memo from [REDACTED]. According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is that found at 8 C.F.R. § 214.2(h)(19)(iii)(B). See Aytes Memo at 4 ("[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities [*sic*] for purposes of exemption from the H-1B cap").

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of ACWIA,<sup>2</sup> 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 the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), 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). As such, we find that USCIS reasonably interpreted AC21 to apply the definition of the phrase found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and we will defer to the Aytes Memo in making our determination on this issue.

The petitioner must, therefore, establish that the beneficiary will be employed "at" an entity that satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act in order for the beneficiary to be exempt from the FY09 H-1B cap. 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.<sup>3</sup>

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<sup>2</sup> Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

<sup>3</sup> This three-part reading is consistent with the Department of Labor's regulation at 20 CFR § 656.40(e)(ii),



Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether the petitioner has established that the beneficiary will be employed at a "nonprofit" entity for purposes of cap-exemption determinations:

*Non-profit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity is:

- (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.

Turning to the director's basis for denial, we find preliminarily that the director's analysis in this matter was flawed. Specifically, we agree with counsel's assertions that the director misinterpreted the guidance set forth in the Aytes memo regarding this issue. We concur that, in this case, the relevant question is whether [REDACTED], the predominant worksite of the beneficiary, is an entity related to or affiliated with an institution of higher education. The director's findings to the contrary regarding this issue are hereby withdrawn.<sup>4</sup>

Nevertheless, while the director's analysis may have been flawed, her ultimate conclusion that the petition was not exempt from the FY09 cap was correct. Upon a complete and thorough review of the record of proceeding, we find that the petitioner has failed to submit sufficient evidence of a relationship to or affiliation with an institution of higher education as that term is defined by section 101(a) of the Higher Education Act of 1965.

In this matter, counsel for the petitioner asserts that the petitioner is H-1B cap exempt under section 214(g)(5)(A) of the Act due to its relation to or affiliation with an institution of higher education. More specifically, counsel claims that the employment of the beneficiary "at" [REDACTED] which it claims is related to or affiliated with [REDACTED] and [REDACTED], qualifies the petitioner to file H-1B cap-exempt petitions.

The issue before us, therefore, is whether [REDACTED] the location at which the beneficiary will be employed, is an entity that satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act.

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which is identical to 8 CFR § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated." The Department of Labor explains in the supplementary information to its American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) regulations that it consulted with the former Immigration and Naturalization Service (INS) on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (December 20, 2000).

<sup>4</sup> The director's error is harmless, since we conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.

## i. Non-Profit Status

One of the first factors to address is whether the petitioner has established that [REDACTED] is a nonprofit entity. We observe that the petitioner has submitted insufficient evidence to establish that [REDACTED] 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.

We note the numerous assertions by counsel throughout the record that [REDACTED] is a nonprofit entity, and note references to this claimed non-profit status in the agreements submitted for consideration. However, the record is devoid of evidence corroborating this claim, such as a letter from the Internal Revenue Service confirming the hospital's tax exempt status. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For this reason alone, the petition must be denied, since the record contains no evidence confirming that the entity "at" which the beneficiary will provide her services is a nonprofit organization as defined at 8 C.F.R. § 214(h)(19)(iv).

Assuming, *arguendo*, that the petitioner had established the tax exempt status of [REDACTED], the petition would still fall short in establishing that [REDACTED] is a related or affiliated nonprofit entity of an institution of higher education.

As noted previously, when determining whether a nonprofit entity is related to or affiliated with an institution of higher education, one of the following must be demonstrated:

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

In order to meet item one, above, shared ownership or control may be demonstrated when it is shown that the same "board" or "federation," such as a board of education or a board of regents, operates both the nonprofit entity and the institution of higher education. When deciding whether a nonprofit entity



is operated by an institution of higher education under item two, above, adjudicators should use the common meaning of the term "operate" defined in *Webster's New College Dictionary*, 3<sup>rd</sup> edition, as "[t]o control or direct the functioning of" or "[t]o conduct the affairs of : MANAGE <operate a firm>." When evaluating whether a nonprofit entity qualifies under item three, above, we will rely on the definitions of member, branch, cooperative, and subsidiary outlined in *Black's Law Dictionary*, Ninth Edition<sup>5</sup>:

Member. One of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization—including the rights of making, debating, and voting on motions—except to the extent that the organization reserves those rights to certain classes of membership.

Branch. An offshoot, lateral extension, or division of an institution.

Cooperative. An organization or enterprise owned by those who use its services.

Subsidiary. A corporation in which a parent corporation has a controlling share.

All four of the above described terms indicate, at a bare minimum, some type of shared ownership or control or both.

ii. [REDACTED] and [REDACTED]

First, we will consider the relationship between [REDACTED] and [REDACTED]. It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the record fails to establish that the entities are affiliated as required by 8 C.F.R. § 214.2(h)(19)(iii)(B).

Turning to the definition of an "affiliated or related nonprofit entity," we must first consider whether the petitioner has established that [REDACTED] is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership by the same board or federation.

The petitioner submitted the above-referenced "Affiliation Agreement" with amendment between [REDACTED] and [REDACTED]. This agreement, despite being titled as an "affiliation" agreement, does not establish an affiliation with or relationship to an institution of higher education as described above.

The affiliation agreement indicates that [REDACTED] donated land for the purpose of constructing [REDACTED], and further demonstrates a very close relationship between the entities. However, it does not establish that they share common ownership or are controlled by the same board.

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<sup>5</sup> In the supplementary information to the interim regulation now found at 8 CFR § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions of the terms." See 63 Fed. Reg. 65658 (November 30, 1998).

Specifically, the agreement between [REDACTED] and [REDACTED] states, in the section entitled "General Provisions," as follows:

By entering into this agreement, [REDACTED] and [REDACTED] do not intend to create, nor shall they be deemed to have created, any partnerships, joint venture, or joint enterprise. [REDACTED] shall not have any right to control the practice of medicine by the clinical faculty or house staff of [REDACTED]. [REDACTED] and [REDACTED] shall retain all jurisdictional powers incident to separate ownership and control including, in the case of [REDACTED], [REDACTED] sole right to determine the eligibility of patients for care, the allocation of beds and [REDACTED] personnel, and the acquisition and utilization of [REDACTED] resources such as operating rooms, special procedures laboratories and clinical equipment (subject to the conditions of the Statute and Warranty Deed).

The petitioner must establish that the same board or federation owns, directs, or otherwise exercises direct control over both the nonprofit entity and the institution of higher education. The section cited above establishes the interdependence of these two entities, and the record contains no other evidence to suggest that they share common ownership or are controlled by the same board. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we must consider whether the petitioner has established that [REDACTED] is a related or affiliated non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. The evidence in the record does not show that an institution of higher education operates [REDACTED] within the common meaning of this term. As discussed above, the relationship that exists between [REDACTED] and [REDACTED] is one between two separately controlled and operated entities. According to the Affiliation Agreement, [REDACTED] and [REDACTED] are not even partners in a joint venture but are, as referred to numerous times in the Affiliation Agreement, "independent entities." Moreover, there is nothing in this agreement granting the petitioner the right to manage the daily activities or functions of [REDACTED]. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we consider whether [REDACTED] is a related or affiliated nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions" of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that [REDACTED], when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. There is no indication whatsoever from the evidence submitted that [REDACTED] is a member, branch, cooperative, or subsidiary of [REDACTED] as those terms are defined above. All four of these terms indicate at a bare minimum some type of shared ownership and/or control, which has not been presented in this matter. *See generally Black's Law Dictionary* (9th Ed. 2009)(defining the terms member, branch, cooperative, and subsidiary).

iii. [REDACTED] and [REDACTED]



Next, we will consider the relationship between [REDACTED] and [REDACTED]. It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the record fails to establish that the entities are affiliated as required by 8 C.F.R. § 214.2(h)(19)(iii)(B).

The petitioner submitted the above-referenced "Affiliation Agreement" between [REDACTED] and [REDACTED]. This agreement, despite being titled as an "affiliation" agreement, does not establish an affiliation with or relationship to an institution of higher education as described above.

Specifically, the agreement between [REDACTED] and [REDACTED] states, in the section entitled "XIII. Independent Contractors," as follows:

Nothing in this Agreement is intended to create nor it be deemed or construed to create any relationship between [REDACTED] and [REDACTED] hereto other than that of independent entities contracting with each other hereunder solely for the purpose of affecting the provisions of this Agreement. Neither [REDACTED] nor [REDACTED] hereto, nor any of their respective officers, directors, Students, or employees shall be construed to be the agent, employee or representative of the other.

Turning to the definition of an "affiliated or related nonprofit entity," we must first consider whether the petitioner has established that [REDACTED] is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership by the same board or federation.

As previously noted, the petitioner must establish that the same board or federation owns, directs, or otherwise exercises direct control over both the nonprofit entity and the institution of higher education. The section cited above establishes the interdependence of these two entities, and the record contains no other evidence to suggest that they share common ownership or are controlled by the same board. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we must consider whether the petitioner has established that [REDACTED] is a related or affiliated non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. The evidence in the record does not show that an institution of higher education operates [REDACTED] within the common meaning of this term. As discussed above, the relationship that exists between [REDACTED] and [REDACTED] is one between two separately controlled and operated entities. According to the Affiliation Agreement, [REDACTED] and [REDACTED] are not to be construed to be the agent, employee or representative of the other but are, as referred to numerous times in the Affiliation Agreement, "independent entities." Moreover, there is nothing in this agreement granting the petitioner the right to manage the daily activities or functions of [REDACTED]. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we consider whether [REDACTED] is a related or affiliated nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions" of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that [REDACTED] when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. There is no indication whatsoever from the evidence submitted that [REDACTED] is a member, branch, cooperative, or subsidiary of [REDACTED] as those terms are defined above. All four of these terms indicate at a bare minimum some type of shared ownership and/or control, which has not been presented in this matter. *See generally Black's Law Dictionary* (9th Ed. 2009)(defining the terms member, branch, cooperative, and subsidiary).

Based on the evidence of record as currently constituted, we cannot find that the beneficiary "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity." Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

#### iv. Jointly Administered Program

The decision of the director appeared to briefly address the issue of whether the beneficiary would be working in a jointly administered program. According to the Aytes Memo, however, the analysis of program participation only occurs when it has been determined that the beneficiary will be employed on-site "at" an institution of higher education or a related or affiliated nonprofit entity by a third party petitioner. In other words, according to the Aytes Memo, the *locus actus*, or place of performance, is paramount in determining whether a petitioner qualifies for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act. For the reasons set forth above, the beneficiary will not be employed on-site "at" either an institution of higher education or a related or affiliated nonprofit entity and, therefore, further analysis of whether the petitioner qualifies for the third-party employer exception discussed in the Aytes Memo is not warranted.

#### B. Specialty Occupation

As the instant petition is numerically barred, we need not examine the issue of whether the proffered position is a specialty occupation under the relevant statutory and regulatory guidelines. However, in the event that the petitioner had established that the instant petition was exempt from the FY09 cap, it still could not be approved because the record fails to establish that the proffered position is a specialty occupation.

To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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



occupation that requires:

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

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty

occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this 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), 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.

We note that, as recognized by the court in *Defensor, supra*, where the work is to be performed for entities other than the petitioner, evidence of the client companies' job requirements is critical. *See Defensor v. Meissner*, 201 F.3d at 387-388. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services. *Id.* at 384. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular work. We note, as a preliminary matter, that the record contains minimal evidence detailing the exact nature of the duties to be performed onsite at [REDACTED] aside from the employment contract between the petitioner and the beneficiary, which states that the beneficiary will work "as a registered nurse" for [REDACTED]; and that she "agrees to perform such duties that are customarily required of registered nurses within the United States."

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner claims that the proffered position is that of a "Registered Nurse – Pediatric



Specialty." The petitioner submitted a description of the proffered position, which indicated in a section entitled "General Summary" that the duties of the position would be as follows:

Performs the functions of a registered nurse in direct patient care. Utilizes the nursing process in the delivery of developmentally appropriate care. Works effectively with members of the health care team in the provision of care to patients and families.

Counsel for the petitioner also asserted that the placement of the beneficiary onsite at [REDACTED] a medical center specializing in pediatric care, required the services of an individual with experience in pediatric nursing. Counsel contended that the beneficiary was qualified for the position by virtue of her foreign academic credentials, deemed equivalent to a bachelor of science (BSN) degree in nursing with a specialization in pediatric nursing. Counsel further contended that experience in critical care and the PICU unit is essential, and claimed that the beneficiary will be required to perform numerous duties that require skills in these areas of care.

USCIS recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.<sup>6</sup> We reviewed the chapter of the *Handbook* entitled "Registered Nurses," including the sections regarding the typical duties and requirements for this occupational category.<sup>7</sup>

### **What Registered Nurses Do**

Registered nurses (RNs) provide and coordinate patient care, educate patients and the public about various health conditions, and provide advice and emotional support to patients and their family members.

### **Duties**

Registered nurses typically do the following:

- Record patients' medical histories and symptoms
- Administer patients' medicines and treatments
- Set up plans for patients' care or contribute to existing plans
- Observe patients and record observations
- Consult with doctors and other healthcare professionals
- Operate and monitor medical equipment

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<sup>6</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. Our references to the *Handbook* are to the 2014 – 2015 edition available online. We hereby incorporate into the record of proceeding the chapter of the *Handbook* regarding "Registered Nurses."

<sup>7</sup> For additional information regarding the occupational category "Registered Nurses," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Registered Nurses, on the Internet at <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-1> (last visited September 2, 2014).

- Help perform diagnostic tests and analyze results
- Teach patients and their families how to manage illnesses or injuries
- Explain what to do at home after treatment

Most registered nurses work as part of a team with physicians and other healthcare specialists. Some registered nurses oversee licensed practical nurses, nursing assistants, and home health aides.

Registered nurses' duties and titles often depend on where they work and the patients they work with. They can focus in the following areas:

- A specific health condition, such as a diabetes management nurse who helps patients with diabetes or an oncology nurse who helps cancer patients
- A specific part of the body, such as a dermatology nurse working with patients who have skin problems
- A specific group of people, such as a geriatric nurse who works with the elderly or a pediatric nurse who works with children and teens
- A specific workplace, such as an emergency or trauma nurse who works in a hospital or stand-alone emergency department or a school nurse working in an elementary, middle, or high school

Some registered nurses combine one or more of these specific areas. For example, a pediatric oncology nurse works with children and teens who have cancer.

Many possibilities for working with specific patient groups exist. The following list includes just a few other examples:

**Addiction nurses** care for patients who need help to overcome addictions to alcohol, drugs, tobacco, and other substances.

**Cardiovascular nurses** care for patients with heart disease and people who have had heart surgery.

**Critical care nurses** work in intensive care units in hospitals, providing care to patients with serious, complex, and acute illnesses and injuries that need very close monitoring and treatment.

**Genetics nurses** provide screening, counseling, and treatment of patients with genetic disorders, such as cystic fibrosis.

**Neonatology nurses** take care of newborn babies.



**Nephrology nurses** care for patients who have kidney-related health issues stemming from diabetes, high blood pressure, substance abuse, or other causes.

**Rehabilitation nurses** care for patients with temporary or permanent disabilities.

Some nurses have jobs in which they do not work directly with patients, but they must still have an active registered nurse license. For example, they may work as nurse educators, healthcare consultants, public policy advisors, researchers, hospital administrators, salespeople for pharmaceutical and medical supply companies, or as medical writers and editors.

Registered nurses may work to promote general health, by educating the public on warning signs and symptoms of disease. They may also run general health screenings or immunization clinics, blood drives, or other outreach programs.

**Clinical nurse specialists (CNSs)** are a type of advanced practice registered nurse (APRN). They provide direct patient care in one of many nursing specialties, such as psychiatric-mental health or pediatrics. CNSs also provide indirect care, by working with other nurses and various other staff to improve the quality of care that patients receive. They often serve in leadership roles and may advise other nursing staff. CNSs also may conduct research and may advocate for certain policies.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., "Registered Nurses," <http://www.bls.gov/ooh/healthcare/registered-nurses.htm#tab-2> (last visited September 2, 2014).

Again, while the record contains minimal details regarding the specific duties to be performed by the beneficiary while assigned at [REDACTED], the record demonstrates that the proffered position is akin to that of a registered nurse as described by the *Handbook*. However, the *Handbook* does not indicate that normally the minimum requirement for entry into these positions is at least a bachelor's degree in a specific specialty, or its equivalent.

The subchapter of the *Handbook* entitled "How to Become a Registered Nurse" states the following about this occupation:

Registered nurses usually take one of three education paths: a bachelor's of science degree in nursing (BSN), an associate's degree in nursing (ADN), or a diploma from an approved nursing program. Registered nurses also must be licensed.

### **Education**

In all nursing education programs, students take courses in anatomy, physiology, microbiology, chemistry, nutrition, psychology and other social and behavioral sciences, as well as in liberal arts. BSN programs typically take 4 years to complete; ADN and diploma programs usually take 2 to 3 years to complete. All

programs also include supervised clinical experience.

Bachelor's degree programs usually include additional education in the physical and social sciences, communication, leadership, and critical thinking. These programs also offer more clinical experience in nonhospital settings. A bachelor's degree or higher is often necessary for administrative positions, research, consulting, and teaching.

Generally, licensed graduates of any of the three types of education programs (bachelor's, associate's, or diploma) qualify for entry-level positions as a staff nurse. However, some employers may require a bachelor's degree.

Many registered nurses with an ADN or diploma choose to go back to school to earn a bachelor's degree through an RN-to-BSN program. There are also master's degree programs in nursing, combined bachelor's and master's programs, and programs for those who wish to enter the nursing profession but hold a bachelor's degree in another field. Some employers offer tuition reimbursement.

Certified nurse specialists (CNSs) must earn a master's degree in nursing. CNSs who conduct research typically need a doctoral degree.

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### **Advancement**

Most registered nurses begin as staff nurses in hospitals or community health settings. With experience, good performance, and continuous education, they can move to other settings or be promoted to positions with more responsibility.

In management, nurses can advance from assistant unit manager or head nurse to more senior-level administrative roles, such as assistant director, director, vice president, and chief of nursing. Increasingly, management-level nursing positions require a graduate degree in nursing or health services administration. Administrative positions require leadership, communication skills, negotiation skills, and good judgment.

Some nurses move into the business side of healthcare. Their nursing expertise and experience on a healthcare team equip them to manage ambulatory, acute, home-based, and chronic care businesses.

Employers—including hospitals, insurance companies, pharmaceutical manufacturers, and managed care organizations, among others—need registered nurses for jobs in health planning and development, marketing, consulting, policy development, and quality assurance.

Some RNs choose to become nurse anesthetists, nurse midwives, or nurse



practitioners, which, along with certified nurse specialists, are types of advanced practice registered nurses (APRNs). APRNs may provide primary and specialty care, and, in most states, they may prescribe medicines. For example, clinical nurse specialists provide direct patient care and expert consultations in one of many nursing specialties, such as psychiatric-mental health.

Other nurses work as postsecondary teachers in colleges and universities.

U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2014-15 ed., Registered Nurses, available on the Internet at <http://www.bls.gov/ooh/Healthcare/Registered-nurses.htm#tab-4> (last visited September 2, 2014).

The *Handbook* does not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry. Rather, it states that there are three general paths for becoming a registered nurse, i.e., a bachelor's degree in nursing, an associate's degree in nursing, or a diploma from an approved nursing program. The *Handbook* states that associate's degrees and diploma programs for this occupation usually take two to three years to complete. The narrative of the *Handbook* indicates that generally, licensed graduates of any of the three types of educational programs (bachelor's, associate's, or diploma) qualify for entry-level positions. It does not conclude that normally the minimum requirement for entry into these positions is at least a bachelor's degree in nursing, or its equivalent.

Although counsel contends that the beneficiary specializes in pediatric nursing and will provide services in the critical care/PICU unit at [REDACTED] there is no requirement that the beneficiary hold a degree in a specific specialty for entry into this occupation. The *Handbook* indicates that it is not uncommon for nurses to elect a specialty in which to work once they have properly trained for the occupation and obtained the required licenses. We are not persuaded, therefore, that the beneficiary's focus in the area of pediatric nursing elevates her position above that of a registered nurse as described in the *Handbook*.

Further, we find that, to the extent that they are described in the record of proceeding, the numerous duties that the petitioner ascribes to the proffered position indicate a need for a range of knowledge in the health care field, but do not establish any particular level of formal, postsecondary education leading to a bachelor's or higher degree in a specific specialty as minimally necessary to attain such knowledge.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, we find that the evidence of record does not satisfy the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively calls for a petitioner to establish that a requirement of a bachelor's or higher degree in a specific specialty, or its equivalent, is common (1)

to the petitioner's industry; and (2) for positions within that industry that are both: (a) parallel to the proffered position, and (b) located in organizations that are similar to the petitioner.

In determining whether there is a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

In the instant case, the evidence of record does not establish that the proffered position falls under an occupational category for which the *Handbook*, or other reliable and authoritative source, indicates that there is a standard, minimum entry requirement of at least a bachelor's degree in a specific specialty or its equivalent.

Also, there are no submissions from professional associations, individuals, or similar firms in the petitioner's industry attesting that individuals employed in positions parallel to the proffered position are routinely required to have a minimum of a bachelor's degree in a specific specialty or its equivalent for entry into those positions.

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

The petitioner also has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." A review of the record indicates that the petitioner has failed to credibly demonstrate that the duties the beneficiary will be responsible for or perform on a day-to-day basis entail such complexity or uniqueness as to constitute a position so complex or unique that it can be performed only by a person with at least a bachelor's degree in a specific specialty.

Specifically, the petitioner failed to demonstrate how the duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform them. For instance, the petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the duties of the proffered position. While a few related courses may be beneficial, or even required, in performing certain duties of the proffered position, the petitioner has failed to demonstrate how an established curriculum of such courses leading to a baccalaureate or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the particular position here.

Therefore, the evidence of record does not establish that this position is significantly different from other positions in the occupation such that it refutes the *Handbook's* information to the effect that



such positions do not, as a category, require bachelor's degrees. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without at least a bachelor's degree in a specific specialty, or its equivalent. As the petitioner fails to demonstrate how the proffered position is so complex or unique relative to other positions within the same occupational category that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Although the petitioner claims to be health care recruiter for hospitals, the record contains no evidence establishing that the petitioner has previously hired individuals for the position proffered herein. The petitioner has not, therefore, provided any evidence for analysis under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).<sup>8</sup>

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

Again, relative specialization and complexity have not been sufficiently developed by the petitioner as an aspect of the proffered position. The duties of the proffered position, which involve direct patient care in a children's medical center, have not been shown to be of a nature so specialized and complex that they require knowledge usually associated with a minimum of a bachelor's degree in a specific specialty or its equivalent. Moreover, the evidence of record does not distinguish the duties of the proffered position from those of other positions within the same occupational category, which, the *Handbook* indicates, do not necessarily require a person with a minimum of a bachelor's degree in a specific specialty or its equivalent for entry.

In other words, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than the duties of registered nursing positions in pediatric hospitals that may not usually be associated with at least a bachelor's degree in a specific specialty or its equivalent.

For the reasons related in the preceding discussion, the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, it cannot be found that

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

the proffered position qualifies as a specialty occupation. The appeal will be dismissed and the petition denied for this reason.

#### IV. BEYOND THE DIRECTOR'S DECISION – SPECULATIVE EMPLOYMENT

We also find that the petitioner has not established that it has specialty occupation work available for the beneficiary for the requested employment period. In that regard, we have reviewed the information in the record regarding the petitioner's healthcare staffing business. Upon review of this information, we find that the record of proceeding lacks documentation to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition. That is, the record does not include sufficient contracts or work orders to confirm that the petitioner has ongoing projects or actual work that the beneficiary will perform to sufficiently substantiate the claim that the petitioner has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

The petitioner submitted an employment contract between the petitioner and the beneficiary, indicating that the beneficiary will be assigned to work as a registered nurse for an initial term of only 30 months. Although the contract indicates that the agreement is renewable upon consent of both parties, the record at the time of filing indicates definitive employment for 30 months, whereas the petitioner has requested approval for the beneficiary for a period of 36 months. Moreover, the agreement further indicates that the beneficiary agrees to work at [REDACTED] "or such other sites as may be agreed to between the parties."

The petitioner has requested approval for the beneficiary from May 25, 2009 through May 25, 2012. [REDACTED] need for the petitioner's (and simultaneously the beneficiary's) services may end prior to May 25, 2012. The record does not include any work product or other documentary evidence to confirm that the petitioner has other ongoing projects to which the beneficiary will be assigned.

Moreover, it should further be noted that the record indicates that the beneficiary will be physically located at [REDACTED] in [REDACTED] Texas. The petitioner is located approximately 650 miles away in [REDACTED] Tennessee, raising the additional issue of who would supervise, control and oversee the beneficiary's work.

The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i)



of the Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

63 Fed. Reg. 30419, 30419 - 30420 (June 4, 1998). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E). In this matter, even if the petitioner had otherwise established eligibility, which it has not, the petition must still be denied for this additional reason.

## 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 we conduct 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.