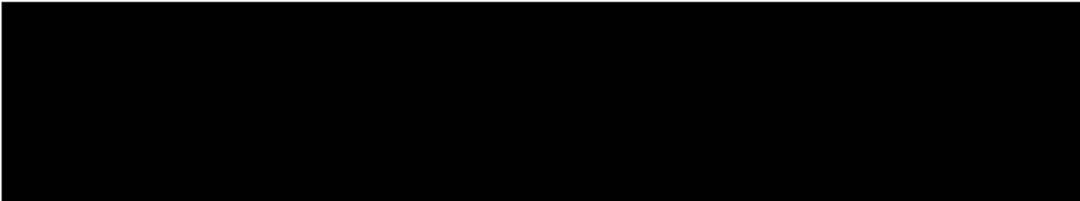




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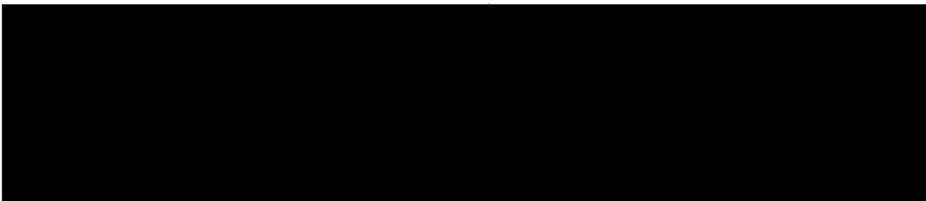
IN RE: Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

*Robert P. Wiemann*  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision is withdrawn and the petition remanded for entry of a new decision.

The petitioner is a private non-profit law enforcement research and solutions organization that seeks to employ the beneficiary as a financial controller. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on August 10, 2005. Although the petitioner filed the Form I-129 petition on December 6, 2005, 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)(B) of the Act, 8 U.S.C. § 1184(g)(5)(A), as a beneficiary who, in the words of the Act, "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization."

The director denied the petition on the ground that the petitioner did not establish that it satisfies the requirement specified in section 214(g)(5)(B) of the Act, 8 U.S.C. § 1184(g)(5)(B), and thus the beneficiary was subject to the annual cap.

On appeal, counsel contends that the petitioner qualifies as an employer within the meaning of section 214(g)(5)(B) of the Act, 8 U.S.C. § 1184(g)(5)(B), by virtue that it is engaged primarily in basic and applied research.

For the reasons discussed below, the AAO finds that the evidence of record establishes that the petitioner is a cap-exempt qualifying employer, that is, an employer within the meaning of section 214(g)(5)(B) of the Act, 8 U.S.C. § 1184(g)(5)(B) as interpreted by Citizenship and Immigration Services (CIS).

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and counsel's brief.

Section 214(g)(5)(B) of the Act, 8 U.S.C. § 1184(g)(5)(B), 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 a nonprofit research organization or a governmental research organization."

CIS has provided guidance in a June 2006 memorandum from Michael Aytes, 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 “Aytes Memo”).

The Aytes Memo observes that the “[c]ongressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations.”

The Aytes Memo states:

Adjudicators should apply the same definitions to determine whether an entity qualifies as a nonprofit research organization or governmental research organization for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(C), the following definitions apply:

A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is 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.

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether an entity is “nonprofit” 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.

The Aytes Memo also provides guidance for determining whether the beneficiary of an H-1B petition filed by a non-qualifying nonprofit entity qualifies for H-1B cap exemption in a situation where the

beneficiary would perform work for, but not be employed by a nonprofit research organization. In pertinent part, the memorandum states:

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain aliens who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.

USCIS will, therefore, allow third party petitioners to claim exemption on behalf of a beneficiary under either section 214(g)(5)(A) or (B), if the alien beneficiary will perform job duties at a qualifying institution that directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research. Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution.

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap. However, qualifying third-party employment can occur in a variety of other ways. USCIS therefore is providing a non-exhaustive list of examples in the AFM to assist adjudicators in determining cap exemption eligibility.

The director did not dispute that the petitioner is a nonprofit entity. The record of proceeding contains a letter from the Internal Revenue Service (IRS) indicating that the petitioner was granted exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code. Because the petitioner is a nonprofit entity as defined at 8 C.F.R. § 214.2(h)(19)(iv), the petition merits further consideration.

The AAO now reviews the record to determine if the petitioner qualifies as a nonprofit research organization. The petitioner described its mission in its support letter, dated November 22, 2005, as

follows:

Established in 1976, [the petitioner], is a non-profit organization providing solutions to law enforcement issues and concerns, as well as to the ever-changing needs of the community. [The petitioner's] goal is to ensure equity in the administration of justice in the provision of public service to all communities, and to serve as the conscience of law enforcement by being committed to justice by action. The organization aggressively pursues its goals by conducting substantive research, speaking out on various issues and performing a variety of outreach activity.

The petitioner also submitted the company's articles of incorporation that states an express purpose of the petitioner is "to conduct research in relevant areas of law enforcement."

Upon review of the record, it does establish that the petitioner is primarily engaged in basic research and/or applied research as outlined in 8 C.F.R. 214.2(h)(19)(iii)(C). As outlined in the Aytes memorandum, the petitioner is primarily engaged in applied research which 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.

Thus, the beneficiary is eligible for a cap exemption under section 214(g)(5)(B) of the Act, 8 U.S.C. § 1184(g)(5)(B).

However, the petition may not be approved at this time as the record, as presently constituted, does not demonstrate that the proposed position qualifies for classification as a specialty occupation, or that the beneficiary qualifies to perform the duties of the specialty occupation.

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

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

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

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which

requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

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

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

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner states that it is seeking to employ the beneficiary to fill the position of financial controller. In the support letter, the petitioner described the proposed duties as the following:

Duties of the position include, but are not limited to: develop policy and procedure to govern the credit and collection activities of [the petitioner]; collect payments due to the company for services rendered; compile and analyze financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions; analysis of financial information detailing assets, liabilities, and capital, and prepare balance sheet, profit & loss statements, and other reports to summarize current and projected company financial position; perform numerous accounting type functions included in the preparation and review of the billing and collection processes; accomplish coding functions necessary for proper data input into the computerized budgetary/accounting system; perform miscellaneous research associated with the accounting functions.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by controllers, i.e., the review and analysis of a business' structure, finances, operations and policies. However, the petitioner's listing of these duties is so generic, so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary would be responsible for developing policy and procedure to govern the credit and collection activities of the petitioner, it offers no indication of what applications of a body of highly specialized knowledge in a related specialty would be required of the beneficiary in completing such an examination and analysis. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them. Accordingly, it finds the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The petitioner did not submit sufficient documentation to evidence that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner has failed to submit any evidence to the record that would serve as proof that the petitioner's degree requirement for the proffered position is common to its industry in parallel positions among similar organizations. Accordingly, the petitioner did not establish that the proposed position qualifies for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a demonstration that the position is so complex or unique that it can only be performed by an individual with a degree. Accordingly, the petitioner has not established its position as a specialty occupation under the second prong of the second criterion.

Although the petitioner asserts that it requires an employee with a bachelor's degree to fill the position of controller, the petitioner did not submit any documentation corroborating this statement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not

established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not established that the proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Upon review of the record, the petitioner did not present any documentation of its past employment practices. In the instant case, the petitioner has submitted no evidence regarding its past recruiting and hiring practices with regard to the proffered position or other similarly situated employees. Accordingly, the evidence of record has not established the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner here specifying a degree requirement for the proffered position is not evidence of its normal recruiting and hiring practices.

Further, while the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or 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. To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In the instant case, the petitioner has not submitted evidence to establish the requirement under 8 C.F.R. § 214.2(h)(4)(iii)(A). Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Based on the foregoing analysis, the AAO has determined that the record fails to establish that the beneficiary would be performing services in a specialty occupation, as defined in section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). However, the director did not address this issue. Therefore, the director's decision will be withdrawn and the matter remanded for the entry of a new decision.

In addition, the petitioner did not submit sufficient evidence to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

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

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

In the support letter, the petitioner stated that the beneficiary has been awarded a bachelor's degree from the University of Ghana. In reviewing the record, the petitioner did not submit a copy of the credential evaluation on behalf of the beneficiary evidencing that the beneficiary has the equivalent of a U.S. bachelor's degree.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Since the beneficiary failed to provide a copy of the credential evaluation, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

Based on the foregoing analysis, the AAO finds that, as presently constituted, the record fails to establish (1) that the proposed position is a specialty occupation as defined in the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) that the beneficiary is qualified to perform the duties of a specialty occupation pursuant to the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). As CIS had not previously addressed these issues with the petitioner, the director should now issue a request for additional evidence on them. The director should afford the petitioner reasonable time to provide evidence pertinent to the issues, and any other evidence the director may deem necessary. At a minimum, the director should request the petitioner to remedy the specific evidentiary deficiencies identified earlier in this decision. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's June 7, 2006 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.