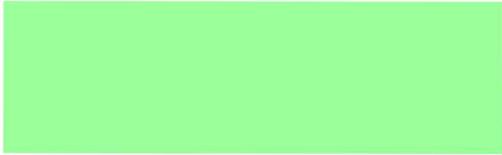




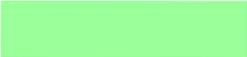
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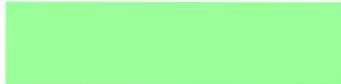
DATE: AUG 22 2014

OFFICE: VERMONT SERVICE CENTER

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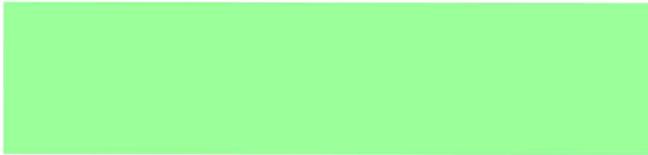
IN RE:

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:

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 (hereinafter the "director") denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a "software development, testing (QA) and support" company. In order to employ the beneficiary in a full-time position to which it assigned the job title "Senior Project Manager," the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis of her determination that the petitioner failed to demonstrate that the beneficiary qualifies for exemption from the Fiscal Year 2013 H-1B cap pursuant to section 214(g) of the Act.

The record of proceeding before this office contains the following: (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to deny (NOID); (3) the petitioner's response to the NOID; (4) the director's letter denying the petition; and (5) the Form I-290B and a brief.

I. FACTUAL AND PROCEDURAL HISTORY

As indicated above, the petitioner seeks to employ the beneficiary in a position that it described as a "Senior Project Manager" on a full-time basis. The petitioner stated on both the Form I-129 and the LCA that it would pay him a salary of \$110,000 per year.

In support of the petition, counsel submitted a March 21, 2013 letter asserting as follows:

Please note that the beneficiary in [REDACTED] has rejected the petitioner's offer of employment and never entered the US using [REDACTED] H1B visa. Therefore, please revoke the approval issued in [REDACTED] recapture the H1B visa number from this case and assign it to the above referenced petition.

The director found the initial evidence insufficient to establish that the instant petition is not subject to the H-1B numerical limitations. The director stated the following:

You are requesting to recapture an H1B cap number and substitute another beneficiary. The beneficiary associated with [REDACTED] counted against the FY 2013 CAP and the CAP number granted is connected to the beneficiary. Thus, you are unable to substitute the current beneficiary.

¹ The record of evidence contains a copy of the May 21, 2012 Form I-797C Approval Notice for the Form I-129, Petition for a Nonimmigrant Worker, listing [REDACTED] as the Petitioner and [REDACTED] as the Beneficiary. The receipt number on this approval notice is [REDACTED]

USCIS has now determined that your petition is subject to the numerical limitations for FY 2013.

You may submit any documentation to establish that your petition is not subject to the H-1B numerical imitations. Otherwise, your petition will be denied because USCIS has already reached the numerical limitations for FY 2013.

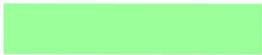
In response to the NOID, counsel stated as follows:

In the instant case, the petitioner requested to recapture an H-1B CAP number and substitute another beneficiary. US CIS indicated that [REDACTED] was counted against the FY 2013 CAP and associated with the beneficiary listed on [REDACTED]. Please note that the CAP subject H1B visa number becomes connected to the beneficiary ONLY in case if the beneficiary does in fact receive a US visa and enter the US. In the instant case, the original beneficiary of [REDACTED] never applied for and never received a US visa at a US consulate and never entered the US on an H1B associated with [REDACTED]. Therefore, the visa number associated with [REDACTED] remains available and was never issued as apart of FY 2013 CAP. Therefore, as FY 2013 has not yet expired, and there is clearly a visa number available from [REDACTED] to the petitioning employer, the US CIS must follow the Congressional mandate to issue 65,000 visas and allow the petitioner to recapture the visa number.

US CIS compliance with this request will be in full accordance with Section 214(g) of the INA and with the public policy underlying this law. To associate the visa number with the individual who was never actually issued an H1B non-immigrant visa at a US Consulate based on the underlying petition runs afoul of the Congressional mandate to issue 65,000 visas in FY 2012, as such policy created a pool of "wasted" H1B visas, which may neither be recaptured by the employer, nor used by the beneficiary. This is clearly not the result envisioned by the Congress in this case, as the Congress here has clearly specified the number of visas to be issued.

[Errors in the original.].

The director denied the petition, finding that the instant petition was filed after the H-1B yearly numerical limitations had been reached for the 2013 fiscal year and concluding that the petitioner had not established that the beneficiary was exempt from the annual permitted numerical limitations for H-1B nonimmigrants as outlined in section 214(g)(1)(A) of the Act. The director further noted that regulations prohibit substituting a beneficiary.



II. THE H-1B CAP

A. LAW

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

(1) The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed---

* * *

(vii) 65,000 in each succeeding fiscal year

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

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

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;
- (B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or
- (C) has earned a master's or higher degree from a United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

Section 214(g)(7) of the Act provides that:

Any alien who has already been counted, within the 6 years prior the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

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

When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petitioner that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year.

B. ANALYSIS

We will now address the director's determination that the petitioner failed to establish eligibility for an H-1B visa on behalf of the beneficiary as a result of the Fiscal Year 2013 H-1B cap having been reached on June 11, 2012. We find that upon review of the entire record of proceeding, the evidence of record does not overcome the director's ground for denying this petition. Accordingly, the appeal will be dismissed, and the petition will be denied.

The petitioner filed the Form I-129 on March 25, 2013. The Form I-129 H-1B Data Collection and Filing Fee Supplement (hereinafter the "H-1B Supplement"), at Part C, Numerical Limitation Information, reads as follows:

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

The petitioner marked "d. CAP EXEMPT." However the petitioner failed to mark the basis for the CAP exemption as required in question 3 of Part C, Numerical Limitation Information of the H-1B Supplement.

In this matter, by requesting an employment start date of March 25, 2013, the instant petition is subject to the Fiscal Year 2013 (FY 2013) limitation on H-1B beneficiaries. The numerical limitation for the "specialty occupation" cap exemption was reached on June 11, 2012. See "USCIS Reaches Fiscal Year 2013 H-1B Cap," available at <http://www.uscis.gov/>

(last visited Aug. 5, 2014). For FY 2013, Congress provided that 65,000 H-1B numbers will be available for visas issued or status provided. See section 214(g)(1)(A) of the Act. The regular statutory cap of 65,000 was reached on June 11, 2012, approximately nine months before the instant petition was filed. *Id.*

The language of section 214(g) of the Act does not provide for beneficiary substitution to avoid the H-1B cap. As noted above, a petitioner must notify the USCIS if an H-1B petition is not utilized and the USCIS will take into account the unused number during the appropriate fiscal year. Despite counsel's assertion to the contrary, neither the law nor regulations requires the unused H-1B number be provided to the petitioner for the substitution of beneficiaries.²

The evidence presented indicates that the beneficiary has not previously been counted toward the numerical limitations. Further, the record does not establish that the petitioner is a cap exempt organization. In addition, there is no evidence in the record that the beneficiary has a master's or higher degree from a United States institution of higher education. Therefore, since neither the petitioner nor the beneficiary meets an exemption under section 214(g)(5) of the Act and the record does not establish that the beneficiary was previously counted toward the numerical limitations under section 214(g)(7) of the Act, the beneficiary is subject to the numerical limitation. As the petition was submitted after the congressionally mandated cap for the fiscal year was reached, the petition cannot be approved.

Consequently, we concur with the director that the petition is not exempt from the standard 65,000 numerical limitation and as a regular FY 2013 cap number is no longer available to be assigned to the beneficiary, the petition must be denied pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B).

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

III. SPECIALTY OCCUPATION

Further, section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

² Contrast this with 8 C.F.R. § 214.2(h)(6)(viii), which states, in pertinent part, the following with respect to Petitions for Aliens to Perform Temporary Nonagricultural Services or Labor (H-2B):

Substitution of beneficiaries. Beneficiaries of H-2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certified.

(B) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner shall file an amended petition with fees at the USCIS Service Center where the original petition was filed, with a copy of the original petition approval notice, a statement explaining why the substitution is necessary, evidence of the qualifications of beneficiaries, if applicable, evidence of the beneficiaries' current status in the United States and evidence that the number of beneficiaries will not exceed the number allocated on the approved temporary labor certification. . . .

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

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

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

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

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

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

necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position"). Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty or its equivalent directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

Upon review, the record does not contain sufficient evidence that the proffered position of senior project manager requires a minimum of a bachelor's degree in a specific specialty or its equivalent. The regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation"

While the petitioner claims that the beneficiary will perform the duties of a senior project manager and submitted a letter outlining the duties of the proffered position, the petitioner did not submit any corroborating evidence relevant to the claimed duties of the proffered position. Given the lack of detail and corroborating evidence, we cannot determine that the proffered position substantially reflects the duties of financial analyst. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1) and 103.2(b)(12). The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

As the petitioner has failed to present sufficient, credible evidence of the actual job duties the beneficiary will perform, it has therefore failed to demonstrate that the occupation more likely than not requires a bachelor's or higher degree in a specific specialty or its equivalent as a minimum for entry. *See* INA § 214(i)(1). The petitioner also has not shown through submission of documentary evidence, that it meets any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Rather, while the petitioner claims that it requires a senior project manager and that it requires a bachelor's degree in "Management, Computer Information Systems, Applied Mathematics, Systems Engineering or closely related field," it has not credibly shown that the work requires such a degree. Thus, the petitioner has not met its burden of proof in this regard, and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation.

III. CONCLUSION AND ORDER

The appeal will be dismissed for the above-stated reasons. An application or petition that fails to comply with the technical requirements of the law may be denied by this office even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of our 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. 127, 128 (BIA 2013). Here, that burden has not been met.

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