

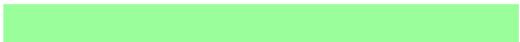


U.S. Citizenship
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Services

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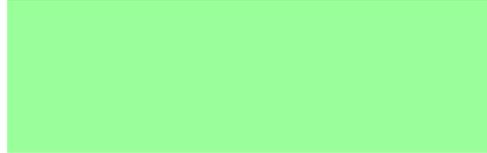


DATE: **NOV 03 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

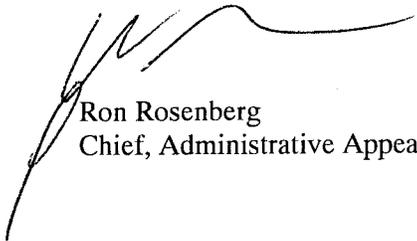


INSTRUCTIONS:

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 Director of the California Service Center 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 December 18, 2013. On the Form I-129 visa petition, the petitioner describes itself as a "Non-Profit Organization" established in 2007. In order to employ the beneficiary in what it designates as a community and social services specialist 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 March 31, 2014, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. Specifically, the director determined that the petitioner had not established that it was a nonprofit entity related to or affiliated with an institution of higher education. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

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

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) 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, 2013, 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 FY14, which covers employment dates starting on October 1, 2013 through September 30, 2014.

The petitioner filed the Form I-129 on December 18, 2013 and requested a starting employment date of January 1, 2014. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2013 and requesting a start date during FY14 must be rejected. However, in this matter the petitioner indicated on the Form I-129 that it was a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a). Thus, the petition was adjudicated by the director as a cap exempt case, even though the petition was filed after April 8, 2013. The director denied the petition on March 31, 2014 and the decision is now before us on appeal.

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

Upon review, the petitioner has not established that it is exempt from the FY14 H-1B cap pursuant to section 214(g)(5) of the Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

On the Form I-129 H-1B Data Collection Supplement (page 17), the petitioner checked the boxes for "Yes" in response to the question, "Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)?" for Part B (Fee Exemption and/or Determination). On the Form I-129 H-1B Data Collection Supplement (page 19), the petitioner checked the box indicating that "The petitioner is a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)" for Part C (Numerical Limitation Exemption Information).

In its undated statement of support, the petitioner claimed that it is a nonprofit organization that focuses on health, wellness, nutrition, fitness and education for underprivileged youth. It claimed that it has partnered with the [redacted] School of Engineering – Maryland Sustainable Engineering to implement solar power energy at the [redacted] School in [redacted]. Specifically, the petitioner explained the nature of this arrangement as follows:

The [redacted] will select and arrange the purchase of solar panels for the roof of the [redacted] [d]esign and install an electrical system to capture solar energy and power lights for the classrooms and office; design and install a secure housing for the solar equipment to be mounted inside; provide tools, supplies and labour for construction; provide regular updates to the [petitioner] on the project budget and progress on the design; provide quality assurance and quality control for the design by enlisting the help of an external review board. Similarly, [the petitioner] will provide information relevant to planning the project, including but not limited to: building specifications, relevant government regulations; provide information relevant to the implementation of the project, including but not limited to: available time frames, available resources at the school and in [redacted] remain in contact with the [redacted] and the community. The financing of this project is divided evenly between [the petitioner] and the [redacted].

Regarding the proffered position, the petitioner stated that it required the services of the beneficiary as a Community and Social Service Program Manager, and claimed that her duties would include the following:

[T]he Program Manager will facilitate the goals and missions of [the petitioner] with the projects and development currently planned in [redacted]. The program manager will work to develop innovative new programs and ensuring that business processes are in place to support them. The program manager will build capacity

among current and new grantees through research and collaborate with liaise between [the petitioner] staff in the U.S. and the projects in [redacted] regarding the external partners to relay the goals and missions of [the petitioner's] initiatives and our findings. Additionally, the Community and Social Service Program Manager will:

- Support the organization, communications, data collection, reporting and program administration;
- Manage various program timelines to ensure timely completion of program deliverables;
- Monitor program activities to ensure quality and accuracy of work outcomes of contractual and grant commitments; and,
- Oversee data collection and analysis of various programs. Tasks may include, but are not limited to: analyzing program outputs and outcomes from local sites to identify trends, providing support.

The petitioner further stated that the duties of the proffered position are specialized and complex, and require the services of the holder of at least a Bachelor's degree in Business Administration, or its equivalent. The petitioner further stated that the beneficiary was qualified to perform the duties of the proffered position by virtue of her combined academic achievements and work experience, deemed to be equivalent to a U.S. bachelor's degree in business administration.

In further support of the petition, the petitioner submitted additional evidence, including a Labor Condition Application (LCA); a copy of its Memorandum of Understanding (MOU) with [redacted]; printouts from the websites of both the petitioner and [redacted] copies of the beneficiary's resume, diplomas, and transcripts; and copies of two evaluations of the beneficiary's foreign academic credentials and work experience.

On December 26, 2013, the director issued a request for evidence. Specifically, the director requested additional evidence in support of the petitioner's contention that it was a nonprofit organization or entity related to or affiliated with an institution of higher education. Additionally, the director requested further evidence in support of the petitioner's contention that the proffered position was a specialty occupation and that the beneficiary was qualified to perform the duties of a specialty occupation.

In a response submitted on March 19, 2014, the petitioner contended that it is formally associated with [redacted] through its partnership with the School of Engineering. Specifically, the petitioner claimed that, through its donation to the [redacted], a partnership was established which allows students from [redacted] to travel to [redacted] to work on engineering projects to improve the quality of life in [redacted].

The petitioner also claimed that it is partnered with [redacted] with the [redacted] by virtue of the petitioner's endowment. Finally, the petitioner claimed that it had previously received approval as a cap exempt organization under receipt number

_____ and submitted copies of the relevant portions of the petition and the approval notice.

The petitioner also submitted an expanded description of the duties of the proffered position; an organizational chart for its organization; photocopies of excerpts regarding the petitioner's organization taken from a newsletter entitled '_____'; copies of job postings for positions the petitioner contends are similar to the proffered position within its industry; and a memorandum from _____ reviewing and evaluating the beneficiary's qualifications.

On March 31, 2014, 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. On appeal, counsel for the petitioner contends that the denial was arbitrary and capricious, claiming that the petitioner clearly established its affiliation with two professional schools within _____. Counsel further claims that, through its affiliation with the School of Public Health, it developed the "Healthy Futures Program," an afterschool program focusing on children's education and health which would be facilitated through _____ a program that furthered the mission of the petitioner. Additional evidence in the form of printouts from relevant web pages and program overviews was submitted in support of the existence of this program. Counsel also asserts that _____ Professor of the Practice at the _____ is a board member of the petitioner and that he has maintained an active role in the development of projects through the School of Public Health.

III. LAW

The petitioner claims that it is a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a).

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:

² Although counsel referred to this prior petition under receipt number _____ review of the supporting documentation reveals this was a typographical error. The prior petition upon which the petitioner relies is _____

- (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).

USCIS provided guidance in a June 2006 memo from Michael Aytes. 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,³ 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.

³ 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.

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 FY14 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.⁴

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.

⁴ This three-part reading is consistent with the Department of Labor's regulation at 20 CFR § 656.40(e)(ii), 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).

The issue before us, therefore, is whether the petitioner 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.

IV. ANALYSIS

Turning to the director's basis for denial, we find that her conclusion that the petition was not exempt from the FY14 cap was correct.

A. Non-Profit Status

One of the first factors to address is whether the petitioner has established that it is a nonprofit entity. We observe that the petitioner has submitted printouts from its website, in which it claims to be a 501(c)(3) tax exempt organization. We further note the numerous assertions by both counsel and the petitioner throughout the record that [the petitioner] is a nonprofit entity. However, the record is devoid of evidence corroborating this claim, such as a letter from the Internal Revenue Service confirming the petitioner'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).

B. Related to or Affiliated with an Institution of Higher Education

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

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, the petitioner asserts that it 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, the petitioner claims that its Memorandum of Understanding with [redacted] qualifies it to file H-1B cap-exempt petitions.

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*, 3rd 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 Edition⁵:

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.

We will now consider the relationship between the petitioner 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).

As previously noted, the petitioner submitted a copy of its MOU with [REDACTED] executed in June of 2012.⁶ The five-page MOU indicates that the purpose of the agreement is to outline the services and

⁵ 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).

⁶ We note the petitioner's assertion that it has multiple affiliations with the [REDACTED] including a relationship with the School of Public Health. However, since the record indicates that the beneficiary will be employed in the capacity of program manager for the [REDACTED] project based

finances expected from each party, and further indicates that both parties have the right to ask for amendments to the agreement.

Page two of the MOU sets forth the roles and responsibilities of both parties. Specifically, under the heading of "roles and Responsibilities," the MOU provides the following:

Maryland Sustainability Engineering will:

- a. Select and arrange the purchase of solar panels for the roof of the [REDACTED].
- b. Design and install an electrical system to capture solar energy and power lights for the classrooms, office
- c. Design and install a secure housing for the solar equipment to be mounted inside
- d. Provide tools, supplies, and labor for construction
- e. Provide regular updates to [the petitioner] on the project budget and progress on the design
- f. Provide quality assurance and quality control for the design by enlisting the help of an external review board

[The Petitioner] will:

- g. Provide information relevant to planning the project, including, but not limited to: building specifications, relevant government regulations
- h. Provide information relevant to the implementation of the project, including, but not limited to: available time frames, available resources at the school and in [REDACTED]
- i. Remain in contact with the [REDACTED] and the Community

Both parties agree to:

- j. Collaborate throughout the design and implementation of the project
- k. Remain consistent with timely communication, responses, and updates throughout the design and construction phase.
- l. Continue communication after project implementation so [REDACTED] can determine the success of the project and assist with any technical issues that may arise.

The MOU also provides an overview of the financial responsibilities of the parties, which stated that the parties would each fund 50% of the total project cost.

in [REDACTED] our review will be limited to evidence pertaining to this program and the petitioner's involvement therein.

The petitioner also submitted excerpts from [REDACTED] website describing the project, indicating that the installation of solar panels in [REDACTED] as described above, was completed with funding from both the petitioner and the [REDACTED]

Turning to the definition of an "affiliated or related nonprofit entity," we must first consider whether the petitioner has established that it is related to or affiliated with an institution of higher education 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 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. Nothing in the record, however, demonstrates or implies that the petitioner and [REDACTED] share common ownership or are controlled by the same board.

As the record does not include evidence suggesting that the petitioner and [REDACTED] share common ownership or are controlled by the same board, 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 it is a related or affiliated nonprofit 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 the petitioner within the common meaning of this term. Although the MOU outlines joint responsibilities shared by these two entities, it appears that the petitioner and [REDACTED] are separately controlled and operated entities.⁷ There is no provision in the MOU granting [REDACTED] the right to manage the daily activities or functions of the petitioner. Instead, it appears that the petitioner provides funding to [REDACTED] students to work abroad installing solar panels at the [REDACTED]. There is nothing in the MOU, or in the record, that allows [REDACTED] to oversee, operate, or manage the petitioner's foundation as a whole. 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 the petitioner 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. As footnoted above, 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

⁷ We note counsel's claim on appeal that a [REDACTED] professor is a member of its board. However, the record does not include documentary evidence of the petitioner's board members, nor does the record include evidence of when Professor [REDACTED] was appointed. Further, the record does not include evidence of the number of the petitioner's board members or the corporate documents detailing the authority of each board member. 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). Accordingly, the record does not include probative evidence that [REDACTED] "operates" the petitioner through the professor appointed as a member of the petitioner's board.

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 the petitioner, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. Again 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).

The petitioner does not specifically contend that it is attached to [REDACTED] through any of these terms, but repeatedly contends that it maintains a close affiliation with [REDACTED]. However, there is no evidence in the record to establish that this claimed affiliation between the parties meets any of the defined relationships as set forth above. Although the petitioner and [REDACTED] may have, as claimed by both counsel and the petitioner, a close affiliation, the record contains no evidence that the parties share the requisite ownership and control as required by the terms in this prong as defined above.

The record does not contain sufficient probative evidence that the petitioner is a nonprofit entity attached to an institution of higher education as a member, branch, cooperative, or subsidiary. Accordingly, we find that the petitioner has not met the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Finally, we note the petitioner's contention that it had previously received a cap-exempt approval and that deference should be given to that prior cap exempt determination in accordance with a USCIS policy memorandum issued on April 28, 2011.⁸ However, a review of the prior petition, filed under Receipt No. [REDACTED] demonstrates that the previously-approved petition was subject to the fiscal year cap, as indicated by the petitioner's selection of Box A, "CAP H-1B Bachelor's Degree," in Part C, "Numerical Limitation Information" on page 18 of the H-1B Data Collection Supplement. Therefore, the petitioner's contention that it previously had received an approval as a cap exempt organization is rejected.

C. Beyond the Director's Decision – Specialty Occupation

Beyond the decision of the director, the petitioner has failed to establish that the proffered position is a specialty occupation.⁹

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

⁸ See Policy Memorandum PM-602-0037 entitled "Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation," April 28, 2011.

⁹ We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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.

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.

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

To prove that a job requires the theoretical and practical application of a body of highly specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study or its equivalent. As discussed *supra*, USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).¹⁰

¹⁰ Specifically, the United States Court of Appeals for the First Circuit explained in *Royal Siam* that:

Again, the petitioner in this matter claims that the duties of the proffered position can be performed by an individual with only a general-purpose bachelor's degree, i.e., a bachelor's degree in business administration. This assertion is tantamount to an admission that the proffered position is not in fact a specialty occupation. The petition must be denied on this basis alone.

Moreover, it also cannot be found that the proffered position is a specialty occupation due to the petitioner's failure to satisfy any of the supplemental, additional criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). To reach this conclusion, we reviewed the description of the duties of the proffered position, both in the initial statement of support and in response to the RFE. The duties of the position are divided equally between two major areas: operational duties and program management duties. Although the petitioner lists specific day-to-day activities of the beneficiary, it is unclear exactly what the focus of the beneficiary's position will be within the petitioner's organization. However, we find that the duties as described are not indicative of complexity, specialized knowledge, or uniqueness. The overall description does not include evidence that a high level of judgment and understanding is required to perform the duties of the position.¹¹

[t]he courts and the agency consistently have stated that, although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa. See, e.g., *Tapis Int'l v. INS*, 94 F.Supp.2d 172, 175-76 (D.Mass.2000); *Shanti*, 36 F. Supp.2d at 1164-66; cf. *Matter of Michael Hertz Assocs.*, 19 I & N Dec. 558, 560 ([Comm'r] 1988) (providing frequently cited analysis in connection with a conceptually similar provision). This is as it should be: otherwise, an employer could ensure the granting of a specialty occupation visa petition by the simple expedient of creating a generic (and essentially artificial) degree requirement.

Id.

¹¹ This is further exemplified by the petitioner's attestation on the LCA that the duties of the proffered position correspond to a Level I wage. The "Prevailing Wage Determination Policy Guidance" issued by DOL provides a description of the wage levels. A Level I wage rate is described by DOL as follows:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance, Nonagric. Immigration Programs* (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

This designation is indicative of a comparatively low, entry-level position relative to others within the occupation. Such a designation is inconsistent with a claim that the duties of the proffered position are

Upon review, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as qualifying as a specialty occupation. That is, to the extent that they are described, the proposed duties do not provide a sufficient factual basis for conveying the substantive matters that would engage the beneficiary in the performance of the proffered position for the entire period requested. The job descriptions do not persuasively support the claim that the position's day-to-day job responsibilities and duties would require the theoretical and practical application of a particular educational level of highly specialized knowledge in a specific specialty directly related to those duties and responsibilities. The overall responsibilities for the proffered position contain generalized functions without providing sufficient information regarding the particular work, and associated educational requirements, into which the duties would manifest themselves in their day-to-day performance within the petitioner's operations. Thus, the petitioner has failed to demonstrate how the performance of the duties of the proffered position, as described by the petitioner, would require the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent.

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 satisfies 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.

Accordingly, the fact that the petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), coupled with the fact that the petitioner accepts an individual with a general purpose degree, such as business administration, as qualified for the proffered position, it cannot be found that the proffered position is a specialty occupation. The appeal will be dismissed and the petition denied for this additional reason.

D. Beneficiary Qualifications

We do not need to examine the issue of the beneficiary's qualifications, because the petitioner has not provided sufficient evidence to demonstrate that the position is a specialty occupation. In other words, the beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation.

As discussed in this decision, the petitioner did not submit sufficient evidence regarding the proffered position to determine whether the duties of the position will require a baccalaureate or higher degree in a specific specialty or its equivalent. Absent this determination that a

supervisory, complex or require specialized knowledge.

baccalaureate or higher degree in a specific specialty or its equivalent is required to perform the duties of the proffered position, it also cannot be determined whether the beneficiary possesses that degree or its equivalent. Therefore, we need not and will not address the beneficiary's qualifications further.

V. CONCLUSION

The petitioner has not provided sufficient evidence to establish that the instant petition seeks an H-1B visa for a nonimmigrant alien who will be employed by a nonprofit organization or entity related to or affiliated with an institution of higher education. We thus find that the evidence of record does not establish that this petition is exempt from the H-1B visa cap. Furthermore, for the reasons set forth above, the petitioner has failed to establish that the proffered position is a specialty occupation.

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 our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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