



U.S. Citizenship
and Immigration
Services

(b)(6)



JUN 03 2015

DATE:

PETITION RECEIPT #: 

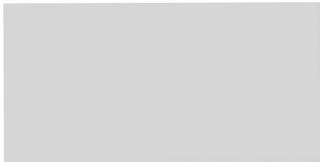
IN RE:

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:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a 95-employee "Hospital," established in [REDACTED]. It seeks to employ and 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 Director denied the petition on September 22, 2014, finding that its approval was barred by the numerical limitation, or "cap," on H-1B visa petitions.

The record of proceeding before this office includes the following: (1) the 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, the petitioner's brief, and additional documentation in support of the appeal.

Upon review of the entire record of proceeding, we find that the evidence of record does not overcome the Director's ground for denying this petition. Beyond the decision of the Director, the petition must also be denied because the petitioner has not established that the proffered position qualifies for classification as a specialty occupation.¹ Accordingly, the appeal will be dismissed.

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2015 (FY15) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, the total number of H-1B visas issued per fiscal year may not exceed 65,000. The numerical limitation does not apply to a nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or a related or affiliated nonprofit entity," or "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization." Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000).

On April 7, 2014, 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 FY15, which covers employment dates starting on October 1, 2014 through September 30, 2015.

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

The petitioner filed the Form I-129 on April 16, 2014 and requested a starting employment date of October 1, 2014. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 7, 2014 and requesting a start date during FY15 must be rejected. However, because the petitioner indicated on the Form I-129 that it is a nonprofit entity related to or affiliated with an institution of higher education, and thus exempt from the FY15 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the Director when it was initially received by the service center. The Director denied the petition on September 22, 2014 and the decision is now before us on appeal.

Upon review, the evidence of record does not establish that the petitioner is exempt from the FY15 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 19), Part C (Numerical Limitation Exemption Information), the petitioner checked box "b" indicating 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. section 1001(a)."

In a letter, dated April 10, 2014, the petitioner asserted that it is a nonprofit hospital and stated its desire to employ the beneficiary as an operations research analyst for a period of three years. The petitioner stated that the beneficiary, in the position of operations research analyst, "will provide much-needed analytics to our hospital so that we can provide more and better services." The petitioner also ascribed the following duties to the proffered position:

- Serves as the operating liaison between the critical access hospital community and the [REDACTED]. Facilitates the development of the [REDACTED] including processes and outcome measures that are aligned with the [REDACTED] vision and mission.
- Leads and facilitates clinical quality work focused on implementation of evidence based care to achieve the triple aim goals.
- Participates in all communications and training as required by [REDACTED] and shares with the [REDACTED] partner sites.
- Develops and delivers educational programs internally to facilitate change.
- Design[s], analyz[es] and implement[s] efficient clinical workflows using the EMR systems using Lean and Six Sigma statistical and mathematical methods.
- Improve[s] operational efficiency of the hospital and increase[es] cost savings.
- Report[s] operational and analytical findings to management.

The petitioner noted that the proffered position required at least a bachelor's degree. On the Labor Condition Application (LCA), the petitioner attested that the occupational classification for the position is "Operations Research Analyst," SOC (ONET/OES) Code 15-2031, at a Level I (entry) wage.²

In support of the petitioner's claim that this petition is eligible for cap exemption, the record included a partial, unsigned copy of a "Clinical Affiliate Agreement" between the petitioner and the [REDACTED] College of Technology. The petitioner also submitted a document entitled "Contract Addendum #1 to Contract [REDACTED]" That partially signed contract addendum which states that the "Contract Name" is "Consultant Services" pertains to a contract between the [REDACTED] and the petitioner.

On July 3, 2014, the Director issued a request for evidence. Specifically, the Director noted that the evidence of record was insufficient to establish that the petitioner qualifies for an exemption to the H-1B cap. The Director outlined the evidence to be submitted.

In a response, dated August 29, 2014, the petitioner re-submitted the same partial [REDACTED] [REDACTED] College of Technology, "Clinical Affiliate Agreement" and the partially signed contract addendum. The petitioner also submitted additional agreements between the petitioner and the following: (1) [REDACTED] (3) [REDACTED]

The petitioner also provided its job description/performance evaluation for the proffered position, internally titled Better Health Improvement Specialist, which noted the minimum qualifications for the position is a bachelor's level degree in business, engineering, health care, or related field and also noted that "consideration will be given to associate degree applicants with considerable experience in health care, managed care, care coordination, process improvement and/or project management." In the letter submitted in response to the RFE, the petitioner highlights specific duties of this position which are listed in section IV of the submitted performance evaluation, although not included in the job description, as follows:

- Works with and educates nursing students from affiliated universities as designated curricular personnel in design/creation/improvement of efficient clinical protocols, assigned by Director of Nursing, by using Lean methodologies and data driven practices.
- Assists with performance evaluations of students as relates to [REDACTED] criteria.
- Attends all meetings with affiliated university representatives to assist in monitoring student efficiency.

² The petitioner attested that the proffered position is a Level I (entry) position which requires an annual wage of \$38,584. The petitioner indicated on the Form I-129 and the LCA that it would pay the beneficiary an annual salary of \$50,000.

- Provides input for methods and materials for evaluating effectiveness of on-site student programs with affiliated universities.
- Aids Director of Nursing and/or Chief of Medical staff in educating students/residents in data driven quality improvement practices during their clinical rotation.

Assists in monitoring and evaluating hospital policies with on-site students.

Assists with orientation for on-site students.

The petitioner asserts that the beneficiary in this matter, as shown by the above listed job responsibilities, "has clear and crucial interaction with students under the Affiliation Agreements."

The petitioner also submitted two unpublished decisions issued by this office in 2006 and in 2010 and a letter from the Honorable [REDACTED] U.S. Senator.

On September 22, 2014, the Director denied the petition, finding that the evidence of record was insufficient to establish that the petitioner is related or affiliated with an institution of higher education and thus did not qualify for an exemption from the H-1B numerical limitation.

On appeal, the petitioner asserts that the Director did not correctly interpret or analyze the petitioner's affiliation agreements with the educational institutions. The petitioner contends that the Director's interpretation of the pertinent provisions of AC21 is impermissibly narrow and asserts that the fee regulation "ACWIA," a restrictive regulation, should not apply to the terms "related" and "affiliated" when determining cap exempt status. The petitioner again submits two unpublished decisions in support of its claim that it is cap exempt. The petitioner also submits an amicus brief, prepared by the American Immigration Lawyers Association, in August 2006, in support of an unrelated case and adopts and incorporates the arguments of that brief in this matter.

III. EXEMPTION FROM THE H-1B CAP

A. Legal Framework

Section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or a related or affiliated nonprofit entity"

For purposes of H-1B cap exemption for an institution of higher education, or a related or affiliated nonprofit entity, the H-1B regulations adopt the definition of institution of higher education set forth in section 101(a) of the Higher Education Act of 1965. Section 101(a) of the Higher Education Act

of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

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

USCIS provided guidance on this subject in a June 2006 memo 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"). 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:

³ Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for

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

By including the phrase "related or affiliated nonprofit entity" in the language of the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), without providing further definition or explanation, Congress likely intended for this phrase to be interpreted consistently with the only relevant definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). As such, we find that USCIS reasonably interpreted AC21 to apply the definition of the phrase found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and we will defer to the Aytes Memo in making our determination on this issue. Although we note the petitioner's arguments that the ACWIA statutory definition is too restrictive when interpreting the cap exempt provision, the petitioner does not provide cogent and probative evidence supporting its alternative interpretation. Moreover, we note that this office defers to the USCIS Senior Policy Council to prescribe agency policy. See Policy Memorandum issued by Ron Rosenberg, Chief, Administrative Appeals Office, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, *Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO)* PM-602-0086.1 (November 18, 2013). In the absence of statutory or regulatory authority specifying a different interpretation, we reiterate that we will defer to the Aytes Memo in making our determination on the cap 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 FY15 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

Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

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

B. Discussion

The primary issue before us is whether 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. The petitioner claims it is related to or affiliated with [REDACTED] and that its relationships with these institutions qualify it to file H-1B cap-exempt petitions.

As indicated above, the petitioner submitted copies of the following agreements in support of its claim that it is affiliated with an institution of higher education:

- [REDACTED] Clinical Affiliate Agreement" and contract addendum;
- [REDACTED] "Affiliation Agreement";
- [REDACTED] "Affiliation Agreement";
- [REDACTED] "Agency Contract; and
- [REDACTED] "Educational Affiliation Agreement."

1. The Petitioner and [REDACTED]

We will first consider the relationship between the petitioner and [REDACTED]. Upon review, the petitioner has only submitted partial copies of the Clinical Affiliate Agreement which consist of two pages identifying the two parties and their responsibilities as well as the "substantive provisions." The contract is incomplete and does not include a signature page. The attached addendum indicates it is valid from September 30, 2012 through September 29, 2013 and specifically states: "[t]his contract is not validated and payment cannot be processed until both signatures are acquired." The addendum includes the signature of the petitioner's authorized representative but does not include the signature of an authorized representative for [REDACTED]. Furthermore, the addendum states that the petitioner is the "Contractor" and that compensation for services to [REDACTED] "shall be for an additional \$10,000 through September 29, 2013."

In regards to these documents, we find that it is not apparent from the evidence submitted that these agreements are still in effect and that they are related to each other. The addendum states that the "Contract Name" is "Consultant Services" and that it is "Addendum #1 to Contract [REDACTED]" however, there is no indication on the partial copy of the Clinical Affiliate Agreement that it is the "Consultant Services" agreement and that it is Contract [REDACTED].

Based on these factors, we do not find it necessary to further discuss this agreement and unrelated addendum. The record does not include probative evidence that the petitioner is related to or affiliated with [REDACTED].

2. The Petitioner and [REDACTED]

Next, we will review the agreement between the petitioner and [REDACTED] effective March 1, 2011, for students for a two-week rotation and a letter agreement, dated June 17, 2014, for the placement of student(s) for the summer, 2014 academic semester.

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

The agreement, despite being titled an "affiliation" agreement, and the submitted letter, placing students in the Nursing Leadership and Management Development course, do not establish the petitioner's affiliation with or relationship to an institution of higher education as described above. The affiliation agreement indicates only that the petitioner agrees to "affiliate with the UNIVERSITY in providing a clinical laboratory education in a low volume laboratory." It does not reference any shared ownership or indicate that both entities are controlled by the same board. Other than indicating that the faculty of the university will communicate and hold meetings with the petitioner's medical personnel on matters of mutual concern, the two entities appear to be independent and unrelated.⁵ The record does not suggest that the two entities share common ownership or are controlled by the same board or federation. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we consider whether the petitioner has established that it is an affiliated or related non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. With regard to this prong, the common meaning of the term "operate," as defined in *Webster's New College Dictionary*, 3rd edition, is "[t]o control or direct the functioning of" or "[t]o conduct the affairs of : MANAGE <operate a firm>." Thus, while an institution of higher education may not have ownership and/or ultimate control of a nonprofit entity, a petitioner may still qualify under this second prong of the definition of affiliated or related nonprofit entity by establishing that the institution of higher education directs the day-to-day functioning of and/or manages the daily affairs of the nonprofit entity. Here, however, the agreement states that the petitioner provides clinical laboratory education in conjunction with the university. The petitioner neither claims nor submits any evidence to corroborate that the university directs the day-to-day functioning of and/or manages the daily affairs of the petitioner. As discussed above, the relationship that exists between the petitioner and [REDACTED] is one between two separately controlled and operated entities. There is nothing in the affiliation agreement or the letter granting the university the right to manage the daily activities or functions of the petitioner. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B) on the basis of the evidence pertaining to [REDACTED].

⁵ Based on the petitioner's description of the beneficiary's duties, the beneficiary in this matter does not appear to be "medical personnel," but rather an individual involved in organizing and monitoring data and reporting and recommending data driven quality improvements.

Third, we consider whether the petitioner is an affiliated or related nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions" of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). There is insufficient indication from the evidence submitted that the petitioner is attached to [REDACTED] as a member, branch, cooperative, or subsidiary.

3. The petitioner and [REDACTED]

Next, we will consider the relationship between the petitioner and [REDACTED]. The "Affiliation Agreement" between the petitioner and [REDACTED] states that it is "for the purpose of the [petitioner] allowing [REDACTED] to conduct a portion of [REDACTED] program upon facilities owned and maintained by the [petitioner]." The agreement specifically states "that the faculty for the program will be provided by [REDACTED]. Although the agreement notes that the [REDACTED] "faculty will, in cooperation with the [petitioner's] staff, ensure that all students are oriented to their duties and functions at the beginning of the clinical rotation," the petitioner does not assume any responsibility for the instruction of the students. The agreement also states that [REDACTED] "is an independent contractor pursuant to this agreement and its students and faculty shall in no manner be considered employees of the [petitioner]."

Here, the petitioner has not established that it is affiliated or related to [REDACTED] pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership or control by the same board or federation. There is no evidence in the record suggesting that the same board or federation owns, directs, or otherwise exercises direct control over both the petitioner and [REDACTED]. Rather, [REDACTED] is an independent contractor entering into an agreement to use the petitioner's facilities within the prescribed guidelines set out in the agreement. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

The petitioner also has not established that it is an affiliated or related non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. Again, the common meaning of the term "operate," as defined in *Webster's New College Dictionary*, 3rd edition, is "[t]o control or direct the functioning of" or "[t]o conduct the affairs of : MANAGE <operate a firm>." Thus, while an institution of higher education may not have ownership and/or ultimate control of a nonprofit entity, a petitioner may still qualify under this second prong of the definition of affiliated or related nonprofit entity by establishing that the institution of higher education directs the day-to-day functioning of and/or manages the daily affairs of the nonprofit entity. The evidence indicates that [REDACTED] operates a training and education program in facilities owned and maintained by the petitioner. The petitioner neither claims nor submits any evidence to corroborate that [REDACTED] directs the day-to-day functioning of and/or manages the daily affairs of the petitioner. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

We further find that the petitioner is not an affiliated or related 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. When reviewing the "generally accepted definitions" of the terms as used by the drafters of this regulation, it is evident 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. There is insufficient evidence to find that the petitioner is attached to [REDACTED] as a member, branch, cooperative, or subsidiary.

4. The Petitioner and [REDACTED]

Next, we will consider the relationship between the petitioner and [REDACTED]. The "Agency Contract" agreement, between the two entities indicates that [REDACTED] among other things, will "assume full responsibility for the instruction and administration of the nursing programs," and will "appoint qualified faculty for student instruction" and that the petitioner will "provide clinical experience for a specified number of students." The contract indicates, generally, that the petitioner will maintain services without depending on the students, will cooperate with the university faculty in the selection and assignment of good learning experiences, provide supplies and equipment for the students, cooperate in evaluating the student experience, provide resource people for students when the on-site faculty is not available, and provide physical space for faculty and students. The agreement also specifically states that the students will not be considered the petitioner's employees, and that the petitioner's personnel participating in the educational program shall remain employees of the petitioner.

The "Agency Contract" between [REDACTED] and the petitioner does not indicate that a partnership or other relationship exists between the two entities and the general purpose of the agreement is for the petitioner to provide facilities and resources to assist in advancing the education of registered nurses. There is nothing in the record that demonstrates or implies that the petitioner and [REDACTED] share common ownership or that the two entities are controlled by the same board or federation. When considering whether the petitioner has established that it is an affiliated or related nonprofit entity pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership or control by the same board or federation, we find that the record does not include probative evidence of such a relationship.

We also have considered whether the petitioner has established that it is an affiliated or related 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 [REDACTED] operates the petitioner within the common meaning of this term. There is no provision in the "Agency Contract" indicating that [REDACTED] controls and operates the petitioner. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

We have also considered whether the petitioner is an affiliated or related 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. Again 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 drafted the regulation "drawing on generally accepted definitions" of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It has not been demonstrated that the petitioner is attached to [REDACTED] as a member, branch, cooperative, or subsidiary.

5. The Petitioner and [REDACTED]

Finally, we will consider the relationship between the petitioner and [REDACTED]. The Agreement between [REDACTED] and the petitioner states that the general purpose of the agreement is for the petitioner to provide practical learning and clinical experiences in Phlebotomy services for [REDACTED] students. Moreover, other than providing space and opportunities for observation, it does not appear that the petitioner will have an active role in [REDACTED] program. According to the Agreement, all instruction and supervision of students is provided by school faculty. Additionally, the Agreement confirms that nothing in the agreement shall create an employee-employer relationship between the students and the hospital or instructor and the hospital and that the students and instructor are not employees of the hospital.

Turning to the definition of an "affiliated or related nonprofit entity," we first consider whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership or control by the same board or federation. Upon review, the record does not establish that the petitioner and [REDACTED] are owned or controlled by the same boards or federations. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we have considered whether the petitioner has established that it is an affiliated or related non-profit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. As depicted in the record, the relationship that exists between the petitioner and [REDACTED] is one between two separately controlled and operated entities. The evidence in the record does not show that [REDACTED] operates the petitioner within the common meaning of this term. 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 have considered whether the petitioner has established that it is an affiliated or related 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. Again, we reiterate that the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions" of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). While the petitioner and [REDACTED] may collaborate generally in the education and training of [REDACTED] students, the petitioner has not demonstrated that it is attached to [REDACTED] as a member, branch, cooperative, or subsidiary of [REDACTED].

C. Summary Analysis of the Agreements

While the petitioner requests a liberal interpretation of the terms "related" and "affiliated," it has not provided sufficient evidence demonstrating that it is (1) associated with an institution of higher education through shared ownership or control by the same board or federation of any higher educational institution, (2) operated by an institution of higher education, or (3) attached to a higher education institution as a member, branch, cooperative or subsidiary. Rather, it appears only to have contractual arrangements with several different schools to provide facilities and clinical experiences for their students. Based on the evidence of record as currently constituted, we cannot find that the beneficiary "is employed (or has received an offer of employment) at an institution of

higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity." The agreements submitted do not establish the essential elements discussed above that would demonstrate that the petitioner is "a related or affiliated nonprofit entity." Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

D. Unpublished Decisions

The petitioner also references two unpublished, non-precedent decisions issued by this office in September 2006, and in October 2010 in support of its claim that it is cap exempt pursuant to the regulation at 8 C.F.R. § 214(h)(19)(iii)(B). The petitioner is free, of course, to demonstrate that the facts of those cases are similar to the facts of the instant case, to refer to the reasoning of those cases, and to urge that the same or similar reasoning be extended to the instant case. However, the cases cited have no probative value as precedent. Moreover, the petitioner has not furnished probative evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions and has not furnished evidence that the reasoning in that matter is reasoning that we currently follow. Further, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

IV. SPECIALTY OCCUPATION

As the instant petition is numerically barred, we need not examine the issue of whether the proffered position is a specialty occupation under the relevant statutory and regulatory guidelines. However, in the event that the petitioner had established that the instant petition was exempt from the FY15 cap, it still could not be approved because the record does not establish that the proffered position is a specialty occupation.

A. Legal Framework

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

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

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

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

Specialty occupation means an occupation which [(1)] requires theoretical and

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must 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.

B. Discussion

We note, as a preliminary matter, that the petitioner has provided a broad overview of the beneficiary's duties. Thus, a crucial aspect of this matter is whether the petitioner has adequately described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act. The petitioner has not done so here.

That is, the duties that are described by the petitioner are described in vague terms that do not convey the specific tasks that the beneficiary will perform. The petitioner, for example, does not explain what actual duties the beneficiary will perform when serving as "the operating liaison between the critical access hospital community and the [REDACTED] or as relates to the "development of the Better Health Improvement Plan." The petitioner does not detail what duties will be involved in leading and facilitating "clinical quality work focused on implementation of evidence based care to achieve the triple aim goals" or what methods the beneficiary will use to "[i]mprove operational efficiency of the hospital and increase[e] cost savings." It is not clear what the beneficiary will actually be doing when he designs, analyzes and implements efficient clinical workflows using statistical and mathematical models.

It appears, that the beneficiary may be involved in organizing and monitoring data and reporting and recommending data driven quality improvements, however, the beneficiary's daily duties have not been detailed. Although the petitioner adds, in response to the RFE, that the beneficiary will be involved in working with and educating nursing students, it is not clear what instruction, if any, the beneficiary will actually deliver. Similarly, although the petitioner asserts that the beneficiary will

attend meetings, assist with performance evaluations, provide input to evaluate effectiveness of programs, the petitioner does not identify the beneficiary's actual role or level of authority in any of these endeavors. Upon review, the petitioner does not provide sufficient insight into the actual work the beneficiary is expected to perform.

Thus, 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 proffered 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 not demonstrated 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.

Moreover, the petitioner in this matter accepts a bachelor's level degree in business, engineering, health care, or related field to perform the duties of the proffered position. The petitioner's acceptance of bachelor's degrees in business, engineering, or health care or an associate's degree with an undefined level of experience is inadequate to establish that the proposed position qualifies as a specialty occupation. In general, provided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the "degree in the specific specialty (or its equivalent)" requirement of section 214(i)(1)(B) of the Act. In such a case, the required "body of highly specialized knowledge" would essentially be the same. Since there must be a close correlation between the required "body of highly specialized knowledge" and the position, however, a minimum entry requirement of a degree in two disparate fields, such as health care and engineering, would not meet the statutory requirement that the degree be "in *the* specific specialty (or its equivalent)," unless the petitioner establishes how each field is directly related to the duties and responsibilities of the particular position such that the required "body of highly specialized knowledge" is essentially an amalgamation of these different specialties. Section 214(i)(1)(B) of the Act (emphasis added).

In other words, while the statutory "the" and the regulatory "a" both denote a singular "specialty," we do not so narrowly interpret these provisions to exclude positions from qualifying as specialty occupations if they permit, as a minimum entry requirement, degrees in more than one closely related specialty. See section 214(i)(1)(B) of the Act; 8 C.F.R. § 214.2(h)(4)(ii). This also includes even seemingly disparate specialties providing, again, the evidence of record establishes how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

It is not readily apparent how all the petitioner's acceptable degree requirements are directly related

to the proffered position. Therefore, absent evidence of a direct relationship between the claimed degrees required and the duties and responsibilities of the position, it cannot be found that the proffered position requires anything more than a general bachelor's degree. As explained above, 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. Moreover, USCIS has consistently stated that, 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).

Absent this evidence, it cannot be found that the particular position proffered in this matter has a normal minimum entry requirement of a bachelor's or higher degree in a specific specialty or its equivalent under the petitioner's own standards. Accordingly, as the evidence of record does not establish a standard, minimum requirement of at least a bachelor's degree *in a specific specialty* or its equivalent for entry into the particular position, it does not support the proffered position as being a specialty occupation and, in fact, supports the opposite conclusion.

For the reasons related in the preceding discussion, we find beyond the decision of the Director, 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) and, therefore, it cannot be found that the proffered position qualifies as a specialty occupation. For this additional reason, approval of the petition is precluded.

V. CONCLUSION

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

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1037, *aff'd*, 345 F.3d 683; *see also BDPCS, Inc. v. Fed. Communications Comm'n*, 351 F.3d 1177, 1183 (D.C. Cir. 2003) ("When an agency offers multiple grounds for a decision, we will affirm the agency so long as any one of the grounds is valid, unless it is demonstrated that the agency would not have acted on that basis if the alternative grounds were unavailable.").

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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