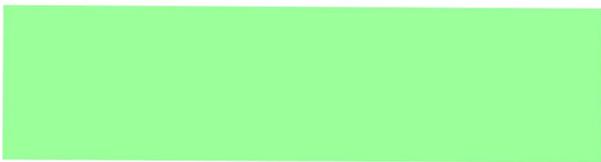




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 03 2015**

OFFICE: VERMONT SERVICE CENTER

FILE: 

IN RE:

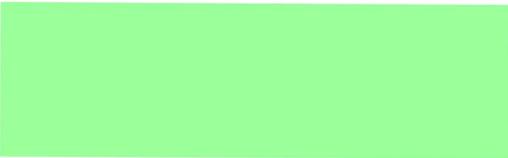
Petitioner:

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:

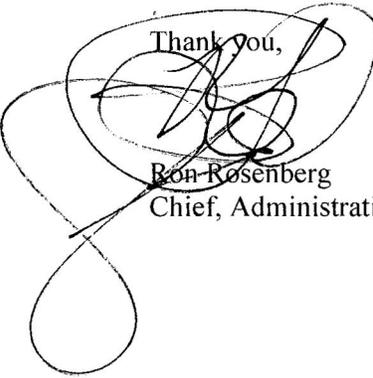


INSTRUCTIONS:

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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

I. PROCEDURAL BACKGROUND

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the Vermont Service Center. In the Form I-129 visa petition, the petitioner describes itself as a business providing computer related services that was established in [REDACTED]. In order to employ the beneficiary in what it designates as a software application developer position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director reviewed the information and determined that the petitioner did not establish eligibility for the benefit sought. Specifically, the director concluded that the petitioner did not establish that the beneficiary has earned a master's or higher degree from a U.S. institution of higher education as defined by 20 U.S.C. § 1001(a), and is exempt from the H-1B numerical limitations under section 214(g)(5)(C) of the Act. Thereafter, the petitioner filed an appeal.

The record of proceeding contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's Notice of Intent to Deny (NOID); (3) the petitioner's response to the NOID (4) the director's decision; and (5) the Form I-290B and supporting documentation. We reviewed the record in its entirety before issuing our decision.¹

For the reasons that will be discussed below, we agree with the director that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

II. H-1B MASTER'S CAP EXEMPTION

A. Legal Framework

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 ("H-1B Cap"). In addition, the maximum number of H-1B visas that may be issued per fiscal year pursuant to the H-1B cap exemption at section 214(g)(5)(C) of the Act may not exceed 20,000 ("U.S. Master's Degree or Higher Cap").

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or

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

otherwise provided [H-1B status] who-

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

Section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-32), 20 U.S.C. § 1001(a), defines an institution of higher education as follows:

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means 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, or persons who meet the requirements of section 1091 (d) of this title;
- (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, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
- (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.

Notably, 8 C.F.R. § 214.2(h)(8)(ii)(B) states, in part:

Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned and refunded.

B. Request by the Petitioner

In the Form I-129 H-1B Data Collection Supplement, Part C, the petitioner marked the item "1b" to indicate that it was applying for the "U.S. Master's Degree or Higher" cap exemption. In the same section, at item "2," the petitioner further stated that the beneficiary received a master's degree from [REDACTED] in Virginia. In support, the petitioner submitted a copy of the beneficiary's diploma which indicates that he received a master's degree from [REDACTED] on October 10, 2010.

C. Analysis

Upon review of the record of proceeding, we find that the petitioner has not established that this petition is eligible for the U.S. master's degree cap exemption. Under section 214(g)(5)(C) of the Act, general H-1B cap does not apply to a nonimmigrant alien that holds a master's degree or higher from a United States institution of higher education as defined in section 101(a) of the Higher Education Act (HEA) of 1965. The fourth criterion of 101(a) defines the United States institution of higher education as a public or other nonprofit institution.

The petitioner claims an exemption based on the beneficiary's degree from [REDACTED] however, as noted by the director, [REDACTED] is a private, for profit institution.² On appeal, the petitioner asserts that "the section 101(a)(4) of the HEA is indeed overly restrictive in that only public and profit institutions are allowed to benefit and qualify under this provision." The petitioner further states that "[i]t would be an anomaly to administer a strict reading of this provision to the exclusion of aliens who are able to obtain degrees from for-profit institutions and a violation of fundamental due process rights."

Although the petitioner argues that its rights to procedural due process were violated, it has not shown that any violation of the regulations resulted in "substantial prejudice" to it. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. The petitioner's primary complaint is that the director denied the petition.

² According to the National Center for Education Statistics, which is located within the U.S. Department of Education and the Institute of Education Sciences and is the primarily federal entity for collecting and analyzing data related to education in the United States, [REDACTED] is a private, for-profit institution. For more information about [REDACTED] see [REDACTED] (last visited February 27, 2015).

A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. Accordingly, the petitioner's claim is without merit.

Further, we do not have authority to rule on the constitutionality of laws enacted by Congress, similar to the Board of Immigration Appeals. See, e.g., *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992). Therefore, we will not further address the constitutional issues raised by the petitioner.

In response to the NOID, the petitioner claimed that if this petition is found ineligible, this petition should be counted towards the regular cap and not the master's cap. However, this petition was filed on April 1, 2014 requesting a U.S. master's degree or higher cap exemption. On April 7, 2014, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach both the H-1B Cap and the U.S. Master's Degree or Higher Cap for fiscal year (FY) 2015 as of that date.³ As previously noted, 8 C.F.R. 214.2(h)(8)(ii)(B) states that the petitions indicating that they are exempt from the numerical limitation but are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied. Since the petitioner has not established that the beneficiary is exempt from the H-1B cap and the numerical limit has been reached, this petition will be denied.

D. BEYOND THE DIRECTOR'S DECISION

Specialty Occupation

Beyond the decision of the director, we will now address whether the petitioner has established that the proffered position qualifies as a specialty occupation position.

For an H-1B petition to be granted, the petitioner must provide sufficient evidence to establish that it will employ the beneficiary in a specialty occupation position. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the applicable 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:

³ For more information, see <http://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap> (last visited February 27, 2015).

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.

In ascertaining the intent of a petitioner, USCIS looks to the Form I-129 and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, et cetera. Pursuant to 8 C.F.R. § 214.2(h)(9)(i), the director has the responsibility to consider all of the evidence submitted by a petitioner and such other evidence that he or she may independently require to assist his or her adjudication. Further, the regulation at 8 C.F.R. § 214.2(h)(4)(iv) provides that "[a]n H-1B petition involving a specialty occupation shall be accompanied by [d]ocumentation . . . or any other required evidence sufficient to establish . . . that the services the beneficiary is to perform are in a specialty occupation."

In a support letter dated March 29, 2014, the petitioner described the proffered position as follows:

We propose at this time to offer [the beneficiary] temporary employment in the specialty occupation of Software Application Developer, within the [petitioner]. Software application development is the process of using a programming language (and a method) to design a program that runs on a computer to perform or automate a given task. The Application Developer designs and develops new and modified features of software application. They also [sic] develop data migration and integrations processes to legacy systems using identified development tools and technologies. The application developer may also create services (web services-w*) called from external applications to integrate with software application.

Responsibilities

- The application developer is the primary resource for determining the approach to be utilized in a project implementation.
- The application developer should possess a thorough understanding of the product from both a functional and technical perspective.
- He or she should have a comprehensive understanding of the implementation methodologies for the technology being utilized in product development, such as .NET or Java Framework.
- The application developer participates in every aspect of the development and implementation, working with business analysts to ensure full understanding of the change implications to current business processes.
- He or she designs and builds product deliverables according to specifications, escalates technical design or specification issues to business analyst/project manager and application development director, and works within a given time frame to complete coding.
- He or she follows good development practices and software development life cycle methodologies throughout product development.

Upon review, we observe that the petitioner's job description appears to be recited virtually verbatim from another source. That is, the same job description appears in a book entitled '[REDACTED]' (2010) by [REDACTED] (excerpts of which are posted at [REDACTED]), as well as other websites including '[REDACTED]' at [REDACTED] (last visited February 27, 2015). There is no indication that the petitioner is related or affiliated to the originating source of these publications. No explanation was provided by the petitioner.

This type of generalized description may be appropriate when defining the range of duties that may be performed within an occupational category, but it fails to adequately convey the substantive work that the beneficiary will perform within the petitioner's business operations and, thus, cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as qualifying as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the beneficiary for the period of employment requested in the petition.

Based upon a complete review of the record of proceeding, we find that the petitioner has not established (1) the actual work that the beneficiary would perform, (2) the complexity, uniqueness and/or specialization of the tasks, and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. Consequently, these material omissions preclude a determination that the petitioner's proffered position qualifies as a specialty occupation under the pertinent statutory and regulatory provisions. Further, there is a lack of probative evidence substantiating the petitioner's claims with regard to the duties, responsibilities and requirements of the proffered position.

The petitioner's failure to establish the substantive nature of the work to be performed by the beneficiary precludes a finding that the proffered position is a specialty occupation under any

criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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. Thus, the petitioner has failed to establish that the proffered position satisfies any of the applicable provisions.

As described, we find that the job description does not provide a sufficient factual basis to convey a persuasive basis to discern the substantive matters that would engage the beneficiary in the actual performance of the proffered position for the entire three-year period requested. Such lack of evidence, thus, fails to persuasively support the claim that the duties and responsibilities of the position proffered here, would generate the theoretical and practical application of any particular educational level of highly specialized knowledge in a specific performance specialty directly related to the demands of the proffered position. 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. The appeal will be dismissed and the petition denied for this additional reason.

E. CONCLUSION AND ORDER

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, 1037 (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 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. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.