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129 H1B Denial ACWIA FEE- INTRODUCTION

8 CFR § 103.2(a)(7) states the following regarding the submission of the correct fees:

Comment [CSC - DHN1]: These are new fee regulations effective on December 23, 2016

(7) Benefit requests submitted. (i) USCIS will consider a benefit request received and will record the receipt date as of the actual date of receipt at the location designated for filing such benefit request whether electronically or in paper format.

(ii) A benefit request which is rejected will not retain a filing date. A benefit request will be rejected if it is not:

(A) Signed with valid signature;

(B) Executed;

(C) Filed in compliance with the regulations governing the filing of the specific application, petition, form, or request; and

(D) Submitted with the correct fee(s). If a check or other financial instrument used to pay a fee is returned as unpayable, USCIS will re-submit the payment to the remitter institution one time. If the instrument used to pay a fee is returned as unpayable a second time, the filing will be rejected and a charge will be imposed in accordance with 8 CFR 103.7(a)(2).

(iii) A rejection of a filing with USCIS may not be appealed.

INA § 214(c)(9) provides for the following required fees for an H-1B petition:

(A) The Attorney General shall impose a fee on an employer (excluding any employer that is a primary or secondary education institution, an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a), a nonprofit entity related to or affiliated with any such institution, a nonprofit entity which engages in established curriculum-related clinical training of students registered at any such institution, a nonprofit research organization, or a governmental research organization) filing before (sic) and a petition under paragraph (1)-

(i) initially to grant an alien nonimmigrant status described in section 101(a)(15)(H)(i)(b);

(ii) to extend the stay of an alien having such status (unless the employer previously has obtained an extension for such alien); or

(iii) to obtain authorization for an alien having such status to change employers.

(B) The amount of the fee shall be \$1,500 for each such petition except that the fee shall be half the amount for each such petition by any employer with not more than 25 full-time equivalent employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer).

(C) Fees collected under this paragraph shall be deposited in the Treasury in accordance with section 286(s).

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8 CFR § 214.2(h)(19)(i) and (h)(19)(ii) provide for the following ACWIA fee:

Additional fee for filing certain H-1B petitions. (i) A United States employer (other than an exempt employer defined in paragraph (h)(19)(iii) of this section, or an employer filing a petition described in paragraph (h)(19)(v) of this section) who files a Petition for Nonimmigrant Worker (Form I-129) must include the additional American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in § 103.7(b)(1) of this chapter, if the petition is filed for any of the following purposes:

- (A) An initial grant of H-1B status under section 101(a)(15)(H)(i)(b) of the INA;
- (B) An initial extension of stay, as provided in paragraph (h)(15)(i) of this section; or
- (C) Authorization for a change in employers, as provided in paragraph (h)(2)(i)(D) of this section.

(ii) A petitioner must submit with the petition the ACWIA fee, and any other applicable fees, in accordance with § 103.7 of this chapter, and form instructions. Payment of all applicable fees must be made at the same time, but the petitioner may submit separate checks. USCIS will accept payment of the ACWIA fee only from the United States employer or its representative of record, as defined in 8 CFR 103.2(a) and 8 CFR part 292.

The H-1B provisions of the Omnibus Appropriations Act for fiscal year 2005 reinstated the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee that sunsetted on October 1, 2003. Further, the provisions raised the fee to \$1,500. However, petitioners who employ no more than 25 full-time equivalent employees, including any affiliate or subsidiary, may submit a reduced fee of \$750. The \$750 or \$1,500 fee applies to any non-exempt petitions filed with USCIS after December 8, 2004, and must be paid by you or your representative. All petitions requesting H-1B classification are subject to the ACWIA fee unless you establish that your organization or the filing situation is exempt from the ACWIA fee.

The following filing situations do not require payment of the \$1,500 or \$750 ACWIA fee:

- Amended petition not requesting extension of stay;
- Petition filed for the sole purpose of correcting a USCIS error; or
- Petition for a beneficiary's second or subsequent extension of stay with the same employer.

The following organizations are also exempt from paying the ACWIA fee:

- Institution of higher education as defined in 20 U.S.C. § 1001(a);
- Nonprofit entity related to or affiliated with institution of higher education;
- Nonprofit research organization or governmental research organization;
- Primary or secondary education institution; or
- Nonprofit entity that engages in established curriculum-related clinical training of students registered at an institution of higher education.

129 H1B Denial ACWIA Fee- 26 or More Full-time Equivalent U.S. Employees

26 or More Full-time Equivalent U.S. Employees

You indicated on the Form I-129 that you seek to change the beneficiary's employer / seek to begin employing the beneficiary / are seeking the first extension of the beneficiary's stay. You also stated that you employ [INSERT

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NUMBER OF U.S. WORKERS FROM PART 5, QUESTION 13 OF I-129] employees in the United States. Therefore, you remitted the reduced \$750 ACWIA fee with the Form I-129.

INA § 214(c)(9)(B) provides for a reduced \$750 ACWIA fee if:

(B) The amount of the fee shall be \$1,500 for each such petition except that the fee shall be half the amount for each such petition by any employer with not more than 25 full-time equivalent employees who are employed in the United States (determined by including any affiliate or subsidiary of such employer).

To qualify for this reduced ACWIA fee, you must show that your organization and all of your affiliates and subsidiaries employ, in total, no more than 25 full-time equivalent U.S. employees in the United States.

XXX[DISCUSS WHY ENTITY IS NOT ELIGIBLE FOR REDUCED ACWIA FEE]XXX (b)(5)

[SAMPLE ANALYSIS 1: ENTITY HAS AFFILIATES AND/OR SUBSIDIARIES]



129 H1B Denial ACWIA Fee- Not an Amended Petition

You indicate that the instant Form I-129 is exempt from the ACWIA fee because the petition is an amended petition that is not requesting an extension of stay.

8 CFR § 214.2(h)(19)(v)(A) allows for an exemption from the ACWIA fee when the petition "is an amended H-1B petition that does not contain any requests for an extension of stay."

XXX[DISCUSS WHY PETITION IS NOT AN AMENDED PETITION]XXX

[SAMPLE ANALYSIS 1: NOT THE SAME END DATE]

USCIS records show that the beneficiary's H-1B status [ended or will end] on [INSERT H-1B STATUS END DATE]. The Form I-129 indicates that you requested to extend the beneficiary's status from [INSERT REQUESTED EXTENSION START DATE] to [INSERT REQUESTED EXTENSION END DATE]. Further, the record shows that this petition is the first extension of stay request that you had filed for the beneficiary. Therefore, you are required to remit the ACWIA fee because the petition is requesting an extension of stay and it is the first extension of stay request you are filing for this beneficiary. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2: CAN'T AMEND A PETITION YOU WERE NEVER APPROVED]

USCIS records show that the instant petition is the second petition that you have filed for the beneficiary. You had previously filed another Form I-129 for the beneficiary. That prior filing was subsequently denied. On this Form I-129, you indicated that the petition is an amended petition that does not seek an extension of stay. Since you have never been approved to employ the beneficiary, the instant petition is not an amended petition because you cannot amend a petition that was not approved. Therefore, you are required to remit the ACWIA fee because the

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petition is not an amended petition. Since this is an initial petition you are filing for this beneficiary, the ACWIA fee is required. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

129 H1B Denial ACWIA Fee- Correcting USCIS Error

You indicate that the instant Form I-129 is exempt from the ACWIA fee because the petition was solely filed to correct an USCIS error.

8 CFR § 214.2(h)(19)(v)(B) allows for an exemption from the ACWIA fee when the petition “is an H-1B petition filed for the sole purpose of correcting a [USCIS] error.”

XXX[DISCUSS WHY USCIS DID NOT MAKE ERROR]XXX

[SAMPLE ANALYSIS 1: USCIS DID NOT MAKE ERROR]

You explained that USCIS [explain what the claimed error was]. However, [explain that USCIS did not make this error]. Therefore, you are required to remit the ACWIA fee because USCIS did not make the error. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

129 H1B Denial ACWIA Fee- Not a Second or Subsequent Extension of Stay Request

You indicate that the instant Form I-129 is exempt from the ACWIA fee because the petition is a second or subsequent request for extension of stay that was filed by you for the beneficiary.

8 CFR § 214.2(h)(19)(v)(C) allows for an exemption from the ACWIA fee when the petition “is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the ACWIA fee was paid on the initial petition or the first extension of stay.”

XXX[DISCUSS WHY PETITION IS NOT 2ND OR SUBSEQUENT EXTENSION OF STAY]XXX

[SAMPLE ANALYSIS 1: PRIOR PETITION WAS AMENDED PETITION]

USCIS records show that the beneficiary was initially granted H-1B status to work for your organization until [INSERT PRIOR STATUS END DATE]. On [INSERT AMENDED PETITION FILING DATE], you filed an amended Form I-129 that sought to amend the prior approval. On that filing, you did not remit the ACWIA fee because the petition did not request an extension of stay. Here, you requested to extend the beneficiary’s stay from [INSERT REQUESTED EXTENSION START DATE] to [INSERT REQUESTED EXTENSION END DATE]. Thus, even though the instant petition is the third H-1B filing that you have filed for the beneficiary, the petition is the first extension of stay request you have filed for this beneficiary. As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2: PRIOR PETITIONS IN ANOTHER NONIMMIGRANT CATEGORY]

USCIS records show that the beneficiary was initially granted XXX[INSERT NONIMMIGRANT WORKER DESCRIPTOR SUCH AS: intracompany transferee (L-1), employee of treaty trader (E-2)]XXX status to work for your organization. Subsequently, you filed several Forms I-129 that extended the beneficiary’s XXX[INSERT PRIOR STATUS SUCH AS: L-1, E-2]XXX status with your organization. USCIS records also show that the beneficiary was initially granted H-1B status to work for your organization until [INSERT PRIOR STATUS END DATE].

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On [PRESENT PETITION FILING DATE], you filed this Form I-129 that requested to extend the beneficiary's stay from [INSERT REQUESTED EXTENSION START DATE] to [INSERT REQUESTED EXTENSION END DATE]. ~~USCIS interprets the requirement at~~ According to 8 CFR § 214.2(h)(19)(v)(C), to mean that a Form I-129 is exempt from the ACWIA fee only when the petition is the second or subsequent extension of stay filed by the same employer for H-1B status. Prior petitions that you may have filed for the beneficiary for other nonimmigrant visa classifications do not qualify to exempt the instant petition from the ACWIA fee under 8 CFR § 214.2(h)(19)(v)(C) exemptions. ~~Thus, even though the instant petition is the second or subsequent extension of stay you have filed for the beneficiary for all nonimmigrant classifications, it is the first extension of stay in H-1B status that you have filed for the beneficiary. As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.~~

Comment [RHC7]: ~~New technical edits Deleted reference to "only" since there are other exemptions.~~

129 H1B Denial ACWIA Fee- Institution of Higher Education

You indicated on the Form I-129 that you seek to change the beneficiary's employer / seek to begin employing the beneficiary / are seeking the first extension of the beneficiary's stay. You also indicated that the instant Form I-129 is exempt from the ACWIA fee because you are an institution of higher education as defined at 20 U.S.C. § 1001(a).

INA § 214(c)(9)(A) provides an exemption from the ACWIA fee if you are "an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a))."

USCIS regulation at 8 CFR § 214.2(h)(19)(iii)(A) also allows for an exemption from the ACWIA fee for an "institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965."

20 U.S.C. § 1001(a) defines an "institution of higher education" as:

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.

This exemption from the ACWIA fee requires that you show that your organization meets all five requirements in the definition of an institution of higher education at 20 U.S.C. § 1001(a).

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XXX[DISCUSS WHY SCHOOL IS NOT AN INSTITUTION OF HIGHER EDUCATION. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: SCHOOL IS NOT A PUBLIC OR NONPROFIT INSTITUTION]

USCIS had requested that you provide evidence that your organization is a public or nonprofit institution. However, you did not provide such documents. Instead, the record indicates that your organization is a private for-profit college. As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2: SCHOOL IS NOT ACCREDITED OR DOES NOT HAVE PRE-ACCREDITATION STATUS]

USCIS requested that you provide evidence that your organization is accredited or has pre-accreditation status from an agency authorized by the U.S. Department of Education to grant such status. In response, you did not provide such evidence. USCIS reviewed the U.S. Department of Education's Database of Accredited Postsecondary Institutions and Programs¹ and USCIS could not locate your organization as an entity that is accredited or has pre-accreditation status. As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

129 H1B Denial ACWIA Fee- Nonprofit Entity Related to or Affiliated with an Institution of Higher Education

You indicated on the Form I-129 that you seek to change the beneficiary's employer / seek to begin employing the beneficiary / are seeking the first extension of the beneficiary's stay. You also indicated that the instant Form I-129 is exempt from the ACWIA fee because you are a nonprofit entity that is related to or affiliated with an institution of higher education as defined at 20 U.S.C. § 1001(a).

INA § 214(c)(9)(A) provides for an exemption from the ACWIA fee if you are "a nonprofit entity related to or affiliated with any such institution [of higher education]."

USCIS regulations at 8 CFR § 214.2(h)(19)(iii)(B) also allow for an exemption from the ACWIA fee for a nonprofit entity related to or affiliated with an institution of higher education as follows:

(B) An affiliated or related nonprofit entity. A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

- (1) The nonprofit entity is connected to 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;
- (3) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
- (4) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a

¹ <http://ope.ed.gov/accreditation/Search.aspx>

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fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education;

A nonprofit entity is defined at 8 CFR § 214.2(h)(19)(iv) as:

(iv) 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.

This exemption from the ACWIA fee requires that you show that you are a nonprofit entity that meets at least one of four criteria² at 8 CFR § 214.2(h)(19)(iii)(B). Prior to January 17, 2017, USCIS had issued interim guidance that allowed for USCIS to afford deference to prior approval where USCIS determined that a petitioner was a nonprofit entity related to or affiliated with an institution of higher education since June 6, 2006.² In the Federal Register notice³ that revised 8 CFR § 214.2(h)(19)(iii)(B), DHS noted that the revised regulation “better reflects current operational realities for institutions of higher education and how they interact with, and sometimes rely on, nonprofit entities, and account for the nature and scope of common, bona fide affiliations between nonprofit entities and institutions of higher education.” The regulation supersedes past USCIS guidance in this area, and deference will no longer be afforded to prior approvals where USCIS determined that a petitioner was a nonprofit entity related to or affiliated with an institution of higher education. Instead, USCIS will adjudicate requests for this cap exemption based on the evidentiary criteria listed in the regulation to determine whether an entity is a nonprofit entity related to or affiliated with an institution of higher education.

Comment [RHC8]: Technically it is a DHS regulation.

SCOPS: Thanks Robert.

Comment [ECB9]: I corrected the previous term to agree with the verb in the quotation. Assuming you are only referring to one regulation, I suggest making all references to “regulation” singular in order to be consistent.

SCOPS: Thanks.

XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT RELATED OR AFFILIATED ENTITY. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: ENTITY IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6)]

To meet the requirements under this ACWIA fee exemption, you must show that your entity is defined as a tax exempt entity under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). USCIS previously requested that you provide evidence of your nonprofit status. In response, XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT UNDER FEDERAL LAWS]XXX. You did not provide evidence that your entity has been approved as a tax exempt entity under the relevant IRC section. Therefore, the record does not show that you are a nonprofit entity as defined in DHS regulations for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

(b)(5)

[SAMPLE ANALYSIS 2: HAS NOT MEET REQUIREMENTS AT 8 CFR § 214.2(h)(19)(iii)(B)(1), (2), (3) or (4)]

You indicate that you are a nonprofit entity related to or affiliated with XXX[INSERT UNIVERSITY]XXX.

USCIS will first consider whether you have shown that you are a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(19)(iii)(B)(1): The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation.

² See USCIS Interim Policy Memorandum, *Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation* (Apr. 28, 2011) (2011 Interim Policy Memo)

³ See 81 Federal Register 82447 (November 18, 2016)

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Upon review, the record does not establish that your entity and XXX[INSERT UNIVERSITY]XXX are owned or controlled by the same boards or federations. USCIS interprets the terms “board” and “federation” as referring to educational bodies such as a board of education or a board of regents. You did not claim that you share the same board or federation with institutions of higher education.

Second, USCIS considers whether you have established that you are a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(19)(iii)(B)(2): The nonprofit entity is operated by an institution of higher education.

The record does not demonstrate that an institution of higher education operates your entity, XXX[DISCUSS WHY PETITIONER IS NOT OPERATED BY AN INSTITUTION OF HIGHER EDUCATION]XXX. Accordingly, you have not shown that you are operated by an institution of higher education.

Third, USCIS considers whether your entity is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(19)(iii)(B)(3): The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary. 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* at 224, 409, 1656 (10th Edition 2014) (defining the terms branch, cooperative, and subsidiary); see also, *Webster's New College Dictionary* at 699 (3rd Edition 2008) (defining the term member). XXX[DISCUSS HOW EMPLOYER DOES NOT MEET REQUIREMENTS AS MEMBER, BRANCH, COOPERATIVE OR SUBSIDIARY]XXX. Accordingly, you have not shown that you are attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(b)(5)

[SAMPLE ANALYSIS 2A: ENTITY HAS NOT ENTERED INTO FORMAL WRITTEN AFFILIATION AGREEMENT WITH SCHOOL. AGREEMENT IS WITH PARENT, AFFILIATE OR SUBSIDIARY]

Fourth, USCIS considers whether you are eligible for the exemption from the ACWIA fee under 8 CFR § 214.2(h)(19)(iii)(B)(4). The issue is whether you have entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education, and a fundamental activity of your entity is to directly contribute to the research or education mission of the institution of higher education.

XXX[Officer must insert analysis to the parties involved in the affiliation agreement and describe the purpose of the affiliation agreement]XXX. Since the regulations require that your entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education, the agreement between your XXX[parent/affiliate/subsidiary]XXX does not meet this requirement. You did not provide evidence that your entity has entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education. Therefore, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2B: FORMAL AGREEMENT IS OLD, EXPIRED AND/OR NO LONGER ACTIVE; OR NOT A FUNDAMENTAL ACTIVITY OF THE ORGANIZATION]

You indicate that your entity is eligible for the exemption from the ACWIA fee under 8 CFR § 214.2(h)(19)(iii)(B)(4). The record shows that you are a nonprofit entity under one of the relevant Internal Revenue Code of 1986 (IRC) sections. The issue, however, is whether you have entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education; and whether a

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fundamental activity of your entity is to directly contribute to the research or education mission of the institution of higher education.

(b)(5)

[SAMPLE ANALYSIS 2B(1): AGREEMENT EXPIRED]

education. Thus, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2B(2): NO EVIDENCE OF ACTIVE RELATIONSHIP]

Further, the regulations require that you show that you have an active working relationship with the institution of higher education. XXX[Officer must insert analysis why there is no active working relationship between the petitioner and institution of higher education]XXX. Therefore, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2B(3): ENTITY'S FUNDAMENTAL ACTIVITY IS NOT TO DIRECTLY CONTRIBUTE TO RESEARCH OR EDUCATION OF THE SCHOOL]

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In addition, you must show that a fundamental activity of your entity is to directly contribute to the research or education mission of the institution of higher education. XXX[Officer must insert analysis on the petitioner's fundamental activity and how it is not to directly contribute to the research or education of the institution of higher education]XXX. Thus, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied as improperly filed because you did not remit the required filing fees.

129 H1B Denial ACWIA Fee- Nonprofit Research Organization or Governmental Research Organization

You indicated on the Form I-129 that you seek to change the beneficiary's employer / seek to begin employing the beneficiary / are seeking the first extension of the beneficiary's stay. You also indicate that the Form I-129 is exempt from the ACWIA fee because you are a nonprofit research organization or governmental research organization.

INA § 214(c)(9)(A) provides an exemption from the ACWIA fee if you are "a nonprofit research organization, or a governmental research organization."

A nonprofit organization is defined at 8 CFR § 214.2(h)(19)(iv) as:

(iv) 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,

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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.

8 CFR § 214.2(h)(19)(iii)(C) defines a nonprofit research organization and a governmental research organization as follows:

(C) A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a federal, state, or local entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

To qualify for ACWIA fee exemption under these criteria, you must show that your organization is a nonprofit research organization that is primarily engaged in basic and/or applied research; or that your organization is a federal, state or local governmental entity whose primary mission is the performance or promotion of basic and/or applied research.

XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT RESEARCH ORGANIZATION OR GOVERNMENTAL RESEARCH ORGANIZATION. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: ENTITY IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6)]

To qualify as a nonprofit research organization, you must show that your organization is defined as a tax exemption organization under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). USCIS previously requested that you provide evidence of your nonprofit status. In response, XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT UNDER FEDERAL LAWS]XXX. You did not provide evidence that your organization has been approved as a tax exempt organization under one of the relevant IRC sections. Therefore, the record does not show that your organization is a nonprofit entity as defined in DHS regulations for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2: ENTITY IS NOT PRIMARILY ENGAGED IN RESEARCH FOR NONPROFIT RESEARCH ORGANIZATIONS]

You indicate that you qualify for ACWIA fee exemption because you are a nonprofit research organization. You did not claim that you are a governmental research organization. The record shows that your organization is a nonprofit entity under one of the relevant Internal Revenue Code of 1986 (IRC) sections, but fails to establish that you are primarily engaged in basic and/or applied research. XXX[DISCUSS HOW ENTITY IS NOT PRIMARILY ENGAGED IN RESEARCH]XXX Thus, the record does not show that your organization is a nonprofit research organization for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Therefore, the Form I-129 is denied because you did not remit the required filing fees.

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[Sample Analysis 3: Government Research organization not engaged in basic or applied research.]

(b)(5)

You indicate that you qualify for ACWIA fee exemption because you are a governmental research organization. To qualify for this exemption, you must establish that you are a federal, state or local governmental entity whose primary mission is the performance or the promotion of basic and/or applied research. XXX[Officer must insert why the petitioner doesn't qualify as a federal, state or local governmental entity or that the petitioner's primary mission is not the performance or promotion of basic/applied research]XXX. Thus, the record does not show that your organization is a governmental research organization that qualifies for the ACWIA fee exemption. As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Therefore, the Form I-129 is denied because you did not remit the required filing fees.

129 H1B Denial ACWIA Fee- Primary or Secondary Education Institution

You indicated on the Form I-129 that you seek to change the beneficiary's employer / seek to begin employing the beneficiary / are seeking the first extension of the beneficiary's stay. You also indicate that the instant Form I-129 is exempt from the ACWIA fee because you are a primary or secondary school.

INA § 214(c)(9)(A) and 8 CFR § 214.2(h)(19)(iii)(D) provide an exemption from the ACWIA fee if you are "a primary or secondary education institution."

XXX[DISCUSS WHY ENTITY IS NOT A PRIMARY OR SECONDARY SCHOOL]XXX

[SAMPLE ANALYSIS 1: DAY CARE ENTITY – NOT A PRIMARY SCHOOL]

129 H1B Denial ACWIA Fee- Nonprofit Entity that Engages in Establishing Curriculum-related Clinical Training of Students Registered at an Institution of Higher Education

You indicate that the instant Form I-129 is exempt from the ACWIA fee because you are a nonprofit organization that engages in established curriculum-related clinical training of students who are registered at institutions of higher education.

INA § 214(c)(9)(A) provides an exemption from the ACWIA fee if you are "a nonprofit entity which engages in established curriculum-related clinical training of students registered at any such institution [of higher education]."

8 CFR § 214.2(h)(19)(iii)(E) provides for the same exemption from the ACWIA fee for a "nonprofit entity which engages in an established curriculum-related clinical training of students registered at an institution of higher education."

A nonprofit entity is defined at 8 CFR § 214.2(h)(19)(iv) as:

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(iv) 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.

XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT ENTITY THAT ENAGES IN CLINICAL TRAINING]XXX

[SAMPLE ANALYSIS 1: ENTITY IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6)]

To qualify for ACWIA fee exemption under this criterion, you must show that your entity is defined as a tax exemption organization under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). USCIS previously requested that you provide evidence of your nonprofit status. In response, XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT UNDER FEDERAL LAWS]XXX. You did not provide evidence that your entity has been approved as a tax exempt entity under one of the relevant IRC sections. Therefore, the record does not show that you are a nonprofit entity under DHS regulations for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Thus, the Form I-129 is denied because you did not remit the required filing fees.

[SAMPLE ANALYSIS 2: ENTITY DOES NOT ENGAGE IN CLINICAL TRAINING]

You indicated that you qualify for this exemption from the ACWIA fee because your entity engages in curriculum-related clinical training of students who are registered at institutions of higher education. USCIS had requested evidence of such clinical training. XXX[Officer must insert reason why the evidence does not establish that the petitioner is engaged in clinical training]XXX. Thus, the record does not show that you are eligible for the ACWIA fee exemption under INA § 214(c)(9)(A). As such, you are required to remit the \$750 or \$1,500 ACWIA fee, as applicable. You did not remit the \$750 or \$1,500 ACWIA fee. Therefore, the Form I-129 is denied because you did not remit the required filing fees.

129 H1B DENIAL CAP EXEMPTION- INTRODUCTION

The [first, second, third, next, only] issue to be discussed is whether your organization or the beneficiary is exempt from the H-1B numerical limitation (“H-1B Cap”).

INA § 214(g)(1)(A) provides for an H-1B Cap as follows:

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

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

- (i) 65,000 in each fiscal year before fiscal year 1999;
- (ii) 115,000 in fiscal year 1999;
- (iii) 115,000 in fiscal year 2000;
- (iv) 195,000 in fiscal year 2001;

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- (v) 195,000 in fiscal year 2002;
- (vi) 195,000 in fiscal year 2003 and
- (vii) 65,000 in each succeeding fiscal year; or

All employers and beneficiaries are subject to the H-1B Cap unless an employer or beneficiary qualifies for an H-1B Cap exemption.

Upon filing, you indicated on the Form I-129 that your organization or the beneficiary is exempt from the H-1B Cap. Subsequently, USCIS requested that you provide additional information or evidence regarding your organization or the beneficiary's exemption from the H-1B Cap. Following your response, the record contains the following documents regarding the H-1B Cap exemption:

XXX[INSERT, REMOVE, CHANGE EVIDENCE SUBMITTED]XXX

- Information about your organization's products or services;
- Evidence that your organization is accredited or has pre-accreditation status from an agency authorized by the U.S. Department of Education to grant such status;
- Evidence of your nonprofit status;
- Copies of your Form 990, Return of Organization Exempt From Income Tax;
- Your organization's Articles of Incorporation, by-laws or similar organizational documents;
- An agreement between your organization and XXX[INSERT UNIVERSITY]XXX;
- Information regarding XXX[INSERT UNIVERSITY]XXX;
- A letter from XXX[INSERT UNIVERSITY]XXX;
- Evidence that you will employ the beneficiary to perform job duties at a qualifying institution;
- Copies of Form I-797, Approval Notices, that previously granted the beneficiary H-1B classification;
- Copies of the beneficiary's Form I-612, Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended); and
- Documents regarding your workers.

USCIS will now discuss each H-1B Cap exemption that you claim.

129 Denial Cap Exemption- Institution of Higher Education

You indicate on the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement that the Form I-129 is exempt from the H-1B Cap because you are an institution of higher education as defined at 20 U.S.C. § 1001(a).

INA § 214(g)(5)(A) provides an exemption from the H-1B Cap at INA § 214(g)(1)(A) as follows:

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

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;

(b)(5)

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exemption under section 214(g)(5) of the Act. For purposes of section 214(g)(5)(A) and (B) of the Act:

(1) "Institution of higher education" has the same definition as described at section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

20 U.S.C. § 1001(a) defines an "institution of higher education" as:

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.

This exemption from the H-1B Cap requires that you show that your organization meets all five requirements in the definition of an institution of higher education at 20 U.S.C. § 1001(a).

XXX[DISCUSS WHY SCHOOL IS NOT AN INSTITUTION OF HIGHER EDUCATION. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: SCHOOL IS NOT A PUBLIC OR NONPROFIT INSTITUTION]

USCIS had requested that you provide evidence that your organization is a public or nonprofit institution. However, you did not provide such documents. Instead, the record indicates that your organization is a private for-profit college. Therefore, your organization is not eligible for the exemption from the H-1B Cap as an institution of higher education under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 2: SCHOOL IS NOT ACCREDITED OR DOES NOT HAVE PRE-ACCREDITATION STATUS]

USCIS requested that you provide evidence that your organization is accredited or has pre-accreditation status from an agency authorized by the U.S. Department of Education to grant such status. In response, you did not provide such evidence. USCIS reviewed the U.S. Department of Education's Database of Accredited Postsecondary Institutions and Programs⁴ and USCIS could not locate your organization as an entity that is

⁴ <http://ope.ed.gov/accreditation/Search.aspx>.

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accredited or has pre-accreditation status. Therefore, you have not established that your organization is exempt from the H-1B Cap as an institution of higher education under INA § 214(g)(5)(A).

129 H1B Denial Cap Exemption- Nonprofit Entity Related to or Affiliated with an Institution of Higher Education

You indicate on the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement that the Form I-129 is exempt from the H-1B Cap because you are a nonprofit entity that is related to or affiliated with an institution of higher education as defined at 20 U.S.C. § 1001(a).

INA § 214(g)(5)(A) provides an exemption from the H-1B Cap at INA § 214(g)(1)(A) as follows:

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

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;

8 CFR § 214.2(h)(8)(ii)(F)(2) provides for an exemption from the H-1B Cap for nonprofit entities related to or affiliated with institutions of higher education as follows:

(F) Cap exemptions under sections 214(g)(5)(A) and (B) of the Act. An alien is not subject to the numerical limitations identified in section 214(g)(1)(A) of the Act if the alien qualifies for an exemption under section 214(g)(5) of the Act. For purposes of section 214(g)(5)(A) and (B) of the Act:

(2) A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

(i) The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;

(ii) The nonprofit entity is operated by an institution of higher education;

(iii) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or

(iv) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

A nonprofit entity is defined at 8 CFR § 214.2(h)(19)(iv) as:

(iv) 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

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by the Internal Revenue Service.

XXX[ONLY KEEP THIS IN IF PETITIONER IS TRYING TO CLAIM DEFERENCE UNDER THE APRIL 2013 GUIDANCE]XXX This exemption from the H-1B Cap requires that you show that you are a nonprofit entity that meets at least one of four criteria⁵ at 8 CFR § 214.2(h)(8)(ii)(F)(2). Prior to January 17, 2017, USCIS had issued interim guidance that allowed for USCIS to afford deference to prior approvals where USCIS determined that a petitioner was a nonprofit entity related to or affiliated with an institution of higher education since June 6, 2006.⁵ In the Federal Register notice⁶ that implemented 8 CFR § 214.2(h)(8)(ii)(F)(2), USCIS-DHS noted that the regulation “better reflects current operational realities for institutions of higher education and how they interact with, and sometimes rely on, nonprofit entities, and account for the nature and scope of common, bona fide affiliations between nonprofit entities and institutions of higher education.” The regulation supersedes past USCIS guidance in this area, and deference will no longer be afforded to prior approvals where USCIS determined that a petitioner was a nonprofit entity related to or affiliated with an institution of higher education. Instead, USCIS will adjudicate requests for this cap exemption based on the evidentiary criteria listed in the regulation to determine whether an entity is a nonprofit entity related to or affiliated with an institution of higher education.

XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT RELATED OR AFFILIATED ENTITY. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: ENTITY IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6)]

To meet the requirements under this H-1B Cap exemption, you must show that your entity is defined as a tax exempt entity under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). USCIS previously requested that you provide evidence of your nonprofit status. In response, XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT UNDER FEDERAL LAWS]XXX. You did not provide evidence that your entity has been approved as a tax exempt entity under one of the relevant IRC sections. Therefore, the record does not show that you are a nonprofit entity as defined in DHS regulations for the H-1B Cap exemption under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 2: HAS NOT MEET REQUIREMENTS AT 8 CFR § 214.2(h)(8)(ii)(F)(2)(i), (ii), (iii) or (iv)]

You indicate that you are a nonprofit entity related to or affiliated with XXX[INSERT UNIVERSITY]XXX.

USCIS will first consider whether you have shown that you are a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(i): The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation.

(b)(5)

Second, USCIS considers whether you have established that you are a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(ii): The nonprofit entity is operated by an institution of higher education.

⁵ See USCIS Interim Policy Memorandum, *Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation* (Apr. 28, 2011) (2011 Interim Policy Memo).

⁶ See 81 Federal Register 82447 (November 18, 2016).

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The record does not demonstrate that your entity is operated by an institution of higher education, XXX[DISCUSS WHY PETITIONER IS NOT OPERATED BY AN INSTITUTION OF HIGHER EDUCATION]XXX. Accordingly, you have not shown that you are operated by an institution of higher education.

Third, USCIS considers whether your entity is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(iii): The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

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* at 224, 409, 1656 (10th Edition 2014) (defining the terms branch, cooperative, and subsidiary); *see also, Webster's New College Dictionary* at 699 (3rd Edition 2008) (defining the term member). XXX[DISCUSS HOW EMPLOYER DOES NOT MEET REQUIREMENTS AS MEMBER, BRANCH, COOPERATIVE OR SUBSIDIARY]XXX Accordingly, you have not shown that you are attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

[SAMPLE ANALYSIS 2A: ENTITY HAS NOT ENTERED INTO FORMAL WRITTEN AFFILIATION AGREEMENT WITH SCHOOL. AGREEMENT IS WITH PARENT, AFFILIATE OR SUBSIDIARY]

Fourth, USCIS considers whether your organization is eligible for the exemption from the H-1B Cap under 8 CFR § 214.2(h)(8)(ii)(F)(2)(iv): The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

The record shows that your organization is a nonprofit entity under one of the relevant Internal Revenue Code of 1986 (IRC) sections. The issue, however, is whether you have entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education.

XXX[Officer must insert analysis to the parties involved in the affiliation agreement and describe the purpose of the affiliation agreement]XXX. Since the regulations require that your entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, the agreement between your XXX[parent/affiliate/subsidiary]XXX does not meet this requirement. You did not provide evidence that your entity has entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education. Therefore, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the H-1B cap exemption under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 2B: FORMAL AGREEMENT IS OLD, EXPIRED AND/OR NO LONGER ACTIVE; OR NOT A FUNDAMENTAL ACTIVITY OF THE ORGANIZATION]

You indicate that your organization is eligible for the exemption from the H-1B Cap under 8 CFR § 214.2(h)(8)(ii)(F)(2)(iv). The record shows that your organization is a nonprofit entity under one of the relevant Internal Revenue Code of 1986 (IRC) sections. The issue, however, is whether you have entered into a formal written agreement with an institution of higher education that establishes an active working relationship between your entity and the institution of higher education for the purposes of research or education; and whether a fundamental activity of your entity is to directly contribute to the research or education mission of the institution of higher education.

[SAMPLE ANALYSIS 2B(1)A: AGREEMENT EXPIRED]

(b)(5)

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(b)(5)

Further, the regulations require that you show that you have an active working relationship with the institution of higher education. XXX[Officer must insert analysis why there is no active working relationship between the petitioner and the institution of higher education]XXX. Therefore, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 2B(3): ENTITY'S FUNDAMENTAL ACTIVITY IS NOT TO DIRECTLY CONTRIBUTE TO RESEARCH OR EDUCATION OF THE SCHOOL]

In addition, you must show that a fundamental activity of your entity is to directly contribute to the research or education mission of the institution of higher education. XXX[Officer must insert analysis on the petitioner's fundamental activity and how it is not to directly contribute to the research or education of the institution of higher education]XXX. Thus, the record does not show that you are a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A).

129 H1B Denial Cap Exemption- Nonprofit Research Organization or Governmental Research Organization

You indicate on the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement that the Form I-129 is exempt from the H-1B Cap because you are a nonprofit research organization or governmental research organization.

INA § 214(g)(5)(B) provides an exemption from the H-1B Cap at INA § 214(g)(1)(A) as follows:

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

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

8 CFR § 214.2(h)(8)(ii)(F)(3) provides for an exemption from the H-1B Cap for nonprofit research organizations or governmental research organizations as follows:

(F) Cap exemptions under sections 214(g)(5)(A) and (B) of the Act. An alien is not subject to the numerical limitations identified in section 214(g)(1)(A) of the Act if the alien qualifies for an exemption under section 214(g)(5) of the Act. For purposes of section 214(g)(5)(A) and (B) of the Act:

(3) An entity is considered a "nonprofit entity" if it meets the definition described at paragraph (h)(19)(iv) of this section. "Nonprofit research organization" and "governmental research organization" have the same definitions as described at paragraph (h)(19)(iii)(C) of this section.

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A nonprofit entity is defined at 8 CFR § 214.2(h)(19)(iv) as:

(iv) 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.

8 CFR § 214.2(h)(19)(iii)(C) defines a nonprofit research organization and a governmental research organization as follows:

(C) A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a federal, state, or local entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

To qualify for H-1B Cap exemption under these criteria, you must show that your organization is a nonprofit research organization that is primarily engaged in basic and/or applied research; or that your organization is a federal, state or local entity whose primary mission is the performance or promotion of basic and/or applied research.

XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT RESEARCH ORGANIZATION OR GOVERNMENTAL RESEARCH ORGANIZATION. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: ENTITY IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6)]

To qualify as a nonprofit research organization, you must show that your organization is defined as a tax exemption organization under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). USCIS previously requested that you provide evidence of your nonprofit status. In response, XXX[DISCUSS WHY ENTITY IS NOT A NONPROFIT UNDER FEDERAL LAWS OR [You did not provide evidence that your organization has been approved as a tax exempt organization under one of the relevant IRC sections.] Therefore, the record does not show that your organization is a nonprofit organization under DHS regulations for the H-1B Cap exemption under INA § 214(g)(5)(B).

[SAMPLE ANALYSIS 2: ENTITY IS NOT PRIMARILY ENGAGED IN RESEARCH]

You indicate that you qualify for H-1B Cap exemption because you are a nonprofit research organization. You did not claim that you are a governmental research organization. The record shows that your organization is a nonprofit entity under one of the relevant Internal Revenue Code of 1986 (IRC) sections. However, XXX[DISCUSS HOW ENTITY IS NOT PRIMARILY ENGAGED IN RESEARCH]XXX Thus, the record does not

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show that your organization is a nonprofit research organization for the H-1B Cap exemption under INA § 214(g)(5)(B).

[Sample Analysis 3: Government Research organization not engaged in basic or applied research.]

You indicate that you qualify for H-1B Cap exemption because you are a governmental research organization. To qualify for this exemption, you must establish that you are a federal, state or local governmental entity whose primary mission is the performance or the promotion of basic and/or applied research. XXX[Officer must insert why the petitioner doesn't qualify as a federal, state or local governmental entity or that the petitioner's primary mission is not the performance or promotion of basic/applied research]XXX. Thus, the record does not show that your organization is a governmental research organization for the H-1B Cap exemption under INA § 214(g)(5)(B).

129 H1B Denial Cap Exemption- Beneficiary Will Perform Job Duties at a Qualifying Institution, Organization, or Entity

You indicate that the beneficiary is exempt from the H-1B Cap because you will employ the beneficiary to perform job duties at a qualifying institution, organization or entity that directly and predominantly furthers the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity.:

INA § 214(g)(5)(A) and (g)(5)(B) provide for exemptions from the H-1B Cap at INA § 214(g)(1)(A) as follows:

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

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

8 CFR § 214.2(h)(8)(ii)(F)(4) provides for an exemption from the H-1B Cap if the beneficiary will spend the majority of the beneficiary's work time performing job duties at a qualifying institution, organization or entity as defined at INA § 214(g)(5)(A) or (g)(5)(B).

(4) An H-1B beneficiary who is not directly employed by a qualifying institution, organization or entity identified in section 214(g)(5)(A) or (B) of the Act shall qualify for an exemption under such section if the H-1B beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research. The burden is on the H-1B petitioner to establish that there is a nexus between the duties to be performed by the H-1B beneficiary and the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity.

To meet the requirements under this H-1B Cap exemption, you must show that the majority of the beneficiary's work time will be spent performing duties at a qualifying institution, organization or entity under INA § 214(g)(5)(A) or (g)(5)(B). A qualifying institution is an institution of higher education, a nonprofit related or affiliated entity, a nonprofit research organization or a governmental research organization.

XXX[DISCUSS WHY EMPLOYMENT IS NOT MAJORITY AT A QUALIFYING INSTITUTION]XXX

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[SAMPLE ANALYSIS 1: JOB DUTIES DO NOT DIRECTLY AND PREDOMINATELY FURTHER THE ESSENTIAL PURPOSE, MISSION, OBJECTIVES OR FUNCTIONS OF QUALIFYING INSTITUTION]

You stated that the beneficiary will work at XXX[INSERT QUALIFYING INSTITUTION]XXX. You also indicate that XXX[INSERT QUALIFYING INSTITUTION]XXX is a qualifying institution, organization or entity under INA § 214(g)(5)(A) or (g)(5)(B). However, to qualify for this exemption from the H-1B Cap, you must show that the majority of the beneficiary's work time will be spent performing duties at the qualifying institution and that those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution. XXX[DISCUSS HOW THE BENEFICIARY WILL NOT SPEND A MAJORITY OF TIME PERFORMING DUTIES THAT PREDOMINANTLY FURTHER THE ESSENTIAL PURPOSE, MISSION, OBJECTIVES OR FUNCTIONS OF QUALIFYING INSTITUTION]XXX Thus, you have not shown that the majority of the beneficiary's working time will be spent performing job duties at a qualifying institution, organization or entity and that those job duties directly and predominantly furthers the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research. Accordingly, the beneficiary is not eligible for the H-1B Cap exemption under this criterion.

[SAMPLE ANALYSIS 2: QUALIFYING INSTITUTION IS NOT A NONPROFIT UNDER IRC 501(c)(3), (c)(4) or (c)(6) Related to or Affiliated]

You stated that the beneficiary will work at XXX[INSERT QUALIFYING INSTITUTION]XXX. You also indicate that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education. USCIS had requested evidence to show that the qualifying institution is defined as a tax exempt organization under the Internal Revenue Code of 1986 (IRC) section 501(c)(3), (c)(4) or (c)(6). In response, you did not provide evidence that the qualifying institution has been approved as a tax exempt organization under one of the relevant IRC sections. Therefore, the record does not show that the qualifying institution is a nonprofit entity related to or affiliated with an institution of higher education under DHS regulations for the H-1B Cap exemption under INA § 214(g)(5)(A). Thus, the beneficiary is not exempt from the H-1B Cap because the beneficiary will not work at a qualifying institution.

[SAMPLE ANALYSIS 3: QUALIFYING INSTITUTION HAS NOT MEET REQUIREMENTS AT 8 CFR § 214.2(h)(8)(ii)(F)(2)(i), (ii), (iii) or (iv)]

You stated that the beneficiary will work at XXX[INSERT QUALIFYING INSTITUTION]XXX. You also indicate that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with XXX[INSERT UNIVERSITY]XXX. The record contains sufficient evidence that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity under one of the relevant Internal Revenue Code (IRC) sections. However, you must show that XXX[INSERT QUALIFYING INSTITUTION]XXX is related to or affiliated with an institution of higher education in order to qualify for exemption from the cap on this basis.

USCIS will first consider whether you have shown that XXX[INSERT QUALIFYING INSTITUTION]XXX is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(i): The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation.

Upon review, the record does not establish that XXX[INSERT QUALIFYING INSTITUTION]XXX and XXX[INSERT UNIVERSITY]XXX are owned or controlled by the same boards or federations. USCIS interprets the terms "board" and "federation" as referring to educational bodies such as a board of education or a board of regents. You did not claim that XXX[INSERT QUALIFYING INSTITUTION]XXX share the same board or federation with institutions of higher education.

Second, USCIS considers whether you have established that XXX[INSERT QUALIFYING INSTITUTION]XXX is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(ii): The nonprofit entity is operated by an institution of higher education.

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The record does not demonstrate that an institution of higher education operates XXX[INSERT QUALIFYING INSTITUTION]XXX, XXX[DISCUSS WHY QUALIFYING INSTITUTION IS NOT OPERATED BY AN INSTITUTION OF HIGHER EDUCATION]XXX. Accordingly, you have not shown that XXX[INSERT QUALIFYING INSTITUTION]XXX is operated by an institution of higher education.

Third, USCIS considers whether XXX[INSERT QUALIFYING INSTITUTION]XXX is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(iii). The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(b)(5)

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* at 224, 409, 1656 (10th Edition 2014) (defining the terms branch, cooperative, and subsidiary); *see also*, *Webster's New College Dictionary* at 699 (3rd Edition 2008) (defining the term member). XXX[DISCUSS HOW QUALIFYING ORGANIZATION IS NOT A MEMBER, BRANCH, COOPERATIVE OR SUBSIDIARY]XXX. You have not sufficiently explained how these aspects demonstrate shared ownership and/or control. Therefore, the record does not show that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A). Thus, the beneficiary is not exempt from the H-1B Cap because the beneficiary will not work at a qualifying institution.

[SAMPLE ANALYSIS 3A: QUALIFYING INSTITUTION HAS NOT ENTERED INTO FORMAL WRITTEN AFFILIATION AGREEMENT WITH SCHOOL. AGREEMENT IS WITH PARENT, AFFILIATE OR SUBSIDIARY]

Fourth, USCIS will consider whether XXX[INSERT QUALIFYING INSTITUTION]XXX is a related or affiliated nonprofit entity pursuant to 8 CFR § 214.2(h)(8)(ii)(F)(2)(iv). You stated that the beneficiary will work at XXX[INSERT QUALIFYING INSTITUTION]XXX.

XXX[Officer must insert analysis to the parties involved in the affiliation agreement and describe the purpose of the affiliation agreement]XXX. Since the regulations require that XXX[INSERT QUALIFYING INSTITUTION]XXX has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, the agreement between XXX[INSERT NAME OF AFFILIATE, PARENT OR SUBSIDIARY]XXX and XXX[INSERT QUALIFYING INSTITUTION]XXX does not meet this requirement. You did not provide evidence that XXX[INSERT QUALIFYING INSTITUTION]XXX has entered into a formal written agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education. Therefore, the record does not show that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A). Thus, the beneficiary is not exempt from the H-1B Cap because the beneficiary will not work at a qualifying institution.

[SAMPLE ANALYSIS 3B: FORMAL AGREEMENT IS OLD, EXPIRED AND/OR NO LONGER ACTIVE; OR NOT A FUNDAMENTAL ACTIVITY OF THE ORGANIZATION]

You stated that the beneficiary will work at XXX[INSERT QUALIFYING INSTITUTION]XXX. You also indicate that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with XXX[INSERT UNIVERSITY]XXX. The record contains sufficient evidence that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity under one of the relevant Internal Revenue Code (IRC) section. However, you must show that XXX[INSERT QUALIFYING INSTITUTION]XXX is related to or affiliated with an institution of higher education.

[SAMPLE ANALYSIS 3B(1): AGREEMENT EXPIRED]

You submitted an agreement between XXX[INSERT QUALIFYING INSTITUTION]XXX and XXX[INSERT UNIVERSITY]XXX. XXX[Officer must insert analysis describing the evidence that shows the agreement has expired]

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prior to filing.]XXX However, the document indicates a review of this agreement indicates that the agreement had expired prior to the filing of this Form I-129. You did not provide evidence that XXX[INSERT QUALIFYING INSTITUTION]XXX has a formal written agreement at the time of filing with XXX[INSERT UNIVERSITY]XXX that establishes an active working relationship with such institution of higher education. Thus, the record does not show that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 3B(2): NO EVIDENCE OF ACTIVE RELATIONSHIP]

Further, the regulations require that you show that XXX[INSERT QUALIFYING INSTITUTION]XXX has an active working relationship with the institution of higher education. XXX[Officer must insert analysis why there is no active working relationship between the qualifying institution and institution of higher education]XXX. Therefore, the record does not show that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A).

[SAMPLE ANALYSIS 3B(3): ENTITY'S FUNDAMENTAL ACTIVITY IS NOT TO DIRECTLY CONTRIBUTE TO RESEARCH OR EDUCATION OF THE SCHOOL]

In addition, you must show that a fundamental activity of XXX[INSERT QUALIFYING INSTITUTION]XXX is to directly contribute to the research or education mission of the institution of higher education. XXX[Officer must insert analysis describing the qualifying institutions fundamental activity and how it is not to directly contribute to the research or education of the institution of higher education]XXX. Thus, the record does not show that XXX[INSERT QUALIFYING INSTITUTION]XXX is a nonprofit entity related to or affiliated with an institution of higher education for the H-1B Cap exemption under INA § 214(g)(5)(A). Therefore, the beneficiary is not exempt from the H-1B Cap because the beneficiary will not work at a qualifying institution.

129 H1B Denial Cap Exemption- Previously Counted in the H-1B Cap

You indicate on the H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement that the Form I-129 is exempt from the H-1B Cap because the beneficiary was previously counted in the H-1B Cap.

XXX[Officers please delete any citations that does not pertain to the issue at hand.]XXX INA § 214(g)(7) provides an exemption from the H-1B Cap at INA § 214(g)(1)(A) when an H-1B worker was already counted in the H-1B Cap as follows:

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

8 CFR § 214.2(h)(8)(ii)(A) further clarifies how H-1B beneficiaries are counted in the H-1B Cap:

(A) Each alien issued a visa or otherwise provided nonimmigrant status under sections 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act shall be counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit. The spouse and children of principal H aliens are classified as H-4 nonimmigrants and shall not be counted against numerical limits applicable to principals.

8 CFR § 214.2(h)(8)(ii)(C) states that when a beneficiary does not apply for admission to the United States and the H-1B Cap case was automatically revoked, then the H-1B Cap number will be taken back.

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

For beneficiaries who had concurrent cap-exempt employment, 8 CFR § 214.2(h)(8)(ii)(F)(5) states that when the cap-exempt employment ceases and the beneficiary was not previously counted in the H-1B Cap within the six year period of authorized admission to which the cap-exempt employment applied, then the beneficiary will be subject to the H-1B Cap:

If cap-exempt employment ceases, and if the alien is not the beneficiary of a new cap-exempt petition, then the alien will be subject to the cap if not previously counted within the 6-year period of authorized admission to which the cap-exempt employment applied. If cap-exempt employment converts to cap-subject employment subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the petition authorizing such employment consistent with paragraph (h)(11)(iii) of this section.

(b)(5)

To qualify for this exemption from the H-1B Cap, you must submit evidence that the beneficiary was previously counted in the H-1B Cap and has not exhausted his or her 6 years of H-1B admission.

XXX[DISCUSS WHY BENEFICIARY WAS NOT COUNTED WITHIN H-1B CAP. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: BENEFICIARY WORKED AT A CAP-EXEMPT ENTITY]

The record contains copies of the beneficiary's Forms I-797. These documents and USCIS records indicate that the beneficiary was previously approved for H-1B employment with an H-1B Cap exempt entity. USCIS approved that employment because the prior employer was exempt from the H-1B Cap under INA § 214(g)(5)(A) or (g)(5)(B). The record does not show that the beneficiary has ever been counted in the H-1B Cap by virtue of having obtained H-1B status or visa based on a Form I-129 that was subject to the numerical limitations in INA § 214(g)(1)(A). Additionally, the evidence provided does not establish that you are exempt from the H-1B cap under INA § 214(g)(5)(A) and (g)(5)(B). Thus, you have not established that the beneficiary is exempt from the H-1B Cap under this criterion.

[SAMPLE ANALYSIS 2: CAP CASE WAS REVOKED WITHOUT USE]

The record contains copies of the beneficiary's Forms I-797. These documents and USCIS records indicate that the beneficiary was previously counted against the H-1B cap and approved for H-1B classification beginning in fiscal year XXX[INSERT H-1B INITIAL FISCAL YEAR APPROVAL]XXX. Subsequently, on XXX[INSERT REVOCATION DATE]XXX, USCIS revoked the cap-subject H-1B petition approval pursuant to a request from the petitioner. The record does not contain evidence that the beneficiary had ever obtained an H-1B visa or H-1B status based on the revoked H-1B Cap case. Therefore, pursuant to 8 CFR § 214.2(h)(8)(ii)(C), the H-1B Cap number that the beneficiary previously obtained was taken back when USCIS revoked that H-1B Cap case. Thus, the beneficiary is not eligible for H-1B Cap exemption under this criterion.

129 H1B Denial Cap Exemption- Waiver under INA 214(i)

A beneficiary may be exempt from the H-1B Cap if the beneficiary is an exchange visitor (J-1) who engaged in graduate medical education or training in the United States and the beneficiary has obtained a waiver of the two-year foreign residence requirement under INA § 214(l).

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INA § 214(l)(2)(A) provides for an exemption from the H-1B Cap for certain J-1 nonimmigrants:

(2) (A) Notwithstanding section 248(a)(2), the Attorney General may change the status of an alien that qualifies under this subsection and section 212(e) to that of an alien described in section 101(a)(15)(H)(i)(b). The numerical limitations contained in subsection (g)(1)(A) shall not apply to any alien whose status is changed under the preceding sentence, if the alien obtained a waiver of the 2-year foreign residence requirement upon a request by an interested Federal agency or an interested State agency.

This H-1B Cap exemption requires that you provide evidence that the beneficiary has obtained a waiver of the two-year foreign residence requirement under INA § 214(l). INA § 214(l) has two waivers. One waiver is for the beneficiary to work as an H-1B physician for at least three years in a medically underserved area pursuant to a request from a state department of public health. This waiver is commonly called the state “Conrad 30” waiver. The second waiver is for the beneficiary to work as an H-1B physician, in medical research or training for at least three years pursuant to a request from a Federal government agency. This second waiver is commonly called the Interested Government Agency (“IGA”) waiver.

XXX[DISCUSS WHY BENEFICIARY DOES NOT HAVE A WAIVER UNDER INA 214(l). USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: BENEFICIARY HAS THE WRONG WAIVER]

USCIS previously requested that you provide evidence that the beneficiary has a waiver under INA § 214(l). In response, you provided evidence that the beneficiary has an approved Form I-612, Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended). However, the beneficiary’s Form I-612 was approved based on XXX[exceptional hardship to the beneficiary’s U.S. citizen or lawful permanent resident spouse or child / potential persecution of the beneficiary on account of race, religion or political opinion / no objection from the foreign government]XXX. Such an approval is not a waiver under INA § 214(l). Thus, the beneficiary is not eligible for this H-1B Cap exemption because the beneficiary does not have a waiver under INA § 214(l).

129 H1B Denial Cap Exemption- Beneficiary will work in Guam or CNMI

You indicated that the beneficiary is exempt from the H-1B Cap because the beneficiary will work in Guam or CNMI.

Section 702 of Public Law 110-229, as amended by section 10 of Public Law 113-235, created a new section 6 to Public Law 94-241 (90 Stat. 263). The newly created section 6 of Public Law 94-241 allowed for an exemption from the H-1B Cap until December 31, 2019 if the beneficiary will work in Guam or CNMI.

Sections 6(a)(2) and 6(b) of Public Law 94-241 state:

(a)(2) TRANSITION PERIOD.—There shall be a transition period beginning on the transition program effective date and ending on December 31, 2019, during which the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of the Interior, shall establish, administer, and enforce a transition program to regulate immigration to the Commonwealth, as provided in this section (hereafter referred to as the ‘transition program’).

(b) NUMERICAL LIMITATIONS FOR NONIMMIGRANT WORKERS.— An alien, if otherwise qualified, may seek admission to Guam or to the Commonwealth during the transition program as a nonimmigrant worker under section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) without counting against the numerical limitations set forth in section 214(g) of such Act (8 U.S.C. 1184(g)). This subsection does not apply to

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any employment to be performed outside of Guam or the Commonwealth. Not later than 3 years following the transition program effective date, the Secretary of Homeland Security shall issue a report to the Committee on Energy and Natural Resources and the Committee on the Judiciary of the Senate and the Committee on Natural Resources and the Committee on the Judiciary of the House of Representatives projecting the number of asylum claims the Secretary anticipates following the termination of the transition period, the efforts the Secretary has made to ensure appropriate interdiction efforts, provide for appropriate treatment of asylum seekers, and prepare to accept and adjudicate asylum claims in the Commonwealth.

(b)(5)

To qualify for this H-1B Cap exemption, you must show that the beneficiary will work in Guam or CNMI for the entire H-1B validity period.

XXX[DISCUSS WHY BENEFICIARY WILL NOT WORK IN GUAM OR CNMI. USE, CHANGE, ADD OR REMOVE SAMPLE ANALYSIS AS APPROPRIATE]XXX

[SAMPLE ANALYSIS 1: BENEFICIARY IS NOT WORKING IN GUAM OR CNMI]

Upon filing, you stated that the beneficiary will provide services to your organization in XXX[INSERT LOCATION OTHER THAN GUAM OR CNMI]XXX. Consequently, USCIS requested that you provide additional evidence regarding how the beneficiary is eligible for this H-1B Cap exemption. In response, you stated that the beneficiary will not provide services in XXX[INSERT LOCATION OTHER THAN GUAM OR CNMI]XXX and that the beneficiary will work solely in XXX[Guam OR CNMI]XXX. You submitted a Labor Condition Application (LCA) for work in Guam or CNMI that was certified after you had filed in this Form I-129.

You must establish eligibility at the time of filing. 8 CFR § 103.2(b)(1). USCIS cannot consider facts that have come into being only subsequent to the filing of a petition. *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981); *Matter of Drigo*, 18 I&N Dec. 223 (BIA 1982). If the petitioner was not already eligible when the petition was filed, subsequent developments cannot retroactively establish eligibility as of the filing date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm'r 1971). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service [USCIS] requirements. *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998). There comes a point where it is more appropriate for such new evidence to accompany a new petition. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Thus, USCIS cannot accept the new work location and LCA that were created after you had filed this Form I-129.

129 H1B Denial Cap Exemption- Concurrent Employment with H-1B Cap-Subject Employer

You indicate that the beneficiary is exempt from the H-1B Cap because the beneficiary will be concurrently employed by your organization while the beneficiary works for the beneficiary's current employer (which is an H-1B Cap-exempt entity).

8 CFR § 214.2(h)(8)(ii)(F)(6) allows for the beneficiary to be concurrently employed at an H-1B Cap-subject employer while the beneficiary remains employed with an H-1B Cap-exempt entity:

Concurrent H-1B employment in a cap-subject position of an alien that qualifies for an exemption under section 214(g)(5)(A) or (B) of the Act shall not subject the alien to the numerical limitations in section 214(g)(1)(A) of the Act. When petitioning for concurrent cap-subject H-1B employment, the petitioner must demonstrate that the H-1B beneficiary is employed in valid H-1B status under a cap exemption under section 214(g)(5)(A) or (B) of the Act, the beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions.

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(i) Validity of a petition for concurrent cap-subject H-1B employment approved under paragraph (h)(8)(ii)(F)(6) of this section cannot extend beyond the period of validity specified for the cap-exempt H-1B employment.

(ii) If H-1B employment subject to a cap exemption under section 214(g)(5)(A) or (B) of the Act is terminated by a petitioner, or otherwise ends before the end of the validity period listed on the approved petition filed on the alien's behalf, the alien who is concurrently employed in a cap-subject position becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, unless the alien was previously counted with respect to the 6-year period of authorized H-1B admission to which the petition applies or another exemption applies. If such an alien becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the cap-subject petition described in paragraph (h)(8)(ii)(F)(6) of this section consistent with paragraph (h)(11)(iii) of this section.

To qualify for this exemption, you must show that the beneficiary is employed in valid H-1B status under an H-1B Cap-exemption at INA § 214(g)(5)(A) or (B); the beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved; and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions.

XXX[DISCUSS WHY BENEFICIARY DOES NOT QUALIFY FOR CONCURRENT EMPLOYMENT]XXX

XXX[SAMPLE ANALYSIS 1: BENEFICIARY CEASED EMPLOYMENT AT CAP-EXEMPT ENTITY]XXX

USCIS records indicate that the beneficiary was previously approved to work as an H-1B worker at XXX[INSERT CAP EXEMPT ENTITY]XXX. USCIS requested that you provide evidence that the beneficiary is currently employed by XXX[INSERT CAP EXEMPT ENTITY]XXX. In response, you provided the beneficiary's payroll records from XXX[INSERT CAP EXEMPT ENTITY]XXX. These documents indicate that the beneficiary had ceased employment at XXX[INSERT CAP EXEMPT ENTITY]XXX prior to the filing of this Form I-129. Thus, the beneficiary is no longer employed in valid H-1B status under an H-1B Cap-exemption at INA § 214(g)(5)(A) or (B). Therefore, the beneficiary is not eligible for H-1B Cap-exemption under this criterion.

XXX[SAMPLE ANALYSIS 2: THE BENEFICIARY CANNOT REASONABLY PERFORM CONCURRENT EMPLOYMENT]XXX

USCIS records indicate that the beneficiary was previously approved to work as an H-1B worker at XXX[INSERT CAP EXEMPT ENTITY]XXX in XXX[INSERT CAP-EXEMPT WORK LOCATION]XXX. You requested to concurrently employ the beneficiary in XXX[INSERT NEW WORK LOCATION]XXX. This new work location is approximately XXX[INSERT APPROXIMATE DISTANCE]XXX miles from the beneficiary's current work location. USCIS had requested that you provide evidence and an explanation regarding how the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions when the work locations are XXX[INSERT APPROXIMATE DISTANCE]XXX miles from each other. In response, you did not offer any explanation or evidence regarding the beneficiary's work locations. Without such explanation or documentation, you have not shown that the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions. Therefore, the beneficiary is not eligible for H-1B Cap-exemption under this criterion.

XXX[THIS CONCLUSION MUST BE KEPT FOR ANY ISSUE]XXX

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As stated above, all employers and beneficiaries are subject to the H-1B Cap unless you establish how your organization or the beneficiary is exempt from the H-1B Cap. Here, you have not shown that your organization or the beneficiary is exempt from the H-1B Cap. You filed the Form I-129 on XXX[INSERT I-129 FILING DATE]XXX and you seek to begin employing the beneficiary within the Federal government's XXX[INSERT FISCAL YEAR]XXX fiscal year. USCIS previously announced that it stopped accepting filings for the XXX[INSERT FISCAL YEAR]XXX fiscal year H-1B Cap on XXX[INSERT CAP CLOSED DATE]XXX. Since the H-1B Cap is closed and you have not shown that your organization or the beneficiary is exempt from the H-1B Cap, this instant Form I-129 cannot be approved.

129 H1B DENIAL LICENSURE

129 H1B Denial Licensure- No License

Section 101(a)(15)(H)(i)(b) of the Act relates to a nonimmigrant:

...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)..., who meets the requirements for the occupation specified in section 214(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under 212(n)(1).

Further, section 214(i)(2) of the Act states that in order for a nonimmigrant to qualify to perform services in a "specialty occupation" the following evidence is required:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

Title 8, Code of Federal Regulations (8 CFR) 214.2(h)(4)(v)(A) provides that if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, the beneficiary must have that license prior to approval of the petition.

Further, 8 CFR 214.2(h)(4)(v)(C) states, in relevant part:

(1) In certain occupations which generally require licensure, a state may allow an individual without licensure to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS shall examine the nature of the duties and the level at which they are performed, as well as evidence provided by the petitioner as to the identity, physical location, and credentials of the individual(s) who will supervise the alien, and evidence that the petitioner is complying with state requirements. If the facts demonstrate that the alien under supervision will fully perform the duties of the occupation, H classification may be granted.

(2) An H-1B petition filed on behalf of an alien who does not have a valid state or local license, where a license is otherwise required to fully perform the duties in that occupation, may be approved for a period of up to 1 year if:

(i) The license would otherwise be issued provided the alien was in possession of a valid Social Security number, was authorized for employment in the United States, or met a similar technical requirement, and

(ii) The petitioner demonstrates, through evidence from the state or local licensing authority, that the only obstacle to the issuance of a license to the beneficiary is the lack of a Social Security number, a lack of employment authorization in the United States, or a failure to meet a similar technical requirement that precludes the issuance of the license to an individual who is not yet in H-1B status. The petitioner must demonstrate that the alien is fully qualified to receive the state or local license in all other respects, meaning that all educational, training, experience, and other substantive requirements have been met. The alien must have filed an application for the license in accordance with applicable state and local rules and procedures,

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(b)(5)

provided that state or local rules or procedures do not prohibit the alien from filing the license application without provision of a Social Security number or proof of employment authorization or without meeting a similar technical requirement.

According to the XXX[Officer Must Enter Source]XXX, state licensure is required to fully practice in the occupation requested in the petition.

In a Request for Evidence (RFE) dated XXX[Date]XXX, you were notified that the evidence submitted was insufficient to establish that the beneficiary 1) is licensed to perform the duties of the proffered position, 2) would be issued a license but for the beneficiary's inability to meet a technical requirement for such a license, or 3) is otherwise exempt from licensure. As explained in the RFE, XXX[Summarize the Discussion from the RFE]XXX.

Your response, received on XXX[Date]XXX, includes the following evidence: XXX[List Evidence Submitted]XXX

The record does not include evidence that the beneficiary is licensed as a XXX[Profession]XXX in XXX[State]XXX.

XXX[Use/Modify If Applicable:]XXX The record does not include a letter or similar documentation from the appropriate state licensing agency attesting to the beneficiary's exemption from the usual licensing requirements.

XXX[Use/Modify If Applicable:]XXX You indicate that the beneficiary will work under the supervision of licensed senior or supervisory personnel and is therefore exempt from the state licensing requirements. However, you have not provided the identity, physical location, or credentials of the individual who will supervise the beneficiary. XXX[Alternatively, Officer Insert Reason This Documentation Does Not Establish Eligibility, e.g. The Beneficiary's Supervisor is Only Licensed For a Different Profession, The Licensed Individual Named Differs from the Beneficiary's Supervisor, Etc.]XXX

XXX[Use/Modify If Applicable:]XXX You indicate that the beneficiary is eligible as the beneficiary is unable to obtain licensure only because of a lack of a Social Security number, authorization for employment in the United States, or a similar technical requirement. However, the documentation provided does not establish that the beneficiary would be granted a license but for the lack of a Social Security number, authorization for employment in the United States, or a similar technical requirement. The documentation indicates XXX[Officer Insert Reason, e.g. The Beneficiary Has Not Met All Educational or Other Substantive Requirements for Licensure]XXX

Based on this information, the record does not establish that the beneficiary qualifies for classification under section 101(a)(15)(H)(i)(b) of the Act.

1-129 H1B AC21 Denial STANDARDS

129 H1B Denial Licensure- No License after 1 year

Further, section 214(i)(2) of the Act states that in order for a nonimmigrant to qualify to perform services in a "specialty occupation" the following evidence is required:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

Title 8, Code of Federal Regulations (8 CFR) 214.2(h)(4)(v)(A) provides that if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, the beneficiary must have that license prior to approval of the petition.

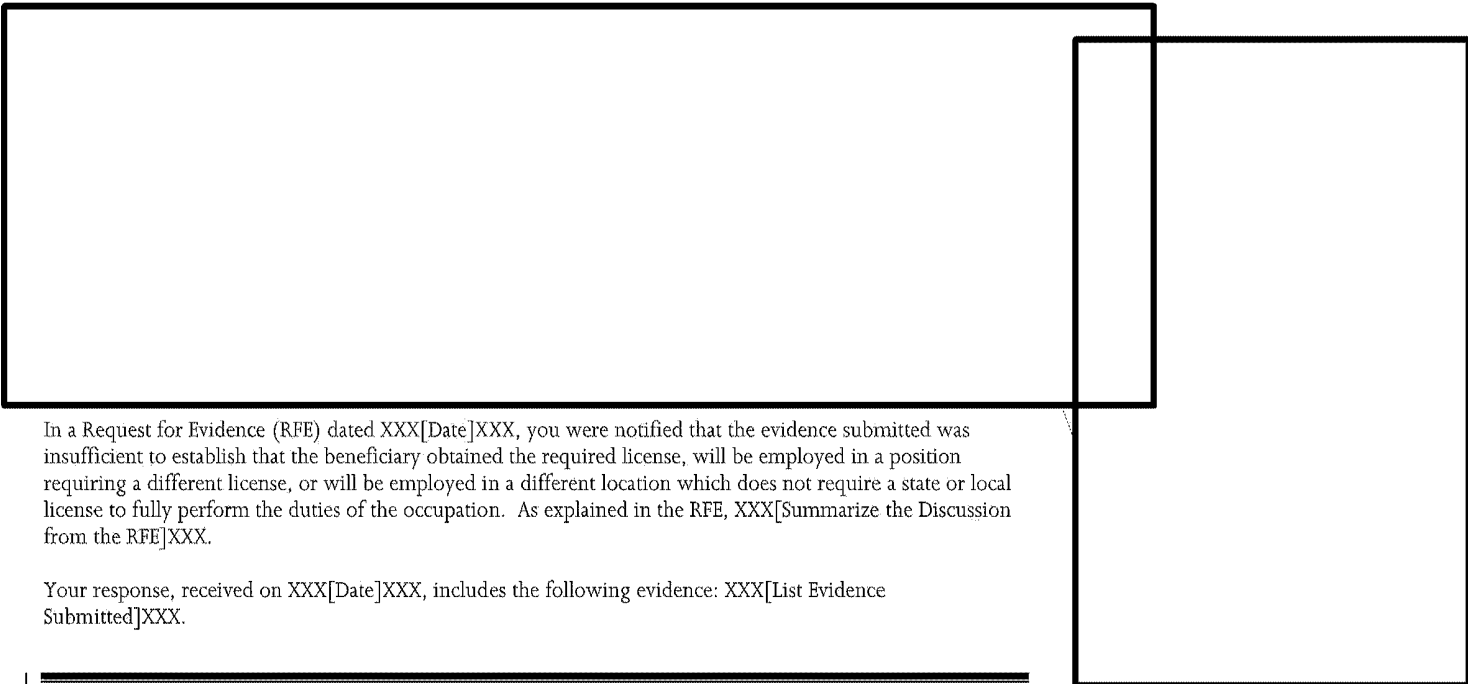
Further, 8 CFR 214.2(h)(4)(v)(C) states in pertinent part:

(2) An H-1B petition filed on behalf of an alien who does not have a valid state or local license, where a license is otherwise required to fully perform the duties in that occupation, may be approved for a period of up to 1 year if:

- (i) The license would otherwise be issued provided the alien was in possession of a valid Social Security number, was authorized for employment in the United States, or met a similar technical requirement...

(3) An H-1B petition filed on behalf of an alien who has been previously accorded H-1B classification under paragraph (h)(4)(v)(C)(2) of this section may not be approved unless the petitioner demonstrates that the alien has obtained the required license, is seeking to employ the alien in a position requiring a different license, or the alien will be employed in that occupation in a different location which does not require a state or local license to fully perform the duties of the occupation.

(b)(5)



In a Request for Evidence (RFE) dated XXX[Date]XXX, you were notified that the evidence submitted was insufficient to establish that the beneficiary obtained the required license, will be employed in a position requiring a different license, or will be employed in a different location which does not require a state or local license to fully perform the duties of the occupation. As explained in the RFE, XXX[Summarize the Discussion from the RFE]XXX.

Your response, received on XXX[Date]XXX, includes the following evidence: XXX[List Evidence Submitted]XXX.

1-129 H1B AC21 Denial STANDARDS

The record does not include evidence that the beneficiary is licensed as a XXX[Profession]XXX in XXX[State]XXX.

XXX[Use/Modify If Applicable:]XXX You do not indicate that the beneficiary's position is different from the beneficiary's initial H-1B petition or that the beneficiary's work location has changed. XXX[Alternatively, Officer Insert Reason This Documentation Does Not Establish Eligibility, e.g. The Beneficiary's Location is in the Same State with the Same Licensure Requirements]XXX Based on this information, the record does not establish that the beneficiary qualifies for classification under section 101(a)(15)(H)(i)(b) of the Act.

129 H1B DENIAL 6th Year Limit

129 H1B Denial 6th Year Limit- No Recapture Time

USCIS regulations allow the beneficiary to "recapture" periods that the beneficiary was physically present outside the United States. This recaptured time is added back to the six-year limit, thereby enabling the beneficiary to fully use the maximum 6-year period of admission, even if such admission has to be extended more than 6 calendar years past the initial day the beneficiary held H-1B status.

8 CFR § 214.2(h)(13)(iii)(C) states:

(C) Calculating the maximum H-1B admission period. Time spent physically outside the United States exceeding 24 hours by an alien during the validity of an H-1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time meaningfully interrupts the alien's stay in H-1B status and the reason for the alien's absence. Accordingly, such remaining time may be recaptured in a subsequent H-1B petition on behalf of the alien, at any time before the alien uses the full period of H-1B admission described in section 214(g)(4) of the Act.

(1) It is the H-1B petitioner's burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. The beneficiary may provide appropriate evidence, such as copies of passport stamps, Arrival-Departure Records (Form I-94), or airline tickets, together with a chart, indicating the dates spent outside of the United States, and referencing the relevant independent documentary evidence, when seeking to recapture the alien's time spent outside the United States. Based on the evidence provided, USCIS may grant all, part, or none of the recapture period requested.

(2) If the beneficiary was previously counted toward the H-1B numerical cap under section 214(g)(1) of the Act with respect to the 6-year maximum period of H-1B admission from which recapture is sought, the H-1B petition seeking to recapture a period of stay as an H-1B nonimmigrant will not subject the beneficiary to the H-1B numerical cap, whether or not the alien has been physically outside the United States for 1 year or more and would be otherwise eligible for a new period of admission under such section of the Act. An H-1B petitioner may either seek such recapture on behalf of the alien or, consistent with paragraph (h)(13)(iii) of this section, seek a new period of admission on behalf of the alien under section 214(g)(1) of the Act.

XXX[ANALYZE WHY RECAPTURE TIME WAS NOT GRANTED AND/OR ACTUAL END-DATE]XXX

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XXX[SAMPLE ANALYSIS 1: RECAPTURE TIME ALREADY GRANTED IN PRIOR PETITIONS, NEW RECAPTURE TIME NOT PROVEN]XXX

You provided a table that lists the trips the beneficiary made abroad and evidence of those trips. However, the time accounted for on these trips abroad was already recaptured in a prior petition. Taking that into consideration, USCIS has determined that the beneficiary reached the six-year limit on XXX[INSERT NEW SIX-YEAR LIMIT WITH RECAPTURE TIME]XXX. Thus, the beneficiary is not eligible for additional H-1B time on this basis.-

(b)(5)

You indicated that the beneficiary made several trips abroad since the prior H-1B approval. The record shows that the beneficiary made these trips abroad while the beneficiary was in a period of authorized admission beyond the six-year limit that was granted pursuant to the 8 CFR 214.2(h)(13)(iii)(C) or (D). The regulations allow the beneficiary to recapture periods at any time before the beneficiary uses the full period of H-1B admission described in section 214(g)(4) of the Act. Since the periods that you now seek to recapture fall under the extensions beyond the six-year limit under 8 CFR 214.2(h)(13)(iii)(C) or (D), those periods cannot be recaptured. Thus, the beneficiary is not eligible to extend the beneficiary's employment based on recaptured time.

129 H1B Denial 6th Year Limit- Remaining Outside the U.S. for One Continuous Year

When the beneficiary has spent six years in the United States as an H-1B nonimmigrant (or other H or L nonimmigrant status that counts toward the 6-year H-1B limit), the beneficiary may not seek extension, change of status, or be readmitted to the United States as an H or L nonimmigrant unless the beneficiary resided or was physically present outside the United States continuously for the immediate prior year.

Per 8 CFR § 214.2(h)(13)(i)(B), qualifying physical presence outside the United States is described as follows:

When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. A certain period of absence from the United States of H-2A and H-2B aliens can interrupt the accrual of time spent in such status against the 3-year limit set forth in 8 CFR 214.2(h)(13)(iv). The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

8 CFR § 214.2(h)(13)(iii)(C)(2) states:

If the beneficiary was previously counted toward the H-1B numerical cap under section 214(g)(1) of the Act with respect to the 6-year maximum period of H-1B admission from which recapture is sought, the H-1B petition seeking to recapture a period of stay as an H-1B nonimmigrant will not subject the beneficiary to the H-1B numerical cap, whether or not the alien has been physically outside the United States for 1 year or more and would be otherwise eligible for a new period of admission under such section of the Act. An H-1B petitioner may either seek such recapture on behalf of the alien or, consistent with paragraph (h)(13)(iii) of this section, seek a new period of admission on behalf of the alien under section 214(g)(1) of the Act.

1-129 H1B AC21 Denial STANDARDS

XXX[DISCUSS WHY BENEFICIARY HAS NOT LEFT FOR ONE CONTINUOUS YEAR]XXX

XXX[SAMPLE ANALYSIS 1: IF BENEFICIARY LEFT MORE THAN A YEAR BUT CHOSE REMAINDER TIME]XXX

If the beneficiary resided and was physically present outside the United States continuously for the immediate prior year but has time remaining on the beneficiary's initial maximum period of admission, USCIS allows the beneficiary to choose between being readmitted for the remainder of any unused time towards that initial six-year period or admitted as a "new" H-1B worker. To be granted a new six-year admission period, the beneficiary would be subject to the H-1B numerical limitation at INA § 214(g), unless otherwise exempted.

Here, USCIS records show that the beneficiary departed the United States on XXX[INSERT DEPARTURE DATE]XXX. At the time the beneficiary returned to the United States on XXX[INSERT RETURN Date]XXX, the beneficiary chose to be readmitted as an H-1B nonimmigrant using the remainder of the beneficiary's unused six-year period instead of obtaining a new H-1B six-year period. Since the beneficiary has spent the maximum allowable period of stay, the beneficiary is not eligible for the requested H-1B employment period because the beneficiary did not reside and was not physically present outside the United States continuously for the immediate prior year.

XXX[SAMPLE ANALYSIS 2: BENEFICIARY RETURNED AS A NONIMMIGRANT THAT IS NOT VISITOR FOR PLEASURE OR BUSINESS]XXX

USCIS records show that the beneficiary departed the United States on XXX[INSERT DEPARTURE DATE]XXX. On XXX[INSERT RETURN Date]XXX, the beneficiary returned to the United States as a nonimmigrant XXX[INSERT NONIMMIGRANT DESCRIPTORS SUCH AS: student, exchange visitor, performer]XXX. The regulations require that the beneficiary has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year. Here, the beneficiary returned to the United States during the one year period as a XXX[INSERT NONIMMIGRANT DESCRIPTORS SUCH AS: student, exchange visitor, performer]XXX. This trip interrupted the one year requirement. Therefore, the beneficiary is not eligible for the requested H-1B employment period because the beneficiary did not reside and was not physically present outside the United States continuously for the immediate prior year.

129 H1B Denial 6th Year Limit- Intermittent, Seasonal, Less than Six Months Employment or Part-Time Employment from Abroad

You indicate that the beneficiary qualifies for an exception from the six-year limit because the beneficiary's employment is seasonal; intermittent; was for an aggregate of six months or less per year; or the beneficiary resides abroad and regularly commutes to the United States to engage in part-time employment;

8 CFR § 214.2(h)(13)(iii)(v) allows for exceptions from 8 CFR § 214.2(h)(13)(iii) through (h)(13)(iv) when:

(v) Exceptions. The limitations in paragraphs (h)(13)(iii) through (h)(13)(iv) of this section shall not apply to H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. An absence from the United States can interrupt the accrual of time spent as an H-2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

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XXX[DISCUSS WHY BENEFICIARY DOES NOT MEET THESE EXEMPTIONS]XXX

XXX[SAMPLE ANALYSIS 1: DOES NOT RESIDE ABROAD]XXX

You stated that the beneficiary resides abroad and that the beneficiary regularly commutes to the United States to engage in part-time employment. USCIS requested that you provide evidence of the beneficiary's residence abroad and part-time employment. In response, you did not provide evidence of the beneficiary's foreign residence such as residential leases, mortgage statements, property tax statements or similar evidence. Without this documentation, you have not shown that the beneficiary resides abroad and that the beneficiary regularly commutes to the United States to engage in part-time employment. Thus, the beneficiary is not eligible for the requested H-1B employment period based on this exception.

129 H1B Denial 6th Year Limit- Per-Country Limitation Exemption

An H-1B nonimmigrant with an approved Form I-140 and who is eligible to be granted that immigrant status but for application of the per country limitation may be eligible to extend his or her H-1B nonimmigrant status beyond the six-year period of admission.

USCIS regulations at 8 CFR § 214.2(h)(13)(iii)(E) state:

(E) Per-country limitation exemption from section 214(g)(4) of the Act. An alien who currently maintains or previously held H-1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H-1B petition is filed with USCIS.

(1) Validity periods. USCIS may grant validity periods for petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.

(2) H-1B approvals under paragraph (h)(13)(iii)(E) of this section may be granted until a final decision has been made to:

(i) Revoke the approval of the immigrant visa petition; or

(ii) Approve or deny the alien's application for an immigrant visa or application to adjust status to lawful permanent residence.

(3) Current H-1B status not required. An alien who is not in H-1B status at the time the H-1B petition on his or her behalf is filed, including an alien who is not in the United States, may seek an exemption of the 6-year limitation under 214(g)(4) of the Act under this clause, if otherwise eligible.

(4) Subsequent petitioners may seek exemptions. The H-1B petitioner need not be the employer that filed the immigrant visa petition that is used to qualify for this exemption. An H-1B petition may be approved under paragraph (h)(13)(iii)(E) of this section with respect to any approved immigrant visa petition, and a subsequent H-1B petition may be approved with respect to a different approved immigrant visa petition on behalf of the same alien.

(5) Advance filing. A petitioner may file an H-1B petition seeking a per country

1-129 H1B AC21 Denial STANDARDS

limitation exemption under paragraph (h)(13)(iii)(E) of this section within 6 months of the requested H-1B start date. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described in section 214(g)(4) of the Act along with the exemption request, but in no case may the H-1B approval period exceed the limits specified by paragraph (h)(9)(iii) of this section.

(6) Exemption eligibility. Only the principal beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act may be eligible under paragraph (h)(13)(iii)(E) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(b)(5)

XXX[DISCUSS WHY THE BENEFICIARY DOES NOT QUALIFY FOR AC21 104(c)]XXX

XXX[SAMPLE ANALYSIS 1: IF I-140 IS NOT APPROVED]XXX

XXX[SAMPLE ANALYSIS 2: IF VISA IS AVAILABLE]XXX

XXX[SAMPLE ANALYSIS 3: IF I-140 WAS DENIED/REVOKED AND NO APPEAL OR MOTION. USE THIS ONLY IF THE I-140 DECISION WAS AT LEAST 45 DAYS OLD TO GIVE TIME FOR MOTION OR APPEALS UPDATE IN CLAIMS NATIONAL]XXX

In the present case, USCIS records indicate that the Form I-140, USCIS receipt number XXX[INSERT I-140 RECEIPT NUMBER]XXX, was XXX[Selection final decision: denied or revoked]XXX on XXX[INSERT I-140 DENIAL/Revocation DATE]XXX. Further, USCIS is unable to locate any additional evidence to establish that an appeal or motion of that decision was filed. As such, the beneficiary does not qualify for the exemption under 8 CFR 214.2(h)(13)(iii)(E) because the beneficiary is not a beneficiary of an approved Form I-140. Therefore, you have not shown that the beneficiary qualifies for an H-1B extension beyond the sixth-year based on 8 CFR 214.2(h)(13)(iii)(E).

129 H1B Denial 6th Year Limit- Lengthy Adjudicative Delays

The beneficiary of an application for permanent labor certification or pending Form I-140 may be eligible for H-1B status beyond the six-year period of authorized admission in INA 214(g)(4) if at least 365 days have elapsed since the filing of the labor certification application or Form I-140.

USCIS regulations at 8 CFR § 214.2(h)(13)(iii)(D) state:

(D) Lengthy adjudication delay exemption from 214(g)(4) of the Act.

(1) An alien who is in H-1B status or has previously held H-1B status is eligible for H-1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if at least 365 days have elapsed since:

(i) The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or

(ii) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

(2) H-1B approvals under paragraph (h)(13)(iii)(D) of this section may be granted in up to 1-year increments until either the approved permanent labor certification expires or a final decision has been made to:

(i) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;

(ii) Deny the immigrant visa petition, or, if approved, revoke such approval;

(iii) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or

(iv) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

(3) *No final decision while appeal available or pending.* A decision to deny or revoke an application for labor certification, or to deny or revoke the approval of an immigrant visa petition, will not be considered final under paragraph (h)(13)(iii)(D)(2)(i) or (ii) of this section during the period authorized for filing an appeal of the decision, or while an appeal is pending.

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(4) *Substitution of beneficiaries.* An alien who has been replaced by another alien, on or before July 16, 2007, as the beneficiary of an approved permanent labor certification may not rely on that permanent labor certification to establish eligibility for H-1B status based on this lengthy adjudication delay exemption. Except for a substitution of a beneficiary that occurred on or before July 16, 2007, an alien establishing eligibility for this lengthy adjudication delay exemption based on a pending or approved labor certification must be the named beneficiary listed on the permanent labor certification.

(5) *Advance filing.* A petitioner may file an H-1B petition seeking a lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section within 6 months of the requested H-1B start date. The petition may be filed before 365 days have elapsed since the labor certification application or immigrant visa petition was filed with the Department of Labor or USCIS, respectively, provided that the application for labor certification or immigrant visa petition must have been filed at least 365 days prior to the date the period of admission authorized under this exemption will take effect. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act along with the exemption request, but in no case may the approved H-1B period of validity exceed the limits specified by paragraph (h)(9)(iii) of this section. Time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act may include any request to recapture unused H-1B, L-1A, or L-1B time spent outside of the United States.

(6) *Petitioners seeking exemption.* The H-1B petitioner need not be the employer that filed the application for labor certification or immigrant visa petition that is used to qualify for this exemption.

(7) *Subsequent exemption approvals after the 7th year.* The qualifying labor certification or immigrant visa petition need not be the same as that used to qualify for the initial exemption under paragraph (h)(13)(iii)(D) of this section.

(8) *Aggregation of time not permitted.* A petitioner may not aggregate the number of days that have elapsed since the filing of one labor certification or immigrant visa petition with the number of days that have elapsed since the filing of another such application or petition to meet the 365-day requirement.

(9) *Exemption eligibility.* Only a principal beneficiary of a nonfrivolous labor certification application or immigrant visa petition filed on his or her behalf may be eligible under paragraph (h)(13)(iii)(D) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(10) *Limits on future exemptions from the lengthy adjudication delay.* An alien is ineligible for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section if the alien is the beneficiary of an approved petition under section 203(b) of the Act and fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. If the accrual of such 1-year period is interrupted by the unavailability of an immigrant visa, a new 1-year period shall be afforded when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control. The limitations described in this paragraph apply to any approved immigrant visa petition under section 203(b) of the Act, including petitions withdrawn by the petitioner or those filed by a petitioner whose business terminates 180 days or more after approval.

(b)(5)



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(b)(5)

XXX[DISCUSS WHY THE BENEFICIARY DOES NOT QUALIFY FOR AC21 106]XXX

XXX[SAMPLE ANALYSIS 1: IF LABOR CERT IS NOT OLD ENOUGH]XXX

XXX[SAMPLE ANALYSIS 2: IF EB IMMIGRANT PETITION IS NOT OLD ENOUGH]XXX

XXX[SAMPLE ANALYSIS 3: IF EB IMMIGRANT PETITION WAS DENIED AND NO APPEAL OR MOTION. USE THIS ONLY IF THE EB IMMIGRANT PETITION DECISION WAS AT LEAST 45 DAYS OLD TO GIVE TIME FOR MOTION OR APPEALS UPDATE IN CLAIMS NATIONAL]XXX

XXX[SAMPLE ANALYSIS 4: IF I-485 WAS DENIED/~~APPROVED~~ AND NO MOTION. USE THIS ONLY IF THE I-485 DECISION WAS AT LEAST 45 DAYS OLD TO GIVE TIME FOR MOTION UPDATE IN CLAIMS NATIONAL]XXX

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(b)(5)

XXX[SAMPLE ANALYSIS 5: VISA AVAILABLE FOR MORE THAN 1 YEAR. CIRCUMSTANCES NOT BEYOND BENEFICIARY'S CONTROL]XXX

USCIS records indicate that the employment-based immigrant petition filed on the beneficiary's behalf was approved under section 203(b)XXX[(1) (2) (3)]XXX of the Act, with a priority date of XXX[INSERT PRIORITY DATE]XXX. The beneficiary was born in XXX[INSERT COUNTRY OF BIRTH]XXX. Based on the U.S. Department of State's Visa Bulletin, it appears that the beneficiary failed to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. On XXX[date]XXX USCIS requested that you provide evidence regarding whether the beneficiary's failure to apply for permanent residence or an employment-based immigrant visa was due to circumstances beyond the beneficiary's control. In response, you explained that XXX[DISCUSS THE EMPLOYER'S EXPLANATION]XXX. XXX[DISCUSS WHY THESE EXPLANATIONS DO NOT SHOW CIRCUMSTANCES BEYOND THE BENEFICIARY'S CONTROL]XXX. Consequently, pursuant to 214.2(h)(13)(iii)(D)(10), an exemption from the six-year limit under 8 CFR 214.2(h)(13)(iii)(D) may not be granted because the beneficiary has an approved employment-based immigrant visa petition and the beneficiary did not file an adjustment of status application or apply for an immigrant visa within one year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. Furthermore, you have not shown that the beneficiary's failure to apply for adjustment of status or immigrant visa was due to circumstances beyond the beneficiary's control.

129 H1B SPLIT DECISIONS

129 H1B Split Decision- Portability **Bridge**

XXX[Use For EOS]XXX Title 8, Code of Federal Regulations (8 CFR), section 214.1(c)(4) states in pertinent part:

(4) Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed...

XXX[Use For COS]XXX Title 8, Code of Federal Regulations (8 CFR), section 248.1(b) states in pertinent part:

(b) Timely filing and maintenance of status. Except in the case of an alien applying to obtain V nonimmigrant status in the United States under § 214.15(f) of this chapter, a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed...

A beneficiary whose previously authorized status expires while a timely filed, non-frivolous request for an extension of stay or a change of status is pending is considered to be in a period of stay authorized by the Secretary of Homeland Security. Even though the beneficiary is not in a valid nonimmigrant status, this period of authorized stay allows the beneficiary to remain in the United States to await a decision on the pending case without accruing unlawful presence. However, the terms "authorized status" and "period of stay authorized by the Secretary of Homeland Security" are not interchangeable and do not carry the same legal implications. A person must be in status at the time XXX[an extension of stay **OR** a change of status]XXX is filed for that request to be considered timely.

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Further, 8 CFR 214.2(h)(2)(i)(H) states in pertinent part:

(H) H-1B portability. An eligible H-1B nonimmigrant is authorized to start concurrent or new employment under section 214(n) of the Act upon the filing, in accordance with 8 CFR 103.2(a), of a nonfrivolous H-1B petition on behalf of such alien, or as of the requested start date, whichever is later.

(1) Eligible H-1B nonimmigrant. For H-1B portability purposes, an eligible H-1B nonimmigrant is defined as an alien:

(i) Who has been lawfully admitted into the United States in, or otherwise provided, H-1B nonimmigrant status;

(ii) On whose behalf a nonfrivolous H-1B petition for new employment has been filed, including a petition for new employment with the same employer, with a request to amend or extend the H-1B nonimmigrant's stay, before the H-1B nonimmigrant's period of stay authorized by the Secretary of Homeland Security expires; and

(iii) Who has not been employed without authorization in the United States from the time of last admission through the filing of the petition for new employment.

(2) Length of employment. Employment authorized under paragraph (h)(2)(i)(H) of this section automatically ceases upon the adjudication of the H-1B petition described in paragraph (h)(2)(i)(H)(1)(ii) of this section.

(3) Successive H-1B portability petitions.

(i) An alien maintaining authorization for employment under paragraph (h)(2)(i)(H) of this section, whose status, as indicated on the Arrival-Departure Record (Form I-94, or successor form), has expired, shall be considered to be in a period of stay authorized by the Secretary of Homeland Security for purposes of paragraph (h)(2)(i)(H)(1)(ii) of this section. If otherwise eligible under paragraph (h)(2)(i)(H) of this section, such alien may begin working in a subsequent position upon the filing of another H-1B petition or from the requested start date, whichever is later, notwithstanding that the previous H-1B petition upon which employment is authorized under paragraph (h)(2)(i)(H) of this section remains pending and regardless of whether the validity period of an approved H-1B petition filed on the alien's behalf expired during such pendency.

(ii) A request to amend the petition or for an extension of stay in any successive H-1B portability petition cannot be approved if a request to amend the petition or for an extension of stay in any preceding H-1B portability petition in the succession is denied, unless the beneficiary's previously approved period of H-1B status remains valid.

(iii) Denial of a successive portability petition does not affect the ability of the H-1B beneficiary to continue or resume working in accordance with the terms of an H-1B petition previously approved on behalf of the beneficiary if that petition approval remains valid and the beneficiary has maintained H-1B status or been in a period of authorized stay and has not been employed in the United States without authorization.

8 CFR 214.2(h)(2)(i)(H) authorizes an H-1B nonimmigrant to accept new employment upon the filing of a new petition by the prospective employer, but it does not extend the H-1B nonimmigrant's authorized status.

1-129 H1B AC21 Denial STANDARDS

Your response, received on XXX[Date]XXX, includes the following evidence: XXX[List Evidence Submitted]XXX

The record shows the beneficiary's nonimmigrant status expired on XXX[Date]XXX. You filed the instant I-129 on XXX[Date]XXX. On the date you filed this I-129, the beneficiary was in a period of authorized stay because of a timely filed, pending XXX[H-1B petition, Insert Receipt Number]XXX. However, this petition was subsequently denied on XXX[Date]XXX. Therefore, the beneficiary's status was not extended beyond XXX[Date]XXX. As such, the beneficiary's status had expired before this I-129 was filed, and the requested XXX[extension of stay OR change of status]XXX is denied.

129 H1B Split Decision- 60 Day Grace Period

XXX[Use For EOS]XXX Title 8, Code of Federal Regulations (8 CFR), section 214.1(c)(4) states in pertinent part:

(4) Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed.

XXX[Use For COS]XXX Title 8, Code of Federal Regulations (8 CFR), section 248.1(b) states in pertinent part:

(b) Timely filing and maintenance of status. Except in the case of an alien applying to obtain V nonimmigrant status in the United States under § 214.15(f) of this chapter, a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed...

Further, 8 CFR 214.1(l) states in pertinent part:

(2) An alien admitted or otherwise provided status in E-1, E-2, E-3, H-1B, H-1B1, L-1, O-1 or TN classification and his or her dependents shall not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of the employment on which the alien's classification was based, for up to 60 consecutive days or until the end of the authorized validity period, whichever is shorter, once during each authorized validity period. DHS may eliminate or shorten this 60-day period as a matter of discretion. Unless otherwise authorized under 8 CFR 274a.12, the alien may not work during such a period.

(3) An alien in any authorized period described in paragraph (l) of this section may apply for and be granted an extension of stay under paragraph (c)(4) of this section or change of status under 8 CFR 248.1, if otherwise eligible.

You indicated that the beneficiary is eligible for a(n) XXX[extension of stay OR change of status]XXX under 214.1(l)(3) because he or she is eligible for the grace period provided in 214.1(l)(2). . You stated that XXX[Insert Petitioner's Statements Here]XXX.

In a request for evidence (RFE) dated XXX[Date]XXX, you were notified that the evidence submitted was insufficient to establish that the beneficiary is eligible for, and otherwise warrants a favorable exercise of our discretion to grant, the grace period authorized in 214.1(l)(2). As explained in the RFE, XXX[Summarize the Discussion from the RFE]XXX.

1-129 H1B AC21 Denial STANDARDS

Your response, received on XXX[Date]XXX, includes the following evidence: XXX[List Evidence Submitted]XXX

XXX[Use/Modify If Applicable:]XXX You stated that the beneficiary ceased employment with his or her previous employer on XXX[Date]XXX. However, you provided no supporting evidence to establish the date the beneficiary ceased employment with the previous employer. Unsupported statements are insufficient to establish the date the beneficiary ceased employment with the previous employer or the beneficiary's eligibility for the grace period.

XXX[Use/Modify If Applicable:]XXX You stated that the beneficiary ceased employment with his or her previous employer on XXX[Date]XXX. However, the evidence provided does not support this date because XXX[Enter Analysis]XXX.

XXX[Use/Modify If Applicable:]XXX A review of the record indicates that the beneficiary was employed without authorization during the grace period. XXX[Insert Analysis of the Evidence]XXX

XXX[Use/Modify If Applicable:]XXX The beneficiary's previously authorized validity period expired on XXX[Date]XXX. Accordingly, the beneficiary would only be eligible for a grace period up to this date. You filed the current petition on XXX[Date]XXX, which is after the expiration of the beneficiary's grace period.

XXX[Use/Modify If Applicable:]XXX The grace period may only be claimed for "consecutive days." You indicate that the beneficiary ceased employment from XXX[Date]XXX to XXX[Date]XXX and also from XXX[Date]XXX to XXX[Date]XXX. While it is noted that the combination of this time is less than 60 days, these two periods are not continuous and the grace period can only apply to one of these time periods. Therefore, the beneficiary did not maintain his or her status for the other time period.

(b)(5)

129 H1B Split Decision- Employer Retaliation

XXX[Use For EOS]XXX Title 8, Code of Federal Regulations (8 CFR), section 214.1(c)(4) states:

(4) Timely filing and maintenance of status. An extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of the Service and without separate application, with any extension granted from the date the previously authorized stay expired, where it is demonstrated at the time of filing that:

- (i) The delay was due to extraordinary circumstances beyond the control of the applicant or petitioner, and the Service finds the delay commensurate with the circumstances;
- (ii) The alien has not otherwise violated his or her nonimmigrant status;
- (iii) The alien remains a bona fide nonimmigrant; and

1-129 H1B AC21 Denial STANDARDS

(iv) The alien is not the subject of deportation proceedings under section 242 of the Act (prior to April 1, 1997) or removal proceedings under section 240 of the Act.

XXX[Use For COS]XXX Title 8, Code of Federal Regulations (8 CFR), section 248.1(b) states:

(b) Timely filing and maintenance of status. Except in the case of an alien applying to obtain V nonimmigrant status in the United States under § 214.15(f) of this chapter, a change of status may not be approved for an alien who failed to maintain the previously accorded status or whose status expired before the application or petition was filed, except that failure to file before the period of previously authorized status expired may be excused in the discretion of USCIS, and without separate application, where it is demonstrated at the time of filing that:

- (1) The failure to file a timely application was due to extraordinary circumstances beyond the control of the applicant or petitioner, and USCIS finds the delay commensurate with the circumstances;
- (2) The alien has not otherwise violated his or her nonimmigrant status;
- (3) The alien remains a bona fide nonimmigrant; and
- (4) The alien is not the subject of removal proceedings under 8 CFR part 240.

Further, 8 CFR 214.2(h)(20) states:

(20) Retaliatory action claims. If credible documentary evidence is provided in support of a petition seeking an extension of H-1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H-1B status by the beneficiary related to such violation as due to, and commensurate with, "extraordinary circumstances" as defined by 8 CFR 214.1(c)(4) and 8 CFR 248.1(b).

You indicated that the beneficiary has not maintained the beneficiary's H-1B nonimmigrant status because the beneficiary faced retaliatory action from the beneficiary's employer based on reporting a violation of that employer's Labor Condition Application (LCA) obligation.

In a Request for Evidence (RFE) dated XXX[Date]XXX, you were notified that the evidence submitted was insufficient to establish that the beneficiary faced relevant retaliatory action from the beneficiary's employer. As explained in the RFE, XXX[Summarize the Discussion from the RFE]XXX.

Your response, received on XXX[Date]XXX, includes the following evidence: XXX[List Evidence Submitted]XXX

XXX[Officer Choose as Appropriate **Either** the Following Sentence: You did not submit any evidence to establish that the beneficiary faced retaliatory actions from the beneficiary's employer. **OR** Officers Must Insert the Reason(s) Why the Evidence Listed Above is Insufficient to Meet This Requirement]XXX