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FILE: EAC 07 054 52851 Office: VERMONT SERVICE CENTER Date: **FEB 21 2008**

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a nonprofit international community development organization that seeks to employ the beneficiary as a librarian associate. The petitioner seeks to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and, (5) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on two grounds: (1) U.S. Citizenship and Immigration Services (USCIS) received sufficient numbers of H-1B petitions to reach the statutory numerical limitation (the H-1B cap) for fiscal year 2007 (FY07) and the petitioner did not qualify for an exemption from the H-1B cap; and, (2) the proffered position is not a specialty occupation.

The AAO will first address the director's decision that the petitioner does not qualify for exemption from the FY07 H-1B cap. The AAO agrees with the director that the petitioner is not an institution of higher education or a nonprofit entity related to or affiliated with an institution of higher education.

The petitioner filed the instant petition on December 19, 2006. At that time, USCIS had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY07, which covers employment dates starting on October 1, 2006 through September 30, 2007. On the Form I-129, the petitioner requested a starting employment date of December 25, 2006. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)¹, the director determined that the petition could be rejected. However, because the petitioner indicated on the Form I-129 that it is a nonprofit organization or entity related to or affiliated with an institution of higher education as such institutions of higher education are defined in the Higher Education Act of 1965, section 101(a), 20 U.S.C. § 1001(a), and thus exempt from the FY07 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was accepted and then denied upon adjudication on the ground that the petitioner failed to demonstrate that it in fact qualifies for this exemption.

Section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section

¹ 8 C.F.R. § 214.2(h)(8)(ii)(E) provides, in pertinent part:

If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

101(a)(15)(H)(i)(b) of the Act who “is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity”

For purposes of H-1B cap exemption for an institution of higher education, or a related or affiliated nonprofit entity, the H-1B regulations adopt the definition of institution of higher education set forth in section 101(a) of the Higher Education Act of 1965. Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

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

On December 27, 2006, the director requested, in part, additional evidence of the petitioner’s affiliation with an institution of higher education. In response to the director’s request for additional evidence, the petitioner stated the following:

[The petitioner] is a cooperative of various institutions of higher education in the U.S., including Columbia University in New York City. We have undertaken joint programs and projects with various institutes of Columbia University. . . .

As stated in Professor [REDACTED]’s letter, [the petitioner] cooperates and collaborates with Columbia University in three ways. First, [the petitioner] provides scholarships to a number of Tibetan scholars to come to the U.S. to take up full-time studies at Columbia University. Second, [the petitioner] collaborates with Columbia University in joint programs including, but not limited to, joint invitations to leading Tibetan artists,

intellectuals, writers, scientists and performers in Tibet. In this regard, [the petitioner] provides key financial, logistical support and knowhow [sic] to Columbia University. Third, [the petitioner] collaborates with Columbia University in terms of providing the necessary technical services and skills. [The petitioner] regularly provides Tibetan interpreters for Columbia's program events, program management assistance for large public Tibetan cultural events, advice and guidance for Columbia faculty visits to Tibet, and legal advice and assistance to Columbia University's librarians in terms of Tibetan book collections.

The director denied the petition concluding that USCIS received sufficient numbers of H-1B petitions to reach the statutory numerical limitation (the H-1B cap) for fiscal year 2007 (FY07) and the petitioner did not qualify for an exemption from the H-1B cap. The director noted that the evidence submitted by the petitioner establishes that the petitioner associates with Columbia University; however, it does not establish that the petitioner is affiliated with or related to this institution of higher education.

The petitioner has asserted that it is H-1B cap exempt under section 214(g)(5)(A) of the Act as a nonprofit entity that is related to or affiliated with an institution of higher education. The director did not dispute that the petitioner is a nonprofit entity, but found that the evidence on record does not establish that the petitioner is a related or affiliated entity of an institution of higher education within the meaning of section 214(g)(5)(A).

Following USCIS policy, the director applied the definition of related or affiliated nonprofit entity found in 8 C.F.R. § 214.2(h)(19)(iii)(B).² 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of American Competitiveness and Workforce Improvement Act (ACWIA),³ defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions of that act:

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

² See Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Dept. Homeland Sec., to Reg. Dirs. & Serv. Ctr. Dirs., *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3 (June 6, 2006) (hereinafter referred to as "Aytes Memo") at 4 ("[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions [as outlined in 8 C.F.R. § 214.2(h)(19)(iii)(B)] to determine whether an entity qualifies as an affiliated nonprofit entities [sic] for purposes of exemption from the H-1B cap").

³ Enacted as title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

Counsel for the petitioner asserts on appeal that the petitioner has a “cooperative relationship with Columbia University.” The petitioner highlighted the documentation previously submitted in response to the director’s request for evidence. Counsel for the petitioner reasserts that the cooperative relationship between the petitioner and Columbia University is by (1) the petitioner providing scholarships to Tibetan scholars who will take full-time studies at Columbia University; (2) joint sponsorships to leading Tibetan artists, intellectuals, writers, scientists and performers in Tibet; and (3) the petitioner providing advice and guidance for Columbia faculty visits to Tibet, and legal advice and assistance to Columbia University’s librarians in terms of Tibetan book collections.

The definition of affiliation was included when the Act was first enacted in 1952. At that time, the use of the term “affiliation” in the Act was limited to provisions making aliens associated with communist, anarchist or totalitarian parties or organizations inadmissible or ineligible for other benefits under the Act.⁴ As discussed above, ACWIA introduced the phrase “related or affiliated nonprofit entity” in the context of the H-1B fee exemption for institutions of higher education, and the former Immigration and Naturalization Services (INS) (now USCIS) promulgated a regulation in accordance with the requirements of the Administrative Procedures Act (APA) defining the phrase. Congress then included essentially the same phrase in enacting the H-1B cap exemption for institutions of higher education.

It should be noted that many non-profit organizations enjoy association of some form with institutions of higher education in the United States. If USCIS applied the definition in section 101(e)(2) of the Act as counsel urges, *any* nonprofit entity could claim exemption from the H-1B cap for *all* of its employees simply by giving or promising a negligible monetary sum to any institution of higher education. There is no indication in the language or the legislative history of AC21 that Congress intended or foresaw such a result.

The AAO finds that it is more likely that Congress intended, by including the phrase “related or affiliated nonprofit entity” in the language of AC21 without providing further definition or explanation, that this phrase be interpreted consistently with the only definition of the phrase that existed in the law at the time of the enactment of AC21: the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B). Such an interpretation by USCIS is reasonable, and the AAO will defer to USCIS policy in making its determination on this issue.

The AAO finds that neither the statutory language nor the legislative history of AC21 demonstrate that Congress intended to exempt all nonprofit organizations that provide educational benefits to the United

⁴ See, e.g., INA § 212(a)(3)(D), 8 U.S.C. 1182(a)(3)(D)(aliens affiliated with communist or totalitarian party inadmissible); see also INA § 313(a), 8 U.S.C. 1424(a)(naturalization forbidden for persons affiliated with anarchist, communist or totalitarian parties or organizations advocating the overthrow of the government of the United States by violence or other unconstitutional means); INA § 313(d), 8 U.S.C. § 313(d)(exception to previous rule for persons whose past affiliation was involuntary); and INA § 340(c), 8 U.S.C. § 340(c)(revocation of naturalization for later affiliation with organizations listed in section 313(a)).

States. Rather, the “[c]ongressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities”⁵

The petitioner must thus satisfy the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) in order to be exempt from the FY07 H-1B cap as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act. The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) allows the petitioner to demonstrate that it is an affiliated or related nonprofit entity by showing one or more of the following:

- (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;
- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.⁶

The AAO first considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. 214.2(h)(19)(iii)(B): shared ownership by the same board or federation. The petitioner did not submit any evidence to establish this criterion and thus, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. 214.2(h)(19)(iii)(B).

The AAO next considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): operation by an institution of higher education. The evidence in the record does not show that an institution of higher education operates the petitioner within the common meaning of this term. The petitioner did not submit any evidence to establish an operational relationship between the petitioner and Columbia University (and other universities mentioned in the record). It may not be inferred from associations of such a limited scope that the petitioner is being operated by an institution of higher education. Accordingly, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. 214.2(h)(19)(iii)(B).

Finally, the AAO considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In the supplementary information to the interim

⁵ See Aytes Memo, *supra*.

⁶ This reading is consistent with the Department of Labor’s regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words “federation” and “operated”. The Department of Labor explains in the supplementary information to its ACWIA regulations that it consulted with the former INS on this definitional issue, which supports the conclusion that both regulations were intended to be identical.

regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation “drawing on generally accepted definitions” of terms.⁷

It is evident from the foregoing discussion of the evidence that the petitioner, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. As noted above, the petitioner did not submit documentation of an established program between the petitioner and Columbia University. Instead, it appears that the petitioner and Columbia University are joint sponsors for certain events. The petitioner did not submit a contractual arrangement or any other documentation to present a consistent collaboration between the two entities. The petitioner asserts that the petitioner has provided scholarships to certain Tibetan students to study at Columbia University, but the record does not have any evidence to corroborate this claim. In addition, in reviewing the petitioner’s website,⁸ the petitioner’s mission to support higher education institutional development is only one mission out of several programs offered by the petitioner. Furthermore, in reviewing the petitioner’s website, it does not identify a program with Columbia University. The collaboration between the petitioner and Columbia University, as discussed on the record, is closer to a community relationship rather than a cooperation as outlined in the regulations. Thus, the petitioner is not attached to an institution of higher education within the meaning of the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

The AAO therefore agrees with the director that the petition does not qualify for an exemption from the H-1B cap under section 214(g)(5)(A) of the Act. Accordingly, the AAO will not disturb the director’s decision that the petition must be denied because the H-1B cap for FY07 has been reached.

Since the petition is not exempt from the H-1B cap, the AAO will not review the second issue regarding whether the proffered position is a specialty occupation pursuant to section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(iii)(A).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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

⁷ 63 FR 65657 at 3.

⁸ <http://www.trace.org>.