

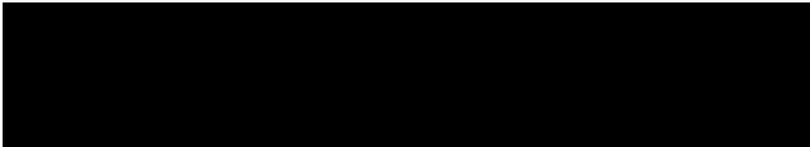
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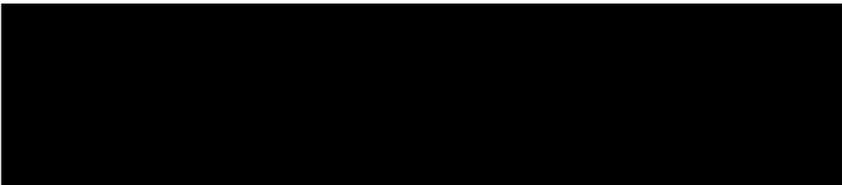
FILE: EAC 07 051 52183 Office: VERMONT SERVICE CENTER Date: JAN 25 2008

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act.

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, 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 private non-profit human service organization that seeks to employ the beneficiary as a member of its therapeutic staff. The petitioner, therefore, endeavors 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 annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on May 26, 2006. Although the petitioner filed the Form I-129 petition on December 14, 2006, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met the cap exemption criterion at section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), as a beneficiary who, in the words of the Act, “is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity.”

The director denied the petition on the ground that the petitioner did not establish that it meets any of the employer categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), and thus the beneficiary was subject to the annual cap.

On appeal, counsel contends that the petitioner qualifies as an employer within the meaning of section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), by virtue of its affiliation with an institution of higher education. Counsel contends that the petitioner qualifies as an affiliated or related nonprofit entity pursuant to 8 C.F.R. 214.2(h)(19)(iii)(B).

For the reasons discussed below, the AAO finds that the evidence of record does not establish that the petitioner is a cap-exempt qualifying employer, that is, an employer within the meaning of section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as interpreted by Citizenship and Immigration Services (CIS). The AAO also finds that the record does not establish that the beneficiary would be so employed as to qualify for cap exemption under the CIS policy of recognizing the H-1B cap exemption as extending to certain beneficiaries doing the work of 8 U.S.C. § 1184(g)(5)(A) entities while not directly employed by them. Consequently the beneficiary does not qualify for exemption from the H-1B cap. The appeal shall be dismissed, and the petition shall be denied.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner’s Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director’s request for additional evidence (RFE); (3) petitioner’s response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B, and counsel’s brief.

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who “is employed (or has received an offer of employment) at an

institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or a related or affiliated nonprofit entity”

Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

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

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

CIS has provided guidance in a June 2006 memorandum from Michael Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Regional Directors and Service Center Directors, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* HQPRD 70/23.12 (June 6, 2006) (hereinafter referred to as “Aytes Memo”).

The Aytes Memo observes that 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”

The Aytes Memo states that the fee exemption provision at 8 C.F.R. § 214.2(h)(19)(iii)(B) should be applied to determine what an affiliated nonprofit entity is, for purposes of the cap exemption. The memorandum states:

[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B

fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities [sic] for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. [§] 214.2(h)(19)(iii)(B) [regarding H-1B additional-fee exemption], the following definition applies:

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

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether an entity is “nonprofit” for purposes of cap-exemption determinations:

Non-profit or tax exempt organizations. For purposes of paragraphs (h)(19)(iii) (B) and (C) of this section, a nonprofit organization or entity is:

- (A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and
- (B) Has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.

The Aytes Memo also provides guidance for determining whether the beneficiary of an H-1B petition filed by a non-qualifying nonprofit entity qualifies for H-1B cap exemption in a situation where the beneficiary would perform work for, but not be employed by, a 20 U.S.C. § 1001(a) institution of higher education or a member, branch, cooperative or facility of such an institution. In pertinent part, the memorandum states:

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional 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, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain aliens who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.

USCIS will, therefore, allow third party petitioners to claim exemption on behalf of a beneficiary under either section 214(g)(5)(A) or (B), if the alien beneficiary will perform job duties at a qualifying institution that directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research. Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution.

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap. However, qualifying third-party employment can occur in a variety of other ways. USCIS therefore is providing a non-exhaustive list of examples in the AFM to assist adjudicators in determining cap exemption eligibility.

The petitioner is not a 20 U.S.C. § 1001(a) institution of higher education. However, the director did not dispute that the petitioner is a nonprofit entity. While the record of proceeding does not contain a letter from the Internal Revenue Service (IRS) indicating that the petitioner was granted exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code, the record does contain a Pennsylvania sales tax blanket exemption certificate stating that the petitioner is a non-profit charitable organization using federal exemption number c10812. Because the petitioner is a nonprofit entity as defined at 8 C.F.R. § 214.2(h)(19)(iv), the petition merits further consideration, to determine the type of relationship, if any, that it has with any institution of higher education.

In its December 20, 2006 response to the director's RFE, the petitioner stated that it is affiliated with Millersville University, Temple University and Penn State University. Based upon these claimed affiliations, the petitioner indicated on the Form I-129 that it was exempt from numerical cap limitations. The petitioner did not present any documentary evidence from Millersville University, Temple University, or Penn State University to establish that it is connected or associated with those institutions of higher education, through shared ownership or control by the same board or federation operated by those institutions, or that it was attached to those institutions as a member, branch, cooperative, or subsidiary. See 8 C.F.R. [§] 214.2(h)(19)(iii)(B). Simply going on the record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N 190 (Reg. Comm. 1972)). The petitioner did submit a document entitled "YAP National Training Curriculum," and indicated that its program is certified by Pennsylvania State University. No evidence was presented, however, from Pennsylvania State University establishing any claimed affiliation.

Applying the guidance of the Aytes Memo for determining a cap-exemption qualifying relationship with an 8 U.S.C. § 1184(g)(5)(A) institution of higher education, the AAO must evaluate whether the evidence of record establishes that the petitioner is either (a) "connected or associated with" an institution of higher

education “through shared ownership or control by the same board or federation operated by an institution of higher education,” or (b) “attached to” an institution of higher education as “a member, branch, cooperative, or subsidiary.” If either type of relationship is established, the beneficiary would be cap exempt.

The AAO finds that the evidence of record does not establish the petitioner within either of the qualifying categories at 8 C.F.R. § 214.2(h)(19)(iii)(B). That is, the evidence of record does not establish that the petitioner is either (a) connected or associated with an institution of higher education through shared ownership or control by the same board or federation operated by an institution of higher education, or (b) attached to an institution of higher education as a member, branch, cooperative, or subsidiary. The AAO does not concur with the petitioner’s assertion that the petitioner qualifies as an affiliated or related non-profit entity under 8 C.F.R. § 214.2(h)(19)(iii)(B).

The evidence of record does not substantiate any relationship between the petitioner and any institution of higher education. The petitioner has not established that the beneficiary qualifies for exemption from the H-1B cap under 8 U.S.C. § 1184(g)(5)(A) as interpreted by CIS. The evidence does not establish the petitioner as an entity within the coverage of 8 C.F.R. § 214(h)(19)(iii)(B) as:

- (1) Associated with a 20 U.S.C. § 1001(a) institution of higher education through shared ownership or control by the same board or federation;
- (2) Operated by a 20 U.S.C. § 1001(a) institution of higher education; or
- (3) Attached to such an institution of higher education as a member, branch, cooperative, or subsidiary.

The record also does not establish that the beneficiary would perform work for, but not be employed by, a 20 U.S.C. § 1001(a) institution of higher education or other qualifying institution. Thus, the beneficiary is not eligible for a cap exemption under this category of workers, as discussed in the Aytes Memo.

The petitioner has not established that it meets any of the exemption categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A). Accordingly, the AAO will not disturb the director’s denial of the petition

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 met that burden.

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