U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D1

[redacted]

FILE: EAC 08 060 50414 Office: VERMONT SERVICE CENTER Date: DEC 07 2009

IN RE: Petitioner: [redacted]
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:

[redacted]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 non-profit hospital that seeks to employ the beneficiary as a physical therapist. 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 2008 cap (FY08) 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 April 3, 2007. Although the petitioner filed the Form I-129 petition on December 24, 2007, 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 United States Citizenship and Immigration Services (USCIS). The AAO also finds that the record does not establish that the beneficiary would be so employed as to qualify for cap exemption under USCIS policy of recognizing the H-1B cap exemption as extending to certain beneficiaries performing the work at 8 U.S.C. § 1184(g)(5)(A) entities while not directly employed by them.

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 notice of intent to deny (NOID) the petition; (3) the petitioner's response to the NOID; (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).

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).[1] The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) defines

---

[1] *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").

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 federation operated by an institution of higher education, or 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 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, and while the burden to establish eligibility remains entirely with the petitioner, an independent search by the AAO of New York State's Division of Corporations website verifies that the petitioner is a domestic not-for-profit corporation. *See* http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry (accessed October 27, 2009). 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 January 7, 2008 response to the director's NOID, the petitioner stated that it is affiliated with the six entities or programs listed below:

1. The City University of New York (CUNY)
2. The Graduate Center of the City University of New York – Doctoral Program in Physical Therapy
3. Hunter College (Masters/Doctoral Program in Physical Therapy)
4. Long Island University School of Nursing – Brooklyn Campus
5. Touro College – School of Health Sciences
6. State University of New York (SUNY) Downstate Medical Center

Specifically, the petitioner claims that it operates a clinical internship program in physical therapy with these entities, which send their graduate students to the petitioner's facility to train with and shadow licensed physical therapists. Based upon these claimed clinical affiliations, the petitioner indicated on the Form I-129 that it was exempt from numerical cap limitations. Although the petitioner submitted copies of the websites of these entities, which include the petitioner on its lists of clinical affiliations, the petitioner did not present any documentary evidence 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 must thus satisfy the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) in order to be exempt from the FY08 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.

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 any of the six entities 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.

Counsel asserts on appeal that the petitioner is in fact "attached" to the named institutions of higher learning by virtue of the claimed clinical affiliations, and in support of this contention, counsel relies on an unpublished decision in which the AAO determined that the petitioner met the requirements of the third prong of the definition based on such an attachment. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Moreover, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

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. While the petitioner submits copies of websites for these entities, which list the petitioner as a "clinical affiliation" site, the petitioner did not submit contractual agreements or any other documentation to demonstrate that a true affiliation, creating or establishing common ownership and/or control between the entities, exists. In addition, in reviewing the petitioner's website,[2] the petitioner's mission is "to partner with our culturally diverse communities to provide a continuum of outstanding health care services to individuals and families through a caring and trustworthy staff." No mention is made of the clinical affiliations claimed in this petition, and the website does not identify programs, much less shared ownership or control, with any of the institutions named in the petition. The collaboration between the petitioner and these entities, therefore, appears closer to a community relationship rather than a membership, branch, cooperative, or subsidiary relationship as outlined in the regulations. 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 182, 336, 1442 (7th Ed. 1999)(defining the terms branch, cooperative, and subsidiary); *see also Webster's New College Dictionary* at 699 (3rd Ed. 2008)(defining the term member). 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 FY08 has been reached.

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.

[2] http://www.kingsbrook.org/About_Us/Our_Mission_and_Vision.aspx