U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: EAC 07 038 51039 Office: VERMONT SERVICE CENTER Date: FEB 21 2008

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:

SELF-REPRESENTED

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 organization that seeks to employ the beneficiary as a director of administrative services. 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) the 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, Notice of Appeal, with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the ground that the 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.

The issue before the AAO is whether the petitioner qualifies 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.

As stated in the director's request for additional evidence, as of June 2006, 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 November 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 but denied 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 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 . . . ."

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[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.

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.

The AAO finds that neither the statutory language nor the legislative history demonstrate that Congress intended to exempt all nonprofit organizations that provide educational benefits to the United 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 . . . ."[2] The director correctly found that the evidence does not establish that the petitioner should be included in the statutory definition of an institution of higher education. Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

The petitioner has asserted, however, that it is H-1B cap exempt as a nonprofit entity. The petitioner submitted a copy of the petitioner's articles of incorporation stating that the corporation is a not for profit organization, and a letter from the Internal Revenue Service stating that the petitioner is "exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code." The director did not dispute that the petitioner is a nonprofit entity, but

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[2] Memo. 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").

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).[3] 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of ACWIA, 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 federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

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 H-FY06 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 AAO finds that the best reading of 8 C.F.R. § 214(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.[4]

The petitioner did not submit any evidence to establish that it is affiliated with institutions of higher education. The petitioner only submitted documentation to establish that the petitioner is a not for profit organization and is exempt from paying Federal taxes to the Internal Revenue Service.

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[3] *See* 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").

[4] 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". As noted by AILA, 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.

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. As discussed above, the petitioner did not submit any documentation to establish this criteria. Consequently, 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. According, 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. The petitioner did not submit any documentation to establish this criteria and thus the petitioner has not met the third prong of 8 C.F.R. 214.2(h)(19)(iii)(B), and the beneficiary is not exempt from the H-1B numerical cap for FY07.

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 and the petition must be denied because the H-1B cap for FY07 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 sustained that burden.

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