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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 184 51516 Office: CALIFORNIA SERVICE CENTER Date: 30 JUL 2009

IN RE: Petitioner:
Beneficiary: [redacted]

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).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center recommended the denial of the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). Upon review, the AAO will affirm the decision of the director. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of teacher as an H-1B nonimmigrant 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 petitioner describes itself as a public school district.

The director recommends denial of the petition based on the petitioner's failure to establish that the beneficiary "is or will be working in the petitioner's program, the ***jointly managed program*** that is affiliated with an institution of higher education." (emphasis in original).

On certification, counsel submits a copy of her response to the director's October 6, 2008 request for evidence (RFE), a copy of the petitioner's motion to reconsider dated August 13, 2008, and copies of the accompanying Memoranda of Understanding. In the response to the RFE, counsel claims that (1) the petitioner is an exempt institution and, as such, the beneficiary's participation in a specific program is not required; and (2) even if participation in the professional development school program is required, the beneficiary will participate in the program as a mentor teacher by virtue of her position as a teacher within the petitioner's school district.

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2008 (FY08) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act., the total number of H-1B visas issued per fiscal year may not exceed 65,000. On April 3, 2007, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY08, which covers employment dates starting on October 1, 2007 through September 30, 2008.

The petitioner filed the Form I-129 on June 18, 2008 and requested a starting employment date of August 1, 2008. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 4, 2008 and requesting a start date during FY08 must 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, and thus exempt from the FY08 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director when it was initially received by the service center. On November 4, 2008, after denying the petitioner's claim and considering a motion to reconsider, the director denied the petition and certified the decision for review by the AAO.

Upon review, the petitioner has not established that it is exempt from the FY08 H-1B cap pursuant to section 214(g)(5) of the Act.

I. Law

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 . . . ."

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.

With regard to institutions of higher education, the legislative history that accompanies AC21 provides in relevant part the following:

> This section exempts from the numerical limitation (1) individuals who are employed or receive offers of employment from an institution of higher education, affiliated entity, nonprofit research organization or governmental research organization and (2) individuals who have a petition filed between 90 and 180 days after receiving a

> master's degree or higher from a U.S. institution of higher education. The principal reason for the first exemption is that by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupations we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education. Additionally, U.S. universities are on a different hiring cycle from other employers. The H-1B cap has hit them hard because they often do not hire until numbers have been used up; and because of the academic calendar, they cannot wait until October 1, the new fiscal year, to start a class.

Sen. Rep. No. 106-260 at 21-22 (April 11, 2000). While the rationale for granting an exemption to the H-1B cap for institutions of higher education might appear at first glance to support granting a similar exemption to primary and secondary schools, nothing in the statutory language or legislative history of AC21 indicates that it was the intent of Congress to do so through this legislation. The H-1B cap exemption provisions of AC21 make no reference to primary or secondary schools, and the legislative history of AC21 does not indicate any congressional intent that such schools be included within the definition of institutions of higher education.[1]

Moreover, the AAO observes that Congress, in exempting certain entities from the H-1B fee it imposed in the American Competitiveness and Workforce Improvement Act (ACWIA),[2] specifically listed institutions of "primary or secondary education" as exempt from the fee in addition to institutions of higher education. As stated by the Supreme Court in *Bates v. United States*, "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" 522 U.S. 23, 29-30, 118 S.Ct. 285, 290, 139 L.Ed.2d 215 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (C.A.5 1972)). As such, based on Congress's inclusion of primary and secondary education institutions in section 214(c)(9) of the Act and its omission from section 214(g)(5) of the same act, it should be presumed that Congress intentionally and purposely acted to exclude primary and secondary education institutions from the exemption to the numerical limitations contained in section 214(g)(1)(A) of the Act.

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[1] *See generally* 146 Cong. Rec. S9643-05 (October 3, 2000) (Statements of Senators Harry Reid, John McCain, Spencer Abraham, Sam Brownback, Kent Conrad, Patrick Leahy and Orrin Hatch); 146 Cong. Rec. S9449-01 (September 28, 2000) (Statements of Senator Hatch, Abraham and Edward Kennedy); 146 Cong. Rec. S7822-01 (July 27, 2000) (Statement of Senator John Warner); 146 Cong. Rec. S538-05 (February 9, 2000) (Statements of Senators Hatch, Abraham and Phil Gramm).

[2] 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.

II. Analysis

The AAO therefore finds that neither the statutory language nor the legislative history demonstrates 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 . . . ." 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").

In this matter, counsel for the petitioner asserts that the petitioner is H-1B cap exempt under section 214(g)(5)(A) of the Act due to its relation to or affiliation with an institution of higher education. More specifically, counsel claims that the Memoranda of Understanding between the petitioner and the University of Maryland and Frostburg State University are evidence of a cooperative relationship that makes the petitioner an exempt employer. Counsel also cites the Aytes Memo and states that "'participation in the qualifying program' issue is only relevant if the petition is from a petitioning employer that itself is not exempt, but will be employing the alien beneficiary at an exempt institution in a program that is part of the educational mission and program of the qualifying institution, i.e., an 'employed at' petition." (emphasis in original).

A. "Exempt Employers"

Upon review, the AAO agrees with counsel that, if the petitioner is an exempt employer, i.e., an institution of higher education or a related or affiliated nonprofit entity, there is no legal requirement that the beneficiary participate in a particular program. In other words, absent the issuance of regulations to the contrary, the on-site employment by an institution of higher education or a related or affiliated nonprofit entity is sufficient in itself to meet the plain statutory requirements of section 214(g)(5)(A) of the Act.

As such, while the AAO does not disagree with the director's conclusions in this matter, the director should have first determined whether this public school district is "related to or affiliated with" the University of Maryland or Frostburg State University by virtue of the submitted Memoranda of Understanding, such that it could be considered an exempt employer under section 214(g)(5)(A) of the Act.

According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is that found at 8 C.F.R. § 214.2(h)(19)(iii)(B). *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 to determine whether an entity qualifies as an affiliated nonprofit entities [*sic*] for purposes of exemption from the H-1B cap").

Title 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:

> *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 AAO, as a component of USCIS, generally follows official statements of policy issued by the agency, provided they are not in conflict with a higher legal authority. *See* USCIS Adj. Field Manual 3.4(b) (2009). By including the phrase "related or affiliated nonprofit entity" in the language of AC21 without providing further definition or explanation, Congress likely intended for this phrase to be interpreted consistently with the only relevant 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). As such, the AAO finds that USCIS reasonably interpreted AC21 to apply the definition of the phrase found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and it will defer to the Aytes Memo in making its determination on this issue.

The petitioner must, therefore, establish that it satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act in order for the beneficiary to be exempt from the FY08 H-1B cap. Reducing the provision to its essential elements, the AAO finds that 8 C.F.R. § 214(h)(19)(iii)(B) allows a petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes 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.[3]

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[3] 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 explained in the supplementary information to its ACWIA regulations that it consulted with the former INS on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

As indicated above, the petitioner submits copies of the Memoranda of Understanding between the petitioner and the University of Maryland and Frostburg State University in support of its claim that it is affiliated with an institution of higher education. In general, the basis for the agreements are the maintenance of Professional Development Schools, "collaboratively planned and implemented partnership[s] for the academic and clinical preparation of interns . . . ." *See* Memoranda of Understanding, p. 1. In addition, the petitioner asserts the following:

> Please also note that [the petitioner] and both of these universities are governed and regulated by the Maryland State Department of Education. Most importantly please note that these [Professional Development School (PDS)] agreements have also created "Advisory Boards" that administer and oversee all aspects of the PDS programs. Thus these PDS programs are jointly administered by common boards. Furthermore, [the petitioner] and both universities are public, non-profit organizations by statute and also enjoy statutory tax exempt status. These agreements are annually renewed indefinitely.

Turning to the definition of an "affiliated or related nonprofit entity," the AAO must first consider 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 AAO notes that it cannot be found that the petitioner meets the definition of related or affiliated nonprofit entity simply because public universities and public primary and secondary schools are all nonprofit entities ultimately owned by the State of Maryland and/or governed or regulated by the Maryland State Department of Education. The AAO interprets the terms "board" and "federation" as referring specifically to educational bodies such as a board of education or a board of regents. Upon review, the record does not establish that the petitioner and the University of Maryland at College Park or the petitioner and Frostburg State University are owned or controlled by the same boards or federations. Accepting the petitioner's argument concerning some type of shared ownership or control through the government of the State of Maryland would allow virtually any state government agency in Maryland, or in any other state for that matter, to claim exemption from the H-1B cap regardless of whether the agency had any connection whatsoever to higher education, a result that would be inconsistent with the intent of AC21. This overly expansive interpretation would undermine the clear Congressional intent to grant an exemption for institutions of higher education. *See generally* 146 Cong. Rec. S9643-05, *supra* fn 2 and related text.

Moreover, the record does not establish that public institutions of higher education and public primary and secondary schools are owned or controlled by the same boards or federations in the State of Maryland. The Memoranda of Understanding indicate instead that the petitioner is operated, supervised, or controlled by or in connection with the Board of Education of Prince George's County. Meanwhile, this same evidence indicates that the University of Maryland at College Park and Frostburg State University are operated, supervised, or controlled by the University System of Maryland Board of Regents. Thus, the two educational entities are not associated through control by the same board or federation.

Counsel's assertion that the "Advisory Boards" constitute boards that controls both public institutions of higher education and public primary and secondary schools is not supported by any evidence in the record. Going on 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 Dec. 190 (Reg. Comm. 1972)). In addition, the very nature of an advisory board indicates instead that it is to act primarily in an advisory capacity, recommending action to, but not owning or controlling, public institutions of higher education or public primary and secondary schools. Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, the AAO must consider whether the petitioner has established that it is a related or affiliated non-profit 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, a public school district, within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and each institution of higher education is one between two separately controlled and operated entities for which indemnification protection is specifically provided. It cannot be inferred from associations of such a limited scope that the entire public school district of 21,000 employees, including approximately 10,000 classroom teachers and instructional supervisors, is being operated by the institutions of higher education named herein. As noted above, the evidence or record indicates instead that the public school district is more likely than not ultimately controlled and operated by the Board of Education of Prince George's County. Accordingly, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and 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 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 the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that the petitioner, a public school district, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. There is no indication whatsoever from the evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of either the University of Maryland at College Park or Frostburg State University. 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).

Based on the evidence of record as currently constituted, the AAO cannot find that the petitioner should be included in the statutory definition of an institution of higher education based on its PDS agreement with either the University of Maryland at College Park or Frostburg State University.

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.

B. "Jointly Administered Program"

As a final note, the decision of the director appeared to bypass this analysis and instead focused on the PDS program and whether the beneficiary would be working in this jointly administered program. According to the Aytes Memo, however, the analysis of program participation only occurs when it has been determined that the beneficiary will be employed on-site "at" an institution of higher education or a related or affiliated nonprofit entity by a third party petitioner. In other words, according to the Aytes Memo, the *locus actus*, or place of performance, is paramount in determining whether a petitioner qualifies for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act. It is clear from the evidence presented in this matter that the beneficiary will be employed at the petitioner's facilities and, therefore, does not qualify for the third party employer exception discussed in the Aytes Memo. As such, while the director's conclusion that the petitioner failed to established it is exempt from the H-1B cap pursuant to section 214(g)(5)(A) of the Act will be affirmed, the director's analysis regarding the beneficiary's program participation or lack thereof will be withdrawn.

III. Conclusion

Upon review, the petitioner has not established that it is exempt from the FY08 H-1B cap pursuant to section 214(g)(5) of the Act. Accordingly, the petition must be denied.[4] The AAO notes, however, that the fiscal year 2010 allocation of H-1B visas has not been exhausted as of the date of this decision. This decision shall not serve to bar the petitioner from re-filing a new petition with a start date of October 1, 2009, accompanied by evidence to show eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.

[4] It is noted that a review of a petitioner's exemption claim is considered to be an adjudication for purposes of determining eligibility for the benefit sought. *See generally* USCIS Adj. Field Manual 31.3(g)(13) (2009). As such, the proper action was to receipt in and adjudicate the instant petition instead of rejecting it outright when it was received by USCIS.