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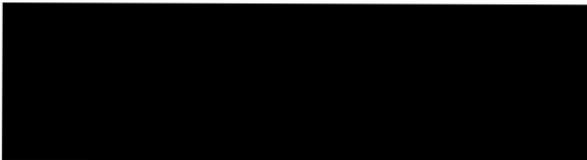


FILE: WAC 08 152 52156 Office: CALIFORNIA SERVICE CENTER Date: NOV 09 2009

IN RE: Petitioner: [Redacted]
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:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 hospital that seeks to employ the beneficiary as a medical technologist. 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 director denied the petition on the basis of her determination that U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the statutory numerical limitation set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), for the Fiscal Year 2009 (FY09) at the time the petition was filed, and that the petitioner had failed to demonstrate its exemption from that numerical cap. The director found that the petitioner had failed to establish that the beneficiary would be working in a program that is jointly managed that is affiliated with an institution of higher education. On appeal, counsel contends that the petitioner is indeed exempt from the numerical cap, and that the director therefore erred in denying the petition.

The record of proceeding before the AAO contains the following: (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 and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As noted previously, H-1B visas are, in general, 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 8, 2008, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2011.

The petitioner filed the Form I-129 on May 2, 2008 and requested a starting employment date of April 20, 2008. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2008 and requesting a start date during FY09 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 FY09 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. The director denied the petition on May 27, 2008.

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.

The petitioner's argument that the petitioner is exempt from the numerical cap rests on two separate grounds: (1) that since the petitioner is owned by the State of New Mexico, and the State of New Mexico operates several colleges and universities, the petitioner is connected, associated, affiliated, or related to such institutions of higher education because they are controlled by a common owner: the

State of New Mexico; and (2) that the petitioner's agreement with Trinidad State Junior College also constitutes an affiliation with an institution of higher education.

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.

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 the “Aytes Memo”).

On appeal, counsel 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. As noted previously, counsel’s argument that the petitioner is affiliated with an institution of higher education rests on two separate grounds: (1) that since the petitioner is owned by the State of New Mexico, and the State of New Mexico operates several colleges and universities, the petitioner is connected, associated, affiliated, or related to such institutions of higher education because they are controlled by a common owner: the State of New Mexico; and (2) that the petitioner’s agreement with Trinidad State Junior College (Trinidad State) also constitutes an affiliation with an institution of higher education.

Counsel argument regarding the State of New Mexico’s operation of several colleges and universities is raised for the first time on appeal, so the director did not make a decision on that ground of counsel’s argument.

With regard to the petitioner’s relationship with Trinidad State, the director found such relationship inadequate to support a finding of cap exemption on the basis of her determination that: (1) the beneficiary would not be enrolled in the program Trinidad State would operate at the petitioner’s facility; and (2) such program would not be jointly managed by the petitioner and Trinidad State. Counsel contends that the submitted May 2, 2003 “Agreement” between the petitioner and the State of Colorado (where Trinidad State is located) constitutes sufficient evidence of the requisite affiliation between the petitioner and Trinidad State and that participation by the beneficiary in the affiliated program is not required.

The AAO agrees with counsel that, if a 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 in itself sufficient to meet the plain statutory requirements of section 214(g)(5)(A) of the Act.

Having made that determination, the AAO turns next to the issue of whether the petitioner is “related to or affiliated with” either (1) the colleges and universities operated by the State of New Mexico; or

(2) Trinidad State, 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”).

The regulation at 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

As noted previously, the petitioner claims relation to, or affiliation with the colleges and universities operated by the State of New Mexico and Trinidad State.

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 the colleges and universities operated by the State of New Mexico are all nonprofit entities ultimately owned by the State of New Mexico and/or governed or regulated by the New Mexico 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. As such, the record does not establish that the petitioner and the colleges and universities operated by the State of New Mexico 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 New Mexico would allow virtually any state government agency in New Mexico, 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. Nor does the record establish that the petitioner and Trinidad State are owned or controlled by the same boards or federations.

Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Having made that determination, the AAO turns next to a consideration of 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 of record does not show that an institution of higher education operates the petitioner, a public hospital, 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. It cannot be inferred from associations of such a limited scope that

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 legacy Immigration and Naturalization Service (INS) on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

the entire public hospital 240 employees is being operated by either the colleges and universities operated by the State of New Mexico, or by Trinidad State. Accordingly, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Having made that determination, the AAO turns next to a consideration of 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): that it is 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 legacy 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 hospital, 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 colleges and universities operated by the State of New Mexico, or by Trinidad State. 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 finds that the petitioner has failed to establish that it is an affiliated or related nonprofit entity pursuant to 8 C.F.R. § 214(h)(19)(iii)(B).

III. Conclusion.

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act. Accordingly, the petition must be denied.

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 appeal will be dismissed, and the petition will be denied.

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