

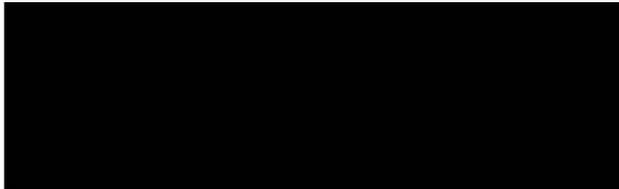
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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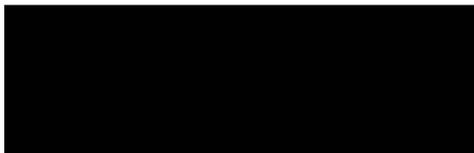
Date: **OCT 29 2009**

IN RE: Petitioner:  
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:



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, 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 organization engaged in teaching music that seeks to employ the beneficiary as a music instructor. 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 Form I-129, Petition for a Nonimmigrant Worker, was filed on August 17, 2006.

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) as it was organized pursuant to the New York State not-for-profit corporation law and has been recognized by the United States Internal Revenue Service (IRS) as a tax exempt organization. Counsel submits copies of the petitioner's articles of organization and the September 19, 1980 letter from the IRS assigning an employer identification number and determining that the petitioner is exempt from Federal income tax under section 501(c) of the Internal Revenue Code.

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 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's letter on appeal, and the supporting documentation.

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 August 17, 2006 and requested a starting employment date of October 1, 2004. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B), any non-cap exempt petition filed on or after the final receipt date as determined by USCIS will 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 FY07 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 September 18, 2006, the director denied the petition because the petitioner

failed to present evidence that it was affiliated with an institution of higher learning. On appeal, counsel submits a brief and additional evidence.

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.<sup>1</sup>

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),<sup>2</sup> 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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<sup>1</sup> 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).

<sup>2</sup> 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.

The AAO acknowledges that the petitioner is a non-profit organization. The letter from the IRS corroborates counsel's characterization of the petitioner as a nonprofit, tax exempt, organization. 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.

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). Although the governing statute does not include a definition, the regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) pertaining to exempt organizations that are not required to pay additional fees, does provide a definition. 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:

The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) states in pertinent part:

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.

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). 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 FY07 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.<sup>3</sup>

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<sup>3</sup> 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

Turning to the definition of an “affiliated or related nonprofit entity,” the AAO must consider whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the above criteria. 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 because it is a non-profit music school. The AAO notes that it cannot be found that the petitioner meets the definition of related or affiliated nonprofit entity simply because it is a school of music. The petitioner has not presented and the record does not include any evidence that the petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation, that the petitioner is operated by an institution of higher education, or that the petitioner is attached to 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.

Upon review, the petitioner has not established that it is exempt from the FY07 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 director's decision will be affirmed, and the petition will be denied.

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

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“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).