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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

DATE: **AUG 21 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (hereinafter "director") denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In the Petition for a Nonimmigrant Worker (Form I-129), filed August 12, 2013, the petitioner describes itself as an 825-employee "Public Independent School District," established in [REDACTED]. The petitioner seeks to employ the beneficiary in what it designates a "Bilingual Elementary Teacher" position and to classify her 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 November 19, 2013, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. Specifically, the director determined that the petitioner had not established that it is a nonprofit entity related to or affiliated with an institution of higher education. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition is erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before us contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2013 (FY13) 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 June 12, 2012, 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 FY13, which covers employment dates starting on October 1, 2012 through September 30, 2013.

The petitioner filed the Form I-129 on August 12, 2013 and requested a starting employment date of August 14, 2013. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after June 12, 2012, and requesting a start date during FY13 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 FY13 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

when it was initially received by the service center. The director denied the petition on November 19, 2013, and the decision is now before us on appeal.

Upon review, the petitioner has not established that it is exempt from the FY13 H-1B cap pursuant to section 214(g)(5) of the Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

At Part B (Fee Exemption Determination) of the Form I-129 H-1B Data Collection Supplement, the petitioner checked the box for "Yes" in response to the question, "Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as defined in 8 CFR 214.2(h)(19)(iii)(C)?" At Part C (Numerical Limitation Information) of the same supplement, the petitioner checked the box in response to the statement, "The petitioner is a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)."

In its letter of support, dated June 22, 2013, the petitioner stated that it "is a non-profit educational organization"; it "provides a quality education for pre-kindergarten through twelfth grade"; and it also provides "special education programs for pre-school and school age children and a career and technology education program of the secondary level."

Regarding the proffered position, the petitioner indicated that the beneficiary in "her capacity as a Bilingual Elementary Teacher, she is required to teach core courses including English, Mathematics, Science and Social Science to students with limited proficiency in English and to no [*sic*] English speaking students."

In further support of the petition, the petitioner submitted a Labor Condition Application; the beneficiary's foreign academic credentials evaluation and a copy of her transcript and diploma; a Texas probationary educator certificate; the petitioner's affiliation agreement with the [REDACTED] and a copy of a July 5, 2013 electronic transmission regarding the beneficiary's enrollment at [REDACTED]. In a letter submitted with the petition, counsel claimed that the petitioner is affiliated with institutions of higher education, including [REDACTED] and thus the numerical limitations under section 214(g)(1)(A) do not apply to the beneficiary.

On August 16, 2013, the director issued an RFE. The petitioner was asked to submit probative evidence that it is a non-profit entity related to or affiliated with an institution of higher education.

In response, the petitioner submitted a Professional Development Schools Internship Affiliation Agreement with [REDACTED] a state-supported institution of higher education. The stated purpose of the agreement is:

- a. [T]o provide the student with a meaningful and intensive on-the-job training experience through learning activities that will meet educational and behavioral objectives established by [REDACTED]

- [REDACTED]
- b. [T]o provide [the petitioner's] personnel with teaching opportunities that will enhance the experience and capabilities of the personnel and provide District with the opportunity to contribute to the training of professionals in educational careers;
 - c. [T]o provide [the petitioner] expanded capabilities to provide its services.

The petitioner agreed, in part, to provide a district representative to work in collaboration with [REDACTED] faculty, professional staff, and Intern I and Intern II students.

The record also includes the petitioner's Alternative Certification Program Affiliation Agreement with [REDACTED] and the petitioner's Graduate Internship/Field Experience Affiliation Agreement with [REDACTED]. Each of these two agreements provides essentially the same information with respect to responsibilities under the agreement, including collaboration with [REDACTED] representatives for evaluations and assessments. Two of the three agreements include an addendum that contained compensation provisions. The petitioner also submitted an October 31, 2013 letter signed by [REDACTED] Director of Human Resources for the petitioner, in which she confirmed that the petitioner had an ongoing "cooperative agreement" with [REDACTED]. Ms. [REDACTED] emphasized that all of the schools in her school district are professional development schools and she referenced [REDACTED] work with professional development schools in local public school districts as set out on [REDACTED] website. A copy of a one-page print-out from the website was also submitted.

The petitioner claimed through counsel that its cooperative arrangements with [REDACTED] establish that it is connected with [REDACTED] as a cooperative and thus should be exempt from the H-1B numerical cap.

On November 19, 2013, the director denied the petition, finding that the evidence of record was insufficient to establish that the petitioner was a nonprofit organization or entity related to or affiliated with an institution of higher education.

On appeal, counsel contends that the denial was erroneous, and that the director did not consider the evidence submitted showing the petitioner's long-standing cooperative relationship with [REDACTED]. Counsel asserts that the director failed to consider the paragraphs in the submitted agreements that referred to the collaboration between the two entities to achieve mutual goals. Counsel notes that the [REDACTED] is made up of one representative from each of the twenty-three participating school districts, and is chaired by the Director of [REDACTED]. Counsel submits a copy of a list of the members of the [REDACTED] and an unsigned statement indicating that the Director of [REDACTED] chairs the Board. The unsigned statement indicates that the "focus of the board is on the number and types of teachers needed by the districts."

Counsel asserts that the director does not address the reasons why the evidence submitted by the

petitioner does not establish that the petitioner is a member, branch, cooperative or subsidiary of [REDACTED]. Counsel also references an unpublished decision issued by the AAO in 2006 in support of the petitioner's assertion that it is affiliated with a qualified institution of higher education.

III. LAW AND ANALYSIS

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.²

Moreover, we observe that Congress, in exempting certain entities from the H-1B fee it imposed in the American Competitiveness and Workforce Improvement Act (ACWIA),³ 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

² 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).

³ 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.

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.

We find that neither the statutory language nor the legislative history demonstrates that Congress intended to exempt all public or 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, the petitioner asserts that it 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, the petitioner claims that it has the requisite affiliation with [REDACTED] which makes the petitioner an exempt employer.

"Exempt Employers"

According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is 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.

As a matter of policy, the AAO, as a component of USCIS, defers to official policy pronouncements issued by the agency, provided they are not in conflict with a higher legal authority. *See USCIS Adjudicator's Field Manual*, 3.4 Adherence to Policy, <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (follow hyperlinks to "Table of Contents" and "3.4") (last visited Aug. 18, 2014). 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 and as there is no evidence that this reasonable interpretation of AC21 conflicts with a higher legal authority, we will defer to the Aytes Memo in making our 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 FY13 H-1B cap. Reducing the provision to its essential elements, we find that 8 C.F.R. § 214(h)(19)(iii)(B) allows a petitioner to demonstrate that it is a related or affiliated 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.⁴

Pursuant to 8 C.F.R. § 214(h)(19)(iv), a nonprofit organization or entity is defined as:

- (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.

We will 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 or control by the same board or federation. We note that it cannot be found that the petitioner meets the definition of related or affiliated nonprofit entity simply because the petitioner and [REDACTED] are both public educational institutions in the State of Texas governed and/or regulated by the Texas State Department of Education. We interpret 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 [REDACTED] are owned or controlled by the same

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." 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).

boards or federations. Accepting an argument concerning some type of shared ownership or control through the government of the State of Texas would allow virtually any state government agency in Texas, 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 information in the record is insufficient to establish that the [REDACTED] controls both [REDACTED] a public institution of higher education and the petitioner, an independent school district. The unsigned statement submitted claiming the Director of the [REDACTED] chairs this Board has no probative weight. 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)). Moreover, even if the unsigned statement is accepted as probative, there is no evidence establishing that the nature of the [REDACTED] is to own or control public institutions of higher education or public primary and secondary schools. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we 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 independent school district, within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and the 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 the petitioner is being operated by the institution of higher education named herein. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we consider 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 independent 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 probative evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of [REDACTED]. 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). Although counsel refers to the language in the affiliation agreements submitted which indicate the two entities will collaborate on work days and

assessments, among other things, the purpose of the collaboration is to provide on-the-job training experience for future teachers. It is not indicative of any intent to share ownership or control. We observe that any contract between two separate entities is indicative of some sort of collaborative effort. The general collaboration between the petitioner and [REDACTED] referenced in the agreements does not establish that the two entities share ownership and/or control.

We have also reviewed counsel's assertion on appeal, that "a school district may not be subject to the cap if the position is part of a collaboration between the school and the institution of higher education" and counsel's citation to a September 8, 2006 unpublished AAO decision in support of this assertion. Counsel is free, of course, to demonstrate that the facts of that case are similar to the facts of the instant case, to refer to the reasoning of that case, and to urge that the reasoning be extended to the instant case. However, the case cited has no probative value as precedent. Moreover, counsel has furnished no probative evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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.

Based on the evidence of record as currently constituted, we cannot find that the petitioner is a related or affiliated non-profit entity of an institution of higher education learning pursuant to the applicable statute and regulations. Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution related or affiliated to an institution of higher education under section 214(g)(5)(A) of the Act.⁵

IV. CONCLUSION

The petition must be denied for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act; *see e.g., Matter of Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

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

⁵ A review of USCIS records indicates that on April 14, 2014, a date subsequent to the denial of the instant petition, the petitioner submitted a new Form I-129 on the beneficiary's behalf. USCIS records further indicate that this second petition was approved on April 30, 2014, which granted the beneficiary H-1B status from October 1, 2014 until September 30, 2015.