



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE **JUL 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 Director of the California 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 healthcare organization with 8000 employees. It seeks to employ the beneficiary as an "R-1 Family Medicine Resident" 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 concluding that the petitioner failed to establish that the beneficiary qualifies for an exemption to the numerical cap because the petitioner does not qualify as an institution of higher education.

On appeal, counsel claims that the petitioner qualifies under section 101(b) of the Higher Education Act of 1965; in contrast to the director's determination that the petitioner must qualify under section 101(a).

The record of proceeding before us contains: (1) Form I-129, Petition for a Nonimmigrant Petition, and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief and supporting documentation. We reviewed the record in its entirety before reaching our decision.

For the reasons that will be discussed below, we agree with the director's decision that the petitioner has not established eligibility for the benefit sought. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

## 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. The numerical limitation does not apply to a 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," or "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization." Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000).

On June 11, 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 June 25, 2013 and requested a starting employment date of June 24, 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 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 when it was initially received by the service center. The director denied the petition on September 9, 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

On the Form I-129 H-1B Data Collection Supplement (page 17), the petitioner checked the box for "Yes," in response to the question, "Are you an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)?".

The petitioner indicated that the beneficiary would be employed at its location in [REDACTED] PA. The petitioner stated in a letter submitted with the initial petition that the beneficiary will work as an R-1 Family Medicine Resident. The petitioner noted that as an R-1 Family Medicine Resident, the beneficiary will assist in providing comprehensive medical services for family care patients; examine patients using medical instruments and equipment; diagnose, treat, and help prevent diseases and injuries; as well as promote health by advising patients concerning diet, hygiene, and methods for prevention of disease.

The petitioner stated that it is accredited by the Accreditation Council for Graduate Medical Education (ACGME) and conducts medical education on three different levels. The petitioner described the levels as follows:

First, the three to five year graduate medical education programs that comprise the medical residency. This clinical education program is necessary for medical students to progress to being fully licensed physicians. Second, [the petitioner] is accredited by the Accreditation Council for Graduate Medical to provide continuing graduate medical education to licensed physicians. . . . Third, [the petitioner] conducts undergraduate medical education (medical school level) for those intending to become physicians. Each year [the petitioner] provides in-house training for medical students while they are engaged in the pursuit of their medical school diplomas. Training at [the petitioner's] site is a requirement of several medical schools, including [REDACTED] and the [REDACTED] among others.

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As a graduate medical education institution, [the petitioner] provides a three to five year program of training to prepare its graduate medical education students for gainful employment in the recognized occupation of physician. In this capacity [the petitioner] is accredited by ACGME and only admits as students those who have completed medical school. Through the [redacted] [the petitioner] is authorized within the state of Pennsylvania to conduct programs of education beyond secondary education. [redacted] through its subsidiary [the petitioner], therefore meets the rationale for receiving an exemption from the H-1B cap envisioned by Congress.

In further support of the petition, the petitioner submitted five previously approved H-1B notices and a copy of the underlying Form I-129 and supporting documentation as follows:

- H-1B approval notice for EAC 07 180 52096. A review of the approval notice and the Form I-129 shows the petitioner in that matter is [redacted], a company originally incorporated as [redacted] and the petitioner's claimed parent company. In that matter, [redacted] marked "Yes" to Part C question two indicating that it is a nonprofit organization or entity related to or affiliated with an institution of higher education. [redacted] included copies of an agreement between the petitioner and [redacted] for a clinical education program for third and fourth year medical students; an agreement between the petitioner and The [redacted] and The [redacted] access to tertiary and quaternary services, and education of physicians and patients; and an agreement between [redacted] and [redacted] to provide clinical faculty, facilities, patient resources and services to deliver the "Anesthesia Core" program and clinical experience for students in the Master of Science in Nursing Degree with a concentration in Anesthesia.
- H-1B approval notice for WAC 09 161 51804. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C questions one and two indicating that it is an institution of higher education, as well as a nonprofit organization or entity related to or affiliated with an institution of higher education. The underlying documentation submitted does not include the claimed affiliation agreements but rather the information in support of the petitioner's claim that it is an institution of higher education.
- H-1B approval notice for [redacted] A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements.



- H-1B approval notice for [REDACTED]. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements.
- H-1B approval notice for [REDACTED]. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements.

In further support of the petition, the petitioner provided a Labor Condition Application (LCA); the petitioner's agreement with the beneficiary; the beneficiary's resume, diplomas, and transcripts; the consolidated financial statements and supplementary information for WellSpan Health for years ended June 30, 2012 and 2011; and Internal Revenue Service letters regarding the petitioner and WellSpan Health's tax identification numbers.

The record also contained accreditation documents, including a letter from the [REDACTED] [REDACTED] bylaws, and [REDACTED] program requirements for [REDACTED].

The record further included an undated statement prepared by [REDACTED] vice-president and general counsel, [REDACTED] attesting that [REDACTED] is the parent organization of several affiliated subsidiary entities, including the petitioner. Mr. [REDACTED] also attested: "[the petitioner] is an institution of higher education, providing graduate medical and dental education ([the petitioner] is accredited by the [REDACTED] to operate medical and dental residency programs), continuing medical education, clinical training for medical school students, and clinical training for undergraduate students of nursing schools and other healthcare-related training programs. In furtherance of its educational activities [the petitioner] has entered into residency rotation agreements with [REDACTED] and Teaching Services Agreements with [REDACTED] Group."

On July 3, 2013, the director issued an RFE requesting evidence that the petitioner qualifies as an institution of higher education as defined under section 101(a) of the Higher Education Act of 1965. In response, counsel asserted that the petitioner meets the cap exempt definition of an institution of higher education defined in the Higher Education Act of 1965 at 20 U.S.C. § 1001(b) because they provide "not less than a one-year program of training to prepare students for gainful employment in a recognized occupation [i.e., physician] . . . ." Counsel asserted further that the petitioner meets the regulatory definition for being cap exempt as it is a non-profit institution of higher education by virtue of its 3-5 year medical residency programs as detailed in the letter and accompanying exhibits. Further, that the petitioner is not relying upon affiliation with any external entity to establish its cap exempt status. The petitioner re-submitted its accreditation documents as well as the same affiliation

agreements submitted in support of [REDACTED] that is the agreement between the petitioner and [REDACTED] the agreement between the petitioner and [REDACTED] and the agreement between [REDACTED] [REDACTED]

The director denied the petition on September 9, 2013, finding that the petitioner failed to establish that the organization qualifies as an institution of higher education as defined under section 101(a) of the Higher Education Act of 1965.

On appeal, counsel claims that pursuant to the Higher Education Act of 1965, both subsections (a) and (b) of the definition of institution of higher education should be accepted. In the alternative, counsel for the petitioner contends that the petitioner meets the definition of subsection (a) paragraph (3) in that it "provides not less than a 2-year program that is acceptable for full credit toward such a degree." Finally, counsel avers that although not checked on the Form I-129, the petitioner should be given deference for its prior H-1B cap exemption determinations for affiliated nonprofit entities made by USCIS after June 6, 2006 as instructed by USCIS Policy Memorandum of April 28, 2011. Counsel again re-submits evidence of prior approvals.

We find that, 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.

### III. LAW AND ANALYSIS

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2013 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

As observed above, 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 November 23, 2011 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.

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).

We find 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 both as a qualifying institution of higher education, and, due to its relation to or affiliation with an institution of higher education.

#### A. Institution of Higher Education

As a preliminary matter, counsel claims on appeal that the director's decision misinterprets the Higher Education Act of 1965 by restrictively reading the provisions of the act to only define an institution of higher education under Section 101(a), instead of Sections 101(a) and (b). The INA, however, incorporates only Section 101(a) of the Higher Education Act of 1965's definition of institution of higher education. As stated above:

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.

[Emphasis added]. Counsel is incorrect in assuming that the director is relying solely on an interpretation of the Higher Education Act of 1965. For H-1B purposes, as stated in the INA, only Section 101(a) of the definition of institution of higher education applies for cap-exempt status. The INA did not incorporate section 101(b). Therefore, the petitioner must show that it meets all five criteria of section 101(a).

Counsel states that, in the alternative, the petitioner meets all five criteria of Section 101(a) of the Higher Education Act in that it "provides not less than a 2-year program that is acceptable for full credit toward such a degree." Specifically, subsection (a) paragraph (3) refers to a 2-year program that is acceptable for full credit towards a bachelor's degree. As evidence of the 2-year program, the petitioner provides a letter discussing accreditation received from the [REDACTED]

According to the petitioner, accreditation was received for [REDACTED]

"sponsored programs in Obstetrics and Gynecology, Internal Medicine, Family Medicine, Surgery and Emergency medicine training programs." The petitioner goes on to explain that in order to be accepted into such a program, the individual must have already completed undergraduate medical education and awarded a bachelor's degree" as well as awarded a Doctor of Medicine Degree. As subsection (a) paragraph (3) of the definition of institution of higher education refers to a 2-year program that is acceptable for full credit towards a bachelor's degree, any [REDACTED] program would not qualify as the individual participating in such a program has already earned their degree and the [REDACTED] program is a licensure qualification requirement.

Counsel for the petitioner also claims that the petitioner "provides a significant role in the undergraduate medical education (medical school level) for those intending to become physicians." The petitioner attached affiliation agreements as follows:

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None of the three programs are specifically for a 2-year program that is acceptable for full credit towards a bachelor's degree. All three of the programs are specifically for graduate level education programs, either medical programs or a master's in nursing, and therefore do not meet the requirements of subsection (a) paragraph (3) of the definition of institution of higher education.

#### B. Related or Affiliated Non-Profit Entity

On appeal, counsel for the petitioner asserts that although not checked on the Form I-129, the petitioner should be given deference for its prior H-1B cap exemption determinations for affiliated nonprofit entities made by USCIS after June 6, 2006 as instructed by the USCIS Policy Memorandum of April 28, 2011. In that regard, we will first review whether the affiliation agreements above qualify the petitioner as related to or affiliated with a nonprofit entity.

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 indicating "[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.

We, as a component of USCIS, generally follow 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, we find 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 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, 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>1</sup>

As indicated above, the petitioner submitted copies of the following agreements in support of its claim that it is affiliated with an institution of higher education:

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<sup>1</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 "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).



- [REDACTED]

- [REDACTED]

- [REDACTED]

First, we consider the relationship between the petitioner and [REDACTED]. It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the agreement with [REDACTED] states, in pertinent part, as follows:

21. Independent Contractors. This agreement does not create, nor shall it be deemed or construed to create, any employment or other relationship between the parties hereto other than that of independent entities contracting with each other hereunder solely for the purpose of effecting the provisions of this agreement.

Turning to the definition of an "affiliated or related nonprofit entity," we 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.

Upon review, the record does not establish that the petitioner and [REDACTED] are owned or controlled by the same boards or federations. Consequently, the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we 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 within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and [REDACTED] is one between two separately controlled and operated entities. According to the Agreement, the petitioner and [REDACTED] are not even partners in a joint venture. Accordingly, the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we must 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. *See* 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence

that the petitioner, 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 [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).

Next, we consider the relationship between the petitioner and [REDACTED]. It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the agreement with [REDACTED] states, in pertinent part, as follows:

1. The Board of Trustees of the [petitioner] shall continue as the governing body of the [petitioner] and the Board of Trustees of [REDACTED] shall continue as the governing body of [REDACTED] in accordance with their respective Charters, Constitutions and Bylaws in effect at the time of the execution of this Agreement.

Turning to the definition of an "affiliated or related nonprofit entity," we again 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.

Upon review, the record does not establish that the petitioner and the [REDACTED] are owned or controlled by the same boards or federations. Consequently, the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we 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 within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and the [REDACTED] is one between two separately controlled and operated entities. According to the Agreement, the petitioner and [REDACTED] are not even partners in a joint venture. Accordingly, the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we must 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. Again we note, that 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. See 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that the petitioner, 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 the Lake Erie College. 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; see also *Webster's New College Dictionary* at 699.

Next, we consider the relationship between [REDACTED] the claimed parent organization of the petitioner, and [REDACTED].<sup>2</sup> It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the agreement with [REDACTED] states, in pertinent part:

2. [REDACTED] and [the petitioner] will appoint a Joint Coordination Committee which will include three members from [REDACTED] and three members from [REDACTED]. The Joint Coordination Committee will have the responsibility to discuss and come to agreement on those details identified in this Agreement that need to be mutually determined by [REDACTED]. Membership will consist of Representatives from [REDACTED].

Turning to the definition of an "affiliated or related nonprofit entity," we again 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.

Upon review, the record does not establish [REDACTED] are owned or controlled by the same boards or federations. The Joint Coordination Committee formed was solely for the purpose of carrying out the terms of the Agreement for a Nurse Anesthesia Degree Program and not for the general governance of either organization. Consequently, the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we again 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 within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner's claimed parent company and YCP is one between two separately controlled and operated entities. According to the Agreement, the petitioner and YCP

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<sup>2</sup> The petitioner has not established that its parent company, [REDACTED] is an institution of higher learning. Thus, any affiliation or relation to [REDACTED] does not establish the petitioner as related or affiliated with an institution of higher learning due to such relationship.



are not even partners in a joint venture. Accordingly, the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we again 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. We note once again that 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. *See* 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that the petitioner, 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's claimed parent organization is a member, branch, cooperative, or subsidiary of [REDACTED]. Again 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; *see also Webster's New College Dictionary* at 699.

Based on the evidence of record as currently constituted, we cannot find that the petitioner qualifies 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.

### C. Deference To Prior H-1B Cap Exemption Determinations

On appeal, counsel for the petitioner asserts that the petitioner should be given deference to its prior H-1B cap exemption determinations for affiliated nonprofit entities made by USCIS after June 6, 2006, as instructed by USCIS Policy Memorandum of April 28, 2011. The petitioner provides five examples of prior approvals.

The first H-1B approval notice is for [REDACTED]. A review of the approval notice and the Form I-129 shows the petitioner in that matter is [REDACTED], a company originally incorporated as [REDACTED], and the petitioner's parent company. In that matter, [REDACTED] marked "Yes" to Part C question two indicating that it is a nonprofit organization or entity related to or affiliated with an institution of higher education. The underlying documentation included two of the same three agreements submitted in support of the instant petition on appeal. The third agreement is between the petitioner, recognized as part of [REDACTED] and The [REDACTED] (as noted above, collectively referred to as [REDACTED]).

Regarding the H-1B approval of [REDACTED], we have already discussed the petitioner's two agreements with [REDACTED] and determined that these agreements do not establish that the petitioner qualified as a nonprofit organization or entity related to or affiliated with an institution of higher education for cap-exempt purposes. As we have not yet discussed the relationship between [REDACTED] (the petitioner's parent company) and [REDACTED] we will do so now. It should be noted

that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the agreement with [REDACTED] states, in pertinent part:

3. Joint Venture Activities: The parties may explore and develop joint venture activities to promote cancer care in [REDACTED] including new programs and technologies, and expand ambulatory services.

\* \* \*

15. Non-binding, Except for Paragraphs 11-14, this Agreement shall not create a binding obligation on any party. Each party acknowledges that the other must obtain Board of Director/Trustee and other internal approvals before committing to proceed with this venture.

Turning to the definition of an "affiliated or related nonprofit entity," we again must first consider whether the petitioner (through its parent company) 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.

Upon review, the record does not establish that [REDACTED] are owned or controlled by the same boards or federations. The non-binding terms recognizes that each entity is still controlled by its own individual board. 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 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 within the common meaning of this term. As depicted in the record, the relationship that exists between [REDACTED] is one between two separately controlled and operated entities. According to the Agreement, [REDACTED] may explore the possibility of future joint-venture agreements, but one does not exist as a result of this agreement. 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 (through its parent company) 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. Again, 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, 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 or the petitioner's claimed parent organization 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; *see also Webster's New College Dictionary* at 699.

Moreover, we have discussed and found in this decision that the petitioner, itself, is not an institution of higher learning. Thus, any reliance by [REDACTED] on its relationship and affiliation with the petitioner to establish that it is affiliated or related to an institution of higher learning is unpersuasive and any approval based on such reliance would be error.

Accordingly, it appears that the director, in the [REDACTED] matter, erred when determining that the petitioner's parent qualified as a related or affiliated non-profit entity to an institution of higher learning. Moreover, as the petitioner in this matter claimed that it qualified as cap-exempt based on its status as an institution of higher education and did not claim such cap-exempt status as a related or affiliated non-profit entity to an institution of higher learning, no deference may be given. Counsel's attempt on appeal to amend the instant petition to state that the beneficiary is cap-exempt based on the petitioner's status as a related or affiliated non-profit entity is not persuasive. If the petitioner believes that it is related or affiliated to an institution of higher learning, the petitioner's proper course of action is to file a new or amended petition, with fee, and the required documentation supporting such relationship or affiliation, with the service center where the original petition was filed to reflect this material change to the petition and any claimed qualifications that it is exempt from the FY13 H-1B cap.

The second H-1B approval notice is for [REDACTED]. The petitioner provides a copy of the underlying Form I-129 and supporting documentation to show the basis of the prior cap exempt approval. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C questions one and two indicating that it is both an institution of higher education and a nonprofit organization or entity related to or affiliated with an institution of higher education. The underlying documentation submitted does not include the claimed affiliation agreements but rather the information in support of the petitioner's claim that it is an institution of higher education. The lack of information submitted to support the petitioner's claim that it is a nonprofit organization or entity related to or affiliated with an institution of higher education is indicative of a claim that the petitioner itself is an institution of higher learning. As found above, if the director determined that the petitioner is an institution of higher learning, such determination was in error.

The third H-1B approval notice is for [REDACTED]. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements. Again, as we have determined above, the petitioner has not established that it is an institution of higher learning and thus the director's decision to the contrary was erroneous.



The fourth H-1B approval notice is for [REDACTED]. The petitioner provides a copy of the underlying Form I-129 and supporting documentation again to show the basis of the prior cap exempt approval. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements. Again, as we have determined above, the petitioner has not established that it is an institution of higher learning and thus, the director's decision to the contrary was erroneous.

The fifth H-1B approval notice is for [REDACTED]. A review of the Form I-129 shows that the petitioner marked "Yes" to Part C question one indicating that it is an institution of higher education. The underlying documentation submitted includes documentation in support of the petitioner's claim that it is an institution of higher education and does not include the claimed affiliation agreements. Again, as we have determined above, the petitioner has not established that it is an institution of higher learning and thus the director's decision to the contrary was erroneous.

As explained above, the petitioner does not qualify as an institution of higher education, and therefore, any prior approval on this basis was made in error. Moreover, the four approvals based on the director's determination that the beneficiary was cap exempt because the petitioner is an institution of higher learning are not due deference under the USCIS Policy Memorandum of April 28, 2011. This memorandum specifically limits the deference policy to those H-1B approved petitions based on a determination that the petitioner was determined to be a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act.

Further, we are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

#### IV. CONCLUSION

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. Accordingly, the petition must be denied.<sup>3</sup>

The appeal will be dismissed and the petition denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

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<sup>3</sup> 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.