



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: NOV 18 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:

[REDACTED]

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.

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 sustained, and the petition will be approved.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner on the Form I-129, Petition for a Nonimmigrant Worker, identifies itself as a "Non-profit hospital." The petitioner states that it was established in [REDACTED] and employs over two thousand persons in the United States. It seeks to employ the beneficiary as a "Kidney Transplant Surgeon" 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).

In support of the petition, the petitioner initially submitted a letter and such evidence as the following: a certified Labor Condition Application (LCA); copies of the beneficiary's resume, diplomas, and transcripts; copies of the petitioner's certificate of incorporation and bylaws; an auditor's report and consolidated balance sheets for the petitioner and its related companies, as of September 30, 2011 and 2012; the petitioner's "Certification of Validity of Tax Exemption of Non-Profit Entity"; the [REDACTED] bylaws; and agreements between the petitioner and the [REDACTED], effective July 1, 2012, and between the petitioner and the [REDACTED], effective July 1, 2013.

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. This numerical limitation, i.e., the "H-1B Cap," 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." Section 214(g)(5)(A) of the Act.

On April 8, 2013, 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 Fiscal Year 2014 (FY14), which covers employment dates starting on October 1, 2013 through September 30, 2014.

The petitioner filed the Form I-129 on November 21, 2013 and requested an employment start date of November 1, 2013. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2013 and requesting a start date during FY14 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 FY14 H-1B cap pursuant to section 214(g)(5)(A) of the Act, the petition was not rejected by the director when it was initially received by the service center.

Upon review of the record, the director issued a request for evidence (RFE) on December 4, 2013,

asking for additional evidence that the petitioner is related to or affiliated with an institution of higher education. In response to the director's RFE, counsel referenced the agreements previously submitted and contended that the petitioner and [REDACTED] have a long-standing partnership and affiliation dedicated to the advancement of medical education and research. The petitioner also noted that "each of the faculty members of the [petitioner's] Transplant Center is also on the Medical Faculty at the [REDACTED]"

The director denied the petition on January 16, 2014, finding that its approval is barred by the numerical limitation 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, the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner meets the requirements for H-1B cap-exempt status on the basis of its university affiliation. Specifically, the petitioner emphasizes that it is a nonprofit teaching hospital affiliated with [REDACTED] and that it serves as the only institution in Puerto Rico that provides higher education for those seeking clinical fellowships in transplant surgery. Accordingly, it claims that it has the responsibility of training future transplant surgeons in its affiliated program with [REDACTED]

Upon our *de novo* review of the record of proceeding, including the evidence submitted on appeal, we issued an RFE on August 5, 2014 in order to determine whether the beneficiary is exempt from the FY14 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).¹ The petitioner responded to our RFE on October 15, 2014 and further clarified its relationship with UPR-SOM.

II. THE LAW

Section 214(g)(5) 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"

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;

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

- (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 note that in regard to nonprofit entities related to or affiliated with an 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).

However, USCIS provided guidance in a June 2006 memorandum from [REDACTED] Associate Director for [REDACTED] Department of Homeland Security, to [REDACTED]

115

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) HQPRD 70/23.12 (June 6, 2006) (hereinafter referred to as "Aytes Memo"). According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is that found at 8 C.F.R. § 214.2(h)(19)(iii)(B). See Aytes Memo at 4 ("[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities [sic] for purposes of exemption from the H-1B cap").

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the American Competitiveness and Workforce Improvement Act (ACWIA),² 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.

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). See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (stating that it is "generally presume[d] that Congress is knowledgeable about existing law pertinent to the legislation it enacts").

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.

The petitioner must, therefore, establish that the beneficiary will be employed at an entity that 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 FY14 H-1B cap. Reducing the provision to its essential elements, we find that 8 C.F.R. § 214.2(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 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.

- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.³

III. ANALYSIS

As a preliminary matter, it must first be determined (1) whether the petitioner is a nonprofit entity and (2) whether [REDACTED] is an institution of higher education. First, the petitioner has demonstrated that it qualifies as a nonprofit entity for purposes of 8 C.F.R. § 214.2(h)(19)(iii)(B) as (1) it is currently exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and (2) its Internal Revenue Service 501(c)(3) designation is based in part on the petitioner's organization as a charitable hospital operated for educational and research purposes. See 8 C.F.R. § 214.2(h)(19)(iv); 26 C.F.R. § 1.501(c)(3)-1(d)(3) and (5). Second, sufficient evidence has also been submitted to establish that [REDACTED] is an institution of higher education as that term is defined at section 101(a) of the Higher Education Act of 1965.

Next, it must be determined whether the petitioner, a nonprofit entity, is related to or affiliated with [REDACTED] an institution of higher education, pursuant to one of the three prongs of 8 C.F.R. § 214.2(h)(19)(iii)(B). Upon review, it cannot be found that the petitioner is associated with [REDACTED] under the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B) in that the petitioner and [REDACTED] have different boards that ultimately control these two separate entities. It also cannot be found that the third prong has been satisfied in that there is insufficient evidence to find that the petitioner is attached to [REDACTED] as a member, branch, cooperative, or subsidiary.

With regard to the second prong, the common meaning of the term "operate," as defined in *Webster's New College Dictionary*, 3rd edition, is "[t]o control or direct the functioning of" or "[t]o conduct the affairs of : MANAGE <operate a firm>." Thus, while an institution of higher education may not have ownership and/or ultimate control of a nonprofit entity, a petitioner may still qualify under this second prong of the definition of affiliated or related nonprofit entity by establishing that the institution of higher education directs the day-to-day functioning of and/or manages the daily affairs of the nonprofit entity.

Here, although the petitioner and [REDACTED] do not have shared ownership or control by the same board or federation, we find sufficient evidence was submitted on appeal to establish that the petitioner is operated by [REDACTED] a qualifying institution of higher education. In response to this office's RFE, the petitioner provided evidence that individuals who are in charge of and direct specific departments at [REDACTED] are also in leadership positions at the hospital and that the clinical leadership staff members are also faculty members of [REDACTED]. Thus, for practical

³ This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". The Department of Labor explained in the supplemental 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).

purposes, the petitioner's day-to-day functions and affairs are controlled or directed by [REDACTED] staff, with the daily management of care effectively residing in these personnel. Accordingly, we find sufficient evidence in the record to conclude that [REDACTED] operates the petitioner. Therefore, under the appropriate three-prong test of 8 C.F.R. § 214.2(h)(19)(iii)(B), it is evident under the preponderance of the evidence standard that the petitioner is a nonprofit entity related to an institution of higher education in that it has satisfied the requirements of the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

IV. CONCLUSION

The petitioner has demonstrated on appeal that it is a nonprofit entity related to an institution of higher education under 8 C.F.R. § 214.2(h)(19)(iii)(B) and is therefore exempt from the FY14 H-1B cap pursuant to section 214(g)(5)(A) of the Act. The director's finding to the contrary is hereby withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has been met. Accordingly, the director's decision will be withdrawn, and the petition will be approved.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the petition is approved.