



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **SEP 25 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)

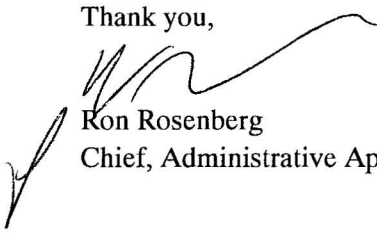
ON BEHALF OF PETITIONER:

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, California Service Center, revoked the previously approved nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition's approval will remain revoked.

The petitioner claims to be a private teacher consultants firm that seeks to employ the beneficiary as a High School Mathematics Teacher. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director revoked the petition in accordance with the provisions of 8 C.F.R. § 214.2(h)(11)(iii)(A) after determining that the petitioner was not eligible for exemption from the annual numerical limitation (cap).

After issuance of a Notice of Intent to Revoke (NOIR) and upon review of the petitioner's submissions in response to the NOIR, the service center director revoked approval of the petition on February 12, 2014.

The record of proceeding before us contains: (1) the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's NOIR; (3) the petitioner's response to the NOIR; (4) the director's notice of revocation (NOR); and (5) the Form I-290B, Notice of Appeal or Motion, appeal brief, and supporting documentation. We reviewed the record in its entirety before issuing our decision.<sup>1</sup>

## 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).

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

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.

## II. FACTUAL AND PROCEDURAL BACKGROUND

The petitioner filed the Form I-129 on May 14, 2013 and requested a starting employment date for the beneficiary of July 1, 2013. As noted above, 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, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 H-1B Data Collection Supplement that it was "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 Part B (Fee Exemption and/or Determination) and Part C (Numerical Limitation Exemption Information).

In its letter of support dated May 6, 2013, the petitioner claimed that it is a "private organization" that was "established to provide well-qualified foreign teachers to the American School System." Regarding the proffered position, the petitioner stated that it required the services of the beneficiary as a high school mathematics teacher, and claimed that she would be employed onsite at [REDACTED] South Carolina.

In further support of the petition, the petitioner submitted a Labor Condition Application (LCA); copies of the beneficiary's offer of employment letter and teacher agreement; a copy of the beneficiary's Educator Certificate issued by the South Carolina State Board of Education; copies of the beneficiary's resume, diploma and transcripts; and a copy of the beneficiary's foreign academic credentials evaluation.

The petitioner also submitted a copy of its Memorandum of Understanding (MOU) with [REDACTED] as well as a copy of a MOU between [REDACTED] the entity at which the petitioner intends to employ the beneficiary. The contents of these documents will be discussed in detail later in this decision.

The director initially approved the petition on May 20, 2013.

Upon further review, however, the director determined that the approval involved gross error in that the statement of facts contained in the approved petition was not true and correct. Specifically, the director noted that the petitioner did not appear to be a nonprofit organization related to or affiliated with an institution of higher education as claimed in the petition. The director also noted that, based on this fact, the petitioner was not exempt from the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA)<sup>2</sup> fee as originally claimed.

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<sup>2</sup> Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.



The petitioner was offered the opportunity to respond to the director's findings.

In a response dated October 10, 2013, the petitioner addressed the issues raised in the NOIR. The petitioner clarified that it was in fact a for-profit entity, and the petitioner submitted the required ACWIA fee with its response. The petitioner further claimed that it was exempt from the numerical limitations because it was a third-party petitioner that would employ the beneficiary onsite at a qualifying nonprofit organization related to or affiliated with an institution of higher education. In support of this contention, the petitioner submitted an amended H-1B Data Collection Supplement.

The director accepted the petitioner's amendment, but ultimately revoked the petition's approval. The director found that despite the petitioner's newly-submitted claim that it was a third party petitioner that would employ the beneficiary at a nonprofit entity related to or affiliated with an institution of higher education, the evidence of record did not 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. The director revoked the petition's approval on February 12, 2014.

On appeal, counsel for the petitioner asserts that the revocation was not based on good and sufficient cause, and likewise was arbitrary, capricious, not supported by substantial evidence, and contrary to law and published agency guidance. Counsel also claims that USCIS failed to give deference to a prior determination of cap exempt status as required under a June 6, 2006 Interoffice Memorandum.<sup>3</sup>

### III. LAW AND ANALYSIS

#### A. Grounds for Revocation

We will turn first to the basis for the director's revocation, and whether this basis provided the director with sufficient grounds to revoke the H-1B petition on notice under the language at 8 C.F.R. § 214.2(h)(11)(iii)(A).

The regulation at 8 C.F.R. § 214.2(h)(11)(iii), which governs revocations that must be preceded by notice, states:

(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

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<sup>3</sup> The memo counsel refers to was written by Michael Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, to Regional Directors and Service Center Directors, entitled *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).

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

We find that the content of the NOIR comported with the regulatory notice requirements, as it provided a detailed statement that conveyed grounds for revocation encompassed by the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(A), and allotted the petitioner the required time for the submission of evidence in rebuttal that is specified in the regulation at 8 C.F.R. § 214.2(h)(11)(iii)(B). As will be discussed below, we further find that the director's decision to revoke approval of the petition accords with the evidence or lack of evidence in the record of proceeding (ROP), and that neither the response to the NOIR nor the submissions on appeal overcome the grounds for revocation indicated in the NOIR. Accordingly, we shall not disturb the director's decision to revoke approval of the petition.

B. Beyond the Director's Decision:  
Material Changes to the Petition and Eligibility at the Time of Filing

As a preliminary matter, while we concur with the director's ultimate revocation of the petition's approval in this matter, the basis upon which the revocation was founded was erroneous. Specifically, the director's acceptance of the petitioner's "amended" H-1B Data Collection Supplement submitted in response to the NOIR, and subsequent adjudication of eligibility under the new claims contained therein, was erroneous. The director's error is harmless, however, since we conduct appellate review on a *de novo* basis.



The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). As such, eligibility for the benefit sought must be assessed and weighed based on the facts as they existed at the time the instant petition was filed.

As noted earlier in the decision, the petitioner claimed in Parts B and C of the H-1B Data Collection Supplement to the Form I-129 petition that it was 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). By signing the Form I-129, the petitioner certified under penalty of perjury that the information provided on the form was true and correct.

The petitioner, by its own admission, is a for-profit entity. However, on the Form I-129 petition, it claimed to be a nonprofit entity. After notifying the petitioner in the NOIR that, based on its for-profit status, it did not appear to qualify for an exemption from the numerical limitations, the petitioner responded by "amending" its answers in Parts B and C of the H-1B Data Collection Supplement. Specifically, the petitioner amended its answer in the Fee Exemption Determination section (Part B) to reflect that, contrary to its original claims, it was actually subject to a \$750 ACWIA fee based on its employment of less than 25 employees in the United States. In addition to submitting the required ACWIA fee with the response to the NOIR, the petitioner also amended its answer in the Numerical Limitation Section (Part C) to reflect that it "will employ the beneficiary to perform job duties at a qualifying institution (see **a – c** above) that directly and predominantly furthers the normal, primary, or essential purpose, mission, objectives, or function of the qualifying institution, namely higher education or nonprofit or government research."

The petitioner's attempt to remedy the deficiency by "amending" its answers in these sections is ineffective. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The regulation at 8 C.F.R. § 214.2(h)(2)(E) states:

*Amended or new petition.* The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

The petitioner must establish that the petition when filed merits classification for the benefit sought. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm'r 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather

than seek approval of a petition that is not supported by the facts in the record. The petition, as filed, requested exemption from the FY13 cap based on the claim that the petitioner was a nonprofit entity related to or affiliated with an institution of higher education. The petitioner readily admits, and at no time disputes, that it is for-profit enterprise, and no evidence has been submitted to suggest otherwise. Therefore, at the time the petition was filed, the petitioner was a for-profit enterprise and subject to the numerical limitations as of the date of filing.

In this matter, the director erroneously accepted a material change to the petition after filing, and afforded the petitioner a second chance at adjudication under an alternative basis for eligibility. The director's actions were erroneous yet harmless, since the petitioner has failed to establish cap exemption under the newly claimed basis for exemption. Although the director's acceptance of this material change in response to the NOIR constituted clear error, we will nevertheless address the petitioner's additional failure to establish exemption from the numerical cap.

### C. Exemption from the Numerical Cap

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.

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).

USCIS provided guidance in the June 2006 memo from Michael Aytes. 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 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.

By including the phrase "related or affiliated nonprofit entity" in the language of the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), 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 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 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 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>4</sup>

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether the petitioner has established that the beneficiary will be employed at a "nonprofit" entity for purposes of cap-exemption determinations:

*Non-profit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity is:

- (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.

Turning to the director's basis for revocation, we find that the petitioner has failed to submit sufficient evidence of a relationship to or affiliation with an institution of higher education as that term is defined by section 101(a) of the Higher Education Act of 1965.

In response to the NOIR, the petitioner asserted that the petitioner is H-1B cap exempt under section 214(g)(5)(A) of the Act due to its relation to or affiliation with an institution of higher education. More specifically, the petitioner generally claims that the employment of the beneficiary "at" an entity which it claims is related to or affiliated with institution of higher education qualifies the petitioner to file H-1B cap-exempt petitions.

We note that neither the petitioner nor counsel at any time outline with specificity the basis for the claimed cap exemption in this matter. We rely, therefore, on the boxes checked on the H-1B Data Classification Supplement and the petitioner's brief statement in the May 6, 2013 letter of support where it claims that the beneficiary will be employed as a math teacher at [REDACTED]

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<sup>4</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).

The issue before us, therefore, is whether [REDACTED] the location at which the beneficiary will be employed, is 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.

As a preliminary matter, we observe that the petitioner has submitted insufficient evidence to establish that [REDACTED] is a nonprofit entity pursuant to 8 C.F.R. § 214(h)(19)(iv) as defined above. The record contains no evidence verifying the tax exempt status of [REDACTED]. Absent such evidence, the petitioner fails to establish this critical element of eligibility and the petition must be revoked for this reason alone.

Assuming, *arguendo*, that the record contained sufficient evidence of the tax exempt or nonprofit status of [REDACTED], the record contains insufficient evidence establishing that [REDACTED] is related to or affiliated with an institution of higher education.

The record contains two documents that warrant examination under this criterion. First, the record contains a MOU between the petitioner and [REDACTED] dated April 30, 2013. The MOU indicates that the petitioner will provide four teachers to [REDACTED] for the 2013-2014 school year, and that [REDACTED] will pay the salaries of these teachers directly to the petitioner. An additional letter from [REDACTED] to USCIS is also submitted, which states that the beneficiary will be assigned to [REDACTED] pursuant to the MOU.

The record also contains a one-page MOU between [REDACTED] dated January 30, 2013. This agreement states that its purpose is to promote "a collaborative relationship" between the parties. Specifically, the agreement indicates that [REDACTED] staff will occupy designated space at [REDACTED] in order to encourage "face-to-face and virtual career exploration."

We again note for the record that the petitioner at no time outlines the claimed nature of the relationship among the parties of these agreements, and leaves it up to USCIS to ascertain eligibility based on the documents included in the record.<sup>5</sup> It appears, therefore, that the issue to examine here is the relationship between [REDACTED]

First, 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

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<sup>5</sup> The petitioner also submits a letter from [REDACTED] County School District dated May 16, 2012, referencing the affiliation of "Ms. [REDACTED]". The relevance, if any, of this document to this matter is unknown. In addition, the record contains a letter from the [REDACTED] County School District acknowledging the "professional development" partnership between the parties. The relevance of this document also cannot be ascertained. The petitioner claims in this matter that the beneficiary will work onsite at [REDACTED] which is a part of [REDACTED]. The relevance of these documents, which pertain to [REDACTED] County School District, therefore, is unclear.



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 between [REDACTED] states, in pertinent part, that it "shall not be construed to constitute an employment agreement, agency relationship, or partnership" between either [REDACTED]

Upon review, the record does not establish that [REDACTED] are owned or controlled by the same boards or federations. 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 [REDACTED] is a related or affiliated nonprofit 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 that are, according to the agreement, not to be considered in a partnership. 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 [REDACTED] 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 [REDACTED] 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 [REDACTED] 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).

Finally, counsel's claims on appeal that we should defer to prior determinations of eligibility are likewise insufficient. An April 28, 2011 USCIS policy memorandum provides interim guidance on H-1B cap exemptions for non-profit entities "related to or affiliated with" an institution of higher education. *See* PM-602-0037: Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation (April 28, 2011). The memo establishes that until further notice, USCIS will defer to prior determinations of cap exemptions made on or after June 6, 2006, provided that petitioners can document that they were previously determined to be cap exempt. The interim procedure is meant to promote consistency in adjudications while USCIS reviews its policy on H-1B cap exemptions.

The record here contains no evidence or assertions that the petitioner was previously determined to be cap exempt. Neither the petitioner nor counsel submit supporting documentation, such as

copies of previously-approved Form I-129 petitions with relevant pages and pertinent supplements, copies of the Form I-797 approval notices, or copies of documentation previously submitted with any such petitions in support of the claimed cap exemption. Simply asserting that the petitioner was previously determined to be cap exempt, without providing documentation to support the claim, will not suffice.<sup>6</sup> 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). 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).<sup>7</sup> Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the evidence of record as currently constituted, we cannot find that the beneficiary "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity." Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

#### D. Beneficiary's Qualifications

As the instant petition is numerically barred, we need not examine the issue of whether the beneficiary is qualified to perform the duties of a specialty occupation under the relevant statutory and regulatory guidelines. However, we note that the record contains insufficient evidence to establish that the beneficiary has the appropriate licensure to teach in the State of South Carolina. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) requires evidence that the beneficiary possesses full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. Licensure is generally required for teaching positions in

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<sup>6</sup> If the petitioner is relying on the director's previous erroneous decision to approve this petition, we reiterate that such approval was gross error.

<sup>7</sup> Generally, USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. Despite the deference afforded under the April 28, 2011 policy memorandum, there is no requirement that such deference be perpetuated when evidence of clear error, as seen here, is demonstrated. If the previous nonimmigrant petitions were approved by USCIS with a determination of cap exemption based on the same deficient evidence contained in the current record, it would constitute material and gross error on the part of the director. USCIS is 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. 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).



public schools. The record contains a certificate from the South Carolina Board of Education, indicating that the beneficiary has a "Bachelors Plus 18," valid from July 1, 2012 through June 30, 2013. The certificate expires prior to the requested employment start date and does not appear to be a license or otherwise entitle the beneficiary to teach high school classes in a public school. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

#### IV. CONCLUSION

An application or petition that fails to comply with the technical requirements of the law may be denied by us even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when we deny a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that we abused our discretion with respect to all of the enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The appeal will be dismissed and the approval of the petition revoked for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 approval of the petition remains revoked.