

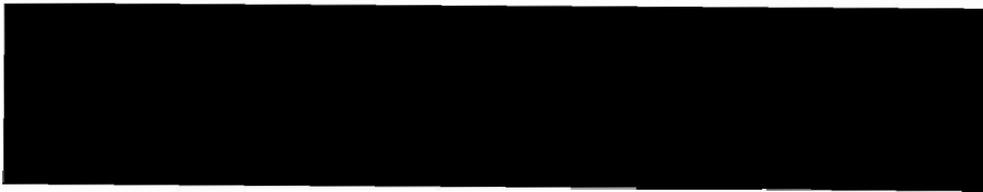
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U.S. Citizenship  
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FILE: EAC 05 046 52521 Office: VERMONT SERVICE CENTER Date: NOV 02 2006

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:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the 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.

In order to newly employ the beneficiary as a medical technologist, the petitioner, a medical care facility, seeks 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 annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), had already been reached by the time that the petition was filed. However, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 (Petition for Nonimmigrant Worker) that the beneficiary meets the cap exemption criterion at section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), as a beneficiary who, in the words of the Act, “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.”

The director denied the petition on the ground that the petitioner has not established that it fits any of the employer categories specified at section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), and thus was subject to the annual cap.

On appeal, counsel contends that the petitioner qualifies as an employer within the meaning of section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) by virtue of a Clinical Affiliation Agreement with Albany College of Pharmacy (ACP). Counsel states, in part, “Petitioner is a non[-]profit tax exempt hospital affiliated with ACP, a non[-]profit institution of higher education, through a cooperative agreement under which the Petitioner provides practical training to students enrolled at ACP.”

For the reasons discussed below, the AAO finds that the evidence of record does not establish that the petitioner is a cap-exempt qualifying employer, that is, an employer within the meaning of section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as interpreted by Citizenship and Immigration Services (CIS). The AAO also finds that the record does not establish that the beneficiary would be so employed as to qualify for cap exemption under the CIS policy of recognizing the H-1B cap exemption as extending to certain beneficiaries doing the work of 8 U.S.C. § 1184(g)(5)(A) entities while not directly employed by them. Consequently the beneficiary does not qualify for exemption from the H-1B cap. The appeal shall be dismissed, and the petition shall be denied.

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner’s Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director’s denial letter; and (3) the Form I-290B, counsel’s December 27, 2004 letter on appeal, and the documents submitted with that letter.

Section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) 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;
- (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).

CIS has provided guidance in a June 2006 memorandum from 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, *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”).

The Aytes Memo observes that 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 . . . .”<sup>1</sup>

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<sup>1</sup> Aytes Memo at 3.

The Aytes Memo states that the fee exemption provision at 8 C.F.R. § 214.2(h)(19)(iii)(B) should be applied to determine what an affiliated nonprofit entity is, for purposes of the cap exemption. The Memo states:<sup>2</sup>

[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. In particular, as outlined in 8 C.F.R. [§] 214.2(h)(19)(iii)(B) [regarding H-1B additional-fee exemption], the following definition applies:

An affiliated or related nonprofit entity. A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is [(a)] connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher education, or [(b)] attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether an entity is “nonprofit” 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.

The Aytes Memo also provides guidance for determining whether the beneficiary of an H-1B petition filed by a non-qualifying nonprofit entity qualifies for H-1B cap exemption in a situation where the beneficiary would perform work for, but not be employed by, a 20 U.S.C. § 1001(a) institution of higher education or a member, branch, cooperative or facility of such an institution. In pertinent part, the memo states:<sup>3</sup>

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional 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, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

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<sup>2</sup> Aytes Memo at 4.

<sup>3</sup> Aytes Memo at 3, 4.

USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain aliens who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.

USCIS will, therefore, allow third party petitioners to claim exemption on behalf of a beneficiary under either section 214(g)(5)(A) or (B), if the alien beneficiary will perform job duties at a qualifying institution that directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research. Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution.<sup>4</sup>

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap. However, qualifying third-party employment can occur in a variety of other ways. USCIS therefore is providing a non-exhaustive list of examples in the AFM to assist adjudicators in determining cap exemption eligibility.<sup>5</sup>

The petitioner is not a 20 U.S.C. § 1001(a) institution of higher education. However, the director did not dispute that the petitioner is a nonprofit entity, and the record copy of the petitioner’s IRS Form 990 corroborates counsel’s characterization of the petitioner as a nonprofit, tax exempt, acute-care hospital. Because the petitioner is a nonprofit entity as defined at 8 C.F.R. § 214.2(h)(19)(iv), the petition merits further consideration, to determine the type of relationship, if any, that it has with any institution of higher education.

The record establishes Ascension Health as a nonprofit “umbrella Section 501(c)(3) organization” to which the petitioner belongs. The director stated that Ascension Health “owns 174 health care institutions located throughout the United States and one educational facility, Columbia College of Nursing, located in Milwaukee Wisconsin.” The record does not indicate the exact nature of the petitioner’s relationship with Ascension Health. The record does not establish Ascension Health as a 20 U.S.C. § 1001(a) institution of

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<sup>4</sup> The Aytes Memo here includes this footnote: “See S. Rep. No. 106-260 (April 11, 2000) [re. S. 2045, the bill that was enacted into AC21] providing that individuals should be considered cap exempt “... *by virtue of what they are doing*” and not simply by reference to the identity of the petitioning employer.

<sup>5</sup> Pages 7-9 of the Memo discuss four examples.

higher education or as connected, associated, or attached to any such entity. Therefore, the petitioner's relationship with this organization is not relevant to the appeal.

The director stated the following about the Columbia College of Nursing:

[I]nformation provided by Columbia College of Nursing on the Internet show that they are accredited through Mount Mary College. Graduates must complete courses through Mount Mary College in order to receive credit for graduation. Admissions for Columbia College of Nursing are conducted through the Mount Mary College. A review of academics at Columbia College of Nursing also directs individuals to either the Mount Mary College or Carroll College. . . .

The evidence of record does not substantiate any relationship between the petitioner and Columbia College of Nursing beyond membership in a common organization, the vaguely described "umbrella organization" Ascension Health. Therefore, the evidence relating to the Columbia College of Nursing is not probative.

The record establishes that the petitioner has a contractual relationship with ACP. The relationship between the petitioner and ACP is defined by the ten-page contract entitled "Clinical Affiliate Agreement between Albany College of Pharmacy ("ACP") and Seton Health System, Inc. ("Clinical affiliate or Seton"). This document sets forth a contractual relationship under which the petitioner makes certain commitments, for a renewable one-year term, in return for which ACP is to provide the petitioner vouchers for ACP's continuing education programs.

Under the contract, the petitioner is to provide practical training and experience to designated ACP students in the subject matter of ACP's clinical degree programs. That training and experience will constitute the Practicum that each ACP student must complete in order to earn an ACP degree. The petitioner will also allow ACP to assign faculty to the petitioner in connection with the Practicum program. The petitioner will designate its own personnel as "Preceptors" who "will carry out the Practicum at the Clinical Affiliate" and "provide supervision of the student in the Practicum in accordance with Program requirements." ACP faculty will also be allowed to serve as Preceptors. The petitioner will not provide compensation to ACP faculty or students participating in the Practicum.

The agreement was signed for a period of one year, with the express understanding that it will be renewed automatically for additional one-year terms, unless terminated by either party upon a six-month written notice. The agreement also provides that either party may terminate it at any time, without cause, upon 90 days notice. Further, the agreement will terminate immediately upon ACP's failure to comply with insurance, confidentiality, ethical directives, corporate compliance, or other compliance requirements of the agreement.

Section 17 of the agreement declares that the document comprises "the entire agreement" between the two parties. Per section 7.1, the petitioner's personnel participating in the Practicum shall be honorary ACP adjunct faculty but will not receive any compensation from ACP. Section 7.4 of the agreement states that the petitioner and ACP "shall at all times be deemed and act as independent contractors"; and section 7.5 states

that “nothing contained in the agreement shall constitute or be construed to be or to create a partnership or joint venture between the parties.”

On the basis of the documentation submitted on appeal, including a copy of the institution’s IRS Form 990, the AAO finds that that ACP is a nonprofit institution of higher education within the meaning of 20 U.S.C. 1001(a) and, therefore, 8 U.S.C. § 1184(g)(5)(A). Therefore, the AAO must next inquire into the nature of the relationship that the nonprofit petitioner in this proceeding has with the nonprofit institution of higher education, ACP. Applying the guidance of the Aytes memo for determining a cap-exemption qualifying relationship with a 8 U.S.C. § 1184(g)(5)(A) institution of higher education, the AAO must evaluate whether the evidence of record establishes that the petitioner is either (a) “connected or associated with” ACP “through shared ownership or control by the same board or federation operated by an institution of higher education,” or (b) “attached to” ACP as “a member, branch, cooperative, or subsidiary.” If either type of relationship is established, the beneficiary would be cap exempt.

The AAO finds that the terms of the contract that defines the relationship between the petitioner and ACP do not establish the petitioner within either of the qualifying categories at 8 C.F.R. § 214.2(h)(19)(iii)(B). That is, the contract does not establish that the petitioner is either (a) connected or associated with ACP through shared ownership or control by the same board or federation operated by an institution of higher education, or (b) attached to ACP as a member, branch, cooperative, or subsidiary. The AAO does not concur with counsel’s assertion on appeal to the effect that, because it is “a cooperative agreement” between the petitioner and an 8 C.F.R. § 214.2(h)(19)(iii)(B) institution, the Clinical Affiliation Agreement establishes the petitioner as a member, branch, cooperative, or subsidiary of that institution.

Finally, the AAO finds that the evidence of record does not qualify the beneficiary for H-1B cap exemption under the Aytes Memo’s guidance regarding beneficiaries who provide services to institutions of higher education as employees of “third party” nonprofit entities that do not meet the criteria at 8 U.S.C. § 1184 (g)(5)(A).

The AAO has applied to the evidence of record the Aytes Memo guidance for qualifying a third-party petitioner’s H-1B beneficiary for cap exemption where there is “a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution.” The Aytes Memo refers to beneficiaries whose specialty occupation work is “needed to further the essential purposes of the qualifying institution” (Aytes Memo, at 6), and the Memo states that a third-party petitioner “must . . . demonstrate how the beneficiary’s duties are directly and predominately related to, and in furtherance of, the normal, primary, or essential purpose, mission, objectives or function” of an institution of higher education.

The AAO notes that the beneficiary would work in a specialty occupation position, medical technologist, which is directly related to the bachelor’s degree in medical technology that ACP offers. However, the evidence of record establishes neither that the beneficiary is to participate in the Practicum program, nor that the beneficiary’s duties would be, in the word of the Aytes Memo, “directly and predominately related to, and in furtherance of, the normal, primary, or essential purpose, mission, objectives or function” of ACP. The

most extensive statement of the beneficiary's duties is this description at section 1 of the Form I-129 Supplement H:

Performs medical laboratory test[s], procedures, experiments and analyses to provide data for diagnosis, treatment, and prevention of diseases[.] Conducts chemical analyses of body fluids, such as blood, urine, and spinal fluid, to determine presence of abnormal components[.]

While counsel asserts the fact that the petitioner provides practical training to ACP students, there is no evidence of record that the beneficiary's duties would include participation in the Practicum program, nor is there evidence in the record as to the specific duties that participating employees of the petitioner would perform with regard to the program.

In sum, the petitioner has not established that the beneficiary qualifies for exemption from the H-1B cap under 8 U.S.C. § 1184(g)(5)(A) as interpreted by CIS. The evidence does not establish the petitioner as an entity within the coverage of 8 C.F.R. § 214(h)(19)(iii)(B) as:

- (1) Associated with a 20 U.S.C. § 1001(a) institution of higher education through shared ownership or control by the same board or federation;
- (2) Operated by a 20 U.S.C. § 1001(a) institution of higher education; or
- (3) Attached to such an institution of higher education as a member, branch, cooperative, or subsidiary.

Also, while the evidence establishes that the petitioner is engaged in a jointly managed program with a 20 U.S.C. § 1001(a) institution of higher education - ACP - that furthers the essential purpose of that institution, the evidence does not establish that the beneficiary would participate in the program and that the beneficiary's duties in her job as a medical technologist would, in the words of the Aytes Memo, be "directly and predominately related to" the 20 U.S.C. § 1001(a) institution's "normal, primary, or essential purpose, mission, objectives or function" of educating bachelor's degree students in medical technology. Therefore, the appeal shall be dismissed, and petition shall be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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