

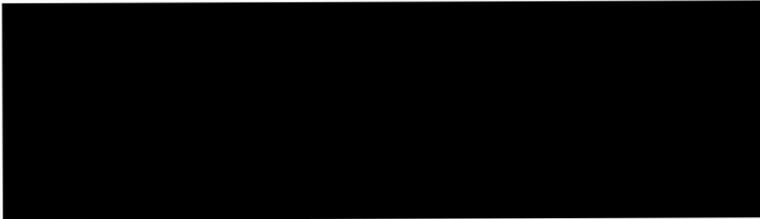
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



*D-2*

FILE: EAC 08 059 51530 Office: VERMONT SERVICE CENTER Date: OCT 01 2008

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

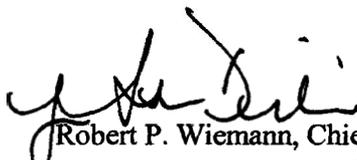
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Vermont 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 religious organization that seeks to employ the beneficiary as an assistant manager of operations. 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 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), was reached on April 2, 2007. Although the petitioner filed the Form I-129 petition on December 20, 2007, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met 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 did not establish that it meets any of the employer categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), and thus the beneficiary 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 its non-profit status a federal tax-exempt organization.

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 request for additional evidence (RFE); (3) counsel’s response to the RFE; (4) the director’s denial letter; and (5) the Form I-290B and supporting documents.

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>

---

<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 memorandum 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 memorandum 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.

---

<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 furthers 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 of proceeding contains a letter from the Internal Revenue Service (IRS) indicating that on May 3, 1996, the petitioner was granted exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code. The letter from the IRS corroborates counsel’s characterization of the petitioner as a nonprofit, tax exempt, organization. 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.

In its February 12, 2008 response to the director’s RFE, the petitioner stated that it is not “affiliated [with] an institution of higher education nor [does it] belong to a research organization by way [of] partnership, sponsorship or ownership.” The petitioner also states that it mistakenly indicated it was a “nonprofit research

---

<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.

organization or a governmental research organization” on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement, page 11.

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.

The record also does not establish that the beneficiary would perform work for, but not be employed by, a 20 U.S.C. § 1001(a) institution of higher education or other qualifying institution. Thus, the beneficiary is not eligible for a cap exemption under this category of workers, as discussed in the Aytes Memo.

Counsel and the petitioner appear to have misunderstood the regulations. On appeal, counsel argues that the CIS website indicates that the petitioner need only be a nonprofit organization in order to qualify for an exemption from the H-1B cap. Counsel submitted a copy of the website and highlighted the words “nonprofit organizations.” However, the website states that “certain” organizations are exempt “as defined by USCIS regulations.” Although counsel argues that the petitioner is an entity within the coverage of 8 C.F.R. § 214(h)(19)(iii)(B), counsel does not indicate how the petitioner qualifies under the regulation after stating that the petitioner is not in any way affiliated with an institution of higher education. Further, the CIS website should not be construed as providing legal advice. As the website’s “terms of use and other policies” states:

This World Wide Web (WWW) site is provided as a public service. Every effort is made to provide complete and accurate information. However, with the volume of documents available, often uploaded with short deadlines, we cannot guarantee there will be no errors. We will do our best to correct errors brought to our attention. With respect to documents and information on this Website, neither the U.S. Government, the Department of Homeland Security, nor their employees and contractors make any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose, or warranties of non-infringement of third party rights, title, and freedom from computer virus.

Counsel asserts that Citizenship and Immigration Services (CIS) has already determined that the petitioner is an entity within the coverage of 8 C.F.R. § 214(h)(19)(iii)(B) since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the cited cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the prior cases were similar to the instant case.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the instant petition or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve 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). Neither CIS nor any other 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).

The petitioner has not established that it meets any of the exemption categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A). Accordingly, the AAO will not disturb the director's denial of the petition.

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.