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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B2

FILE: WAC 09 034 51388 Office: CALIFORNIA SERVICE CENTER Date: **AUG 03 2010**

IN RE: Petitioner:
Beneficiary:

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: SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a "Texas Education Agency approved Charter School, Non-Profit Corporation, affiliated the [sic] University of Texas, Texas A&M." In order to employ the beneficiary in a position designated as a teacher, the petitioner endeavors 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).

The director denied the petition, finding that its approval is barred by the numerical limitation, or cap, on H-1B visa petitions. On appeal, the petitioner asserted that the petitioner is exempt from the cap. In support of that contention, the petitioner submitted a brief.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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. *See* section 214(g)(1)(A) of the Act.

The instant petition was filed for an employment period to commence in November 2008. The 2009 fiscal year (FY09) extends from October 1, 2008 through September 30, 2009. The instant petition is therefore subject to the 2009 H-1B cap, unless exempt. Further, on April 8, 2008, 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 FY09. The petitioner filed the instant visa petition on November 19, 2008. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At issue in this matter, therefore, is whether the beneficiary qualifies for an exemption from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act, 8 U.S.C. § 1184(g)(5)(A).

Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who –

(A) 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.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education . . . until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

As was noted above, the petitioner claimed, on the Form I-129 visa petition, to be affiliated with the [REDACTED]. The petitioner also claimed, at Part C of that petition that it is a nonprofit organization or entity related to or affiliated with an institution of higher education, thus claiming exemption from the cap. With the petition the petitioner submitted a letter, dated October 27, 2008, from its program director. In that letter, the petitioner stated,

Under the guidance of the Texas Education Agency, and through its direct affiliation with its collaborative partners [REDACTED] the mission of [the petitioner] is to create a learner-centered school that will provide and expect excellence in education for all children.

The petitioner did not otherwise detail its "direct affiliation" with those institutions of higher education it mentioned. The petitioner provided a portion of a letter from the Internal Revenue Service (IRS). The petitioner also provided an undated letter from the petitioner's superintendent stating that the letter from IRS demonstrates that the petitioner is exempt from the cap pursuant to section 214(g)(5) of the Act.

None of the evidence submitted details any relationship to or affiliation with any of institution of higher education. The director denied the visa petition, finding that the petitioner had failed to demonstrate that it is exempt from the cap imposed by section 214(g)(1)(A) of the Act.

On appeal, the petitioner stated that "Elementary Schools throughout Texas are 'connected' or 'associated' with an institution of higher learning" because "Under the Texas Education Code the State Board of Education and the Texas Higher Education Coordinating Board ' . . . shall ensure that long-range plans and educational programs established by each board provide a comprehensive education of [Texas students].'"

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 Memo from [REDACTED] Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Dept. Homeland Sec., to Reg. Dirs. & Serv. Ctr. Dirs., *Guidance Regarding Eligibility for Exemption from*

the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) at 4 (June 6, 2006) (hereinafter referred to as “Aytes Memo”) (“[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 [as outlined in 8 C.F.R. § 214.2(h)(19)(iii)(B)] 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 of that act:

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 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, the AAO finds that USCIS reasonably interpreted AC21 to apply the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B), and it will defer to the Aytes Memo in making its determination on this issue. *See Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (“ . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

The petitioner must, therefore, establish that the petitioner 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 FY09 H-1B cap. The AAO finds that the best reading of 8 C.F.R. § 214(h)(19)(iii)(B) allows the petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes one or more of the following: (1) it is associated with an institution of higher education through shared ownership or control by the same board or federation; (2) it is operated by an institution of higher education; or (3) it is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.¹

On appeal, the petitioner noted that the definitions of “related” and “affiliated” were initially adopted in relation to a different section, and asserted that their extension to exemptions from caps was

¹ 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 this definitional issue, which supports the conclusion that both regulations were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

without opportunity for public comment, and therefore impermissible. The petitioner stated that the definition currently used is too restrictive.

The petitioner provided no citation for the proposition that previously-existing definitions may not be extended to new sections of law as the definitions in question were. Absent any authority to the contrary, the AAO finds that the definitions of “related” and “affiliated” that are now routinely applied to claims of exemption, pursuant to section 214(g)(5) of the Act, from the cap imposed by section 214(g)(1)(A) of the Act were correctly adopted and their use correctly extended pertinent to the H-1B cap.²

The petitioner proposes that, because both the Board of Education and the Texas Higher Education Coordinating Board are affected by a single law, that all primary and secondary schools regulated by the Board of Education are affiliated with an institution of higher learning for the purpose of exemption, pursuant to section 214(g)(5)(A) of the Act, from the caps imposed by section 214(g)(1)(A) of the Act. To the contrary, the minimal contact described is insufficient to demonstrate that they are affiliated pursuant to the definition of “affiliated or related nonprofit entity” currently in use, or pursuant to any other reasonable definition.

The AAO interprets the terms “board” and “federation” as referring specifically to educational bodies such as a board of education or a board of regents. Upon review, the record does not establish that the petitioner and the [REDACTED] are owned or controlled by the same boards or federations. Accepting the petitioner’s argument concerning some type of shared ownership or control through the government of the State of Texas would allow virtually any state government agency in Texas, or in any other state for that matter, to claim exemption from the H-1B cap regardless of whether the agency had any connection whatsoever to higher education, a result that would be inconsistent with the intent of AC21.³ This overly expansive interpretation would undermine the clear

² As the application of the regulatory definition of “affiliated or related nonprofit entity” to H-1B cap exemption determinations does not seek to change existing law or policy and instead is instructional and only details how the agency interprets the Act, it is well within the exception to the public notice and comment requirements in 5 U.S.C. § 553(b), which states in pertinent part that the notice requirements do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”

³ While the rationale for granting an exemption to the H-1B cap for institutions of higher education might appear at first glance to support granting a similar exemption to primary and secondary schools, nothing in the statutory language or legislative history of AC21 indicates that it was the intent of Congress to do so through this legislation. The H-1B cap exemption provisions of AC21 make no reference to primary or secondary schools, and the legislative history of AC21 does not indicate any congressional intent that such schools be included within the definition of institutions of higher education. *See generally* 146 Cong. Rec. S9643-05 (October 3, 2000) (Statements of Senators [REDACTED] and [REDACTED]; 146 Cong. Rec. S9449-01 (September 28, 2000) (Statements of S [REDACTED] and [REDACTED]; 146 Cong. Rec. S7822-01 (July 27, 2000) (Statement of Senator [REDACTED]).

Congressional intent to grant an exemption for institutions of higher education. *See generally* 146 Cong. Rec. S9643-05, *supra* fn 2 and related text. As such, the AAO does not find that the petitioner has established that it is associated with the [REDACTED] through shared ownership or control by the same board or federation. Furthermore, the AAO cannot find based on the evidence of record as currently constituted, nor has the petitioner argued, that it is operated by the [REDACTED] or that it is attached to the [REDACTED] as a member, branch, cooperative, or subsidiary.

The record, therefore, does not demonstrate that the petitioner in this matter is related to or affiliated with an institution of higher education, or is in any other way exempt from the cap on H-1B petitions. The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary is exempt from to the H-1B cap, and the petitioner's argument on appeal has not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed.

The record suggests additional issues that were not addressed in the decision of denial. The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

While the Department of Labor (DOL) is the agency that certifies LCAs before they are submitted to USCIS, the DOL regulations note that it is within the discretion of the Department of Homeland

[REDACTED]; 146 Cong. Rec. S538-05 (February 9, 2000) (Statements of [REDACTED])
[REDACTED]

Moreover, the AAO observes that Congress, in exempting certain entities from the H-1B fee it imposed in the American Competitiveness and Workforce Improvement Act (ACWIA), specifically listed institutions of "primary or secondary education" as exempt from the fee in addition to institutions of higher education. *See* 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. As stated by the Supreme Court in *Bates v. United States*, "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 522 U.S. 23, 29-30, 118 S.Ct. 285, 290, 139 L.Ed.2d 215 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983), quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (C.A.5 1972)). As such, based on Congress's inclusion of primary and secondary education institutions in section 214(c)(9) of the Act and its omission from section 214(g)(5) of the same act, it should be presumed that Congress intentionally and purposely acted to exclude primary and secondary education institutions from the exemption to the numerical limitations contained in section 214(g)(1)(A) of the Act.

Security (DHS) (i.e., its immigration benefits branch, USCIS) to determine whether the content of an LCA filed for a particular Form I-129 actually supports that petition. *See* 20 C.F.R. § 655.705(b), which states, in pertinent part:

For H-1B visas . . . DHS accepts the employer's petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification. . . .*

[Emphasis added.]

In the instant case, the LCA states that the petitioner intends to employ the beneficiary from July 15, 2007 to July 15, 2010 and that it intends to pay the beneficiary, as her salary, \$45,695.29, which is above the required minimum prevailing wage of \$38,060 per year. The Form I-129 visa petition submitted in this case, however, states that the petitioner would employ the beneficiary from November 11, 2008 through May 31, 2012 for \$32,000 per year, a wage below that required by section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

The terms of the LCA submitted to support the visa petition do not correspond with the terms of the visa petition and cannot, therefore, be used to support it. The petition must therefore be denied on this additional basis. *See* 20 C.F.R. § 705(b).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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).

The petition will be denied and the appeal dismissed 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. The appeal will be dismissed and the petition denied.

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