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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

D2

[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 08 2010

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

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and dismissed a subsequent motion to reopen or reconsider that decision. The matter is now before the Administrative Appeals Office (AAO) on appeal.¹ The director's underlying decision to deny the petition will be withdrawn and the case will be remanded for further consideration and action.

The petitioner claims to be a nonprofit comprehensive medical care facility in rural Kansas that seeks to employ the beneficiary in what it designates as a medical technologist position. Therefore, the petitioner 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 denied the petition and dismissed the subsequent motion because she determined that the evidence in the record of proceeding failed to establish that the proffered position is a specialty occupation. On appeal, counsel submits a brief and additional evidence.

I. Specialty Occupation

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term “specialty occupation” as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term “specialty occupation” is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

¹ As a procedural note, the appeal in this matter is limited to whether the director erred in dismissing the petitioner's motion to reopen or reconsider the underlying decision to deny the petition. Finding no error in the director's ultimate decision to dismiss the combined motion, the appeal would normally be dismissed. However, in order to correct an error in the underlying decision issued by the director, in dismissing the appeal of the motion decision, the AAO also hereby reconsiders this matter on Service motion in order to issue a decision favorable to the petitioner, i.e., withdrawing the initial denial of the petition and ordering further action consistent with the instructions provided herein. *See* 8 C.F.R. § 103.5(a)(5)(i).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

Although the U.S. Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) states that clinical laboratory technologists usually have a bachelor's degree with a major in medical technology or in one of the life sciences, the *Handbook* also indicates that it is "possible to qualify

for some jobs with a combination of education and on-the-job and specialized training." As such, in noting the different entry-level requirements for various clinical laboratory technologist positions, the *Handbook* does not establish that all medical technologist positions, any particular medical technologist position, or the one proffered here requires such a degree for entry into the occupation as required by the Act. Accordingly, the AAO affirms the director's determination that it was incumbent on the petitioner to establish not only that it was proffering a medical technologist position, but also that the performance requirements of its medical technologist position qualify that particular position as a specialty occupation within the meaning of section 214(i)(1) of the Act and its implementing regulations at 8 C.F.R. § 214.2(h)(4) (iii)(A).

However, the AAO also finds that the totality of the evidence in the record of proceeding establishes that the specific medical technology duties to be performed by the beneficiary for the petitioner are sufficiently specialized and complex as to require knowledge usually associated with the attainment of a baccalaureate or higher degree, therefore qualifying the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Therefore, the director's determination that the proffered position is not a specialty occupation was incorrect, and the director's sole ground for denial will be withdrawn.

While the sole ground supporting the director's denial of the petition has been withdrawn, the petition cannot be approved based on the current record of proceeding. Specifically, an additional ground that was not addressed by the director prevents the AAO from ordering the petition's approval in this matter. This ground being the petitioner's failure to show the beneficiary is cap exempt pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

II. H-1B Numerical Limitations

The petition cannot be approved due to the petitioner's failure to show that the beneficiary qualifies for an exemption from the FY09 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

As of April 7, 2008, USCIS had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY09, which covers employment dates starting on October 1, 2008 through September 30, 2009. On the Form I-129, the petitioner requested a starting employment date of September 15, 2009. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 7, 2008 and requesting a start date during FY09 should be rejected.² However, because the petitioner indicated on the Form I-129 that it is a nonprofit organization or entity related to or affiliated with an institution of higher education as such institutions of higher education are defined in the Higher

² Title 8 C.F.R. § 214.2(h)(8)(ii)(E) provides, in pertinent part:

If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year.

Education Act of 1965, section 101(a), 20 U.S.C. § 1001(a), and thus exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director.

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.

With regard to institutions of higher education, the legislative history that accompanies [REDACTED] provides in relevant part the following:

This section exempts from the numerical limitation (1) individuals who are employed or receive offers of employment from an institution of higher education, affiliated entity, nonprofit research organization or governmental research organization and (2) individuals who have a petition filed between 90 and 180 days after receiving a

master's degree or higher from a U.S. institution of higher education. The principal reason for the first exemption is that by virtue of what they are doing, people working in universities are necessarily immediately contributing to educating Americans. The more highly qualified educators in specialty occupations we have in this country, the more Americans we will have ready to take positions in these fields upon completion of their education. Additionally, U.S. universities are on a different hiring cycle from other employers. The H-1B cap has hit them hard because they often do not hire until numbers have been used up; and because of the academic calendar, they cannot wait until October 1, the new fiscal year, to start a class.

Sen. Rep. No. 106-260 at 21-22 (April 11, 2000). As such, the AAO finds that neither the statutory language nor the legislative history demonstrates that Congress intended to exempt all nonprofit organizations that provide educational benefits to the United States. Rather, 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" Memo. from Michael Aytes, 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 3 (June 6, 2006) (hereinafter referred to as "Aytes Memo").

In this matter, the petitioner asserts that the beneficiary is H-1B cap exempt under section 214(g)(5)(A) of the Act as it is a nonprofit institution that is related to or affiliated with an institution of higher education. Specifically, the petitioner claims that it is a nonprofit entity that is affiliated with [REDACTED]

[REDACTED] College. As corroborating evidence of the petitioner's nonprofit status, it submits an unsigned and incomplete Form ST-28H, Kansas Department of Revenue, Public or Private Nonprofit Hospital, Nonprofit Blood, Tissue or Organ Bank Exemption Certificate. In support of the petitioner's claim that it is affiliated with Barton County Community College, the petitioner submits a copy of the two entities' "Clinical Affiliation Agreement." The petitioner also submits a "Clinical Affiliation Agreement" between itself and Seward County Community College. With regard to its claimed affiliation with Dodge City Community College, the petitioner indicates that its agreement with the college is "informal as [Dodge City Community College] does [not] wish to create a formal written agreement."

Upon review, the evidence of record is insufficient to show that the petitioner is more likely than not a nonprofit organization. The petitioner has failed to provide any evidence, such as a letter from the Internal Revenue Service (IRS), to corroborate its claimed nonprofit status. The submitted Form ST-28H is simply a publicly available form that is used by nonprofit entities in claiming exemptions from the state sales tax during a purchase transaction. Simply typing one's name on the form is not sufficient evidence that that institution is a nonprofit entity. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With regard to the petitioner's claimed affiliations with Dodge City Community College, Barton County Community College, and Seward County Community College, the evidence on record is likewise insufficient to establish that the petitioner is a related or affiliated entity of an institution of higher education within the meaning of section 214(g)(5)(A). 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 [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 [REDACTED] 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 and persuasively interpreted [REDACTED] 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.”); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that “the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

The petitioner must, therefore, establish that it 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) 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.³

As a preliminary issue, it is noted that no corroborating evidence was submitted as evidence of the petitioner's claimed affiliation with Dodge City Community College. As such, it cannot be found that such an affiliation exists for purposes of establishing the beneficiary's exemption from the numerical limitations under section 214(g)(5)(A) of the Act. In addition, insufficient evidence has been submitted to establish that any of the named educational institutions qualify as an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))). Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Next and as indicated above, the petitioner submits a copy of the "Clinical Affiliation Agreement" between itself and Barton County Community College and the "Clinical Affiliation Agreement" between itself and Seward County Community College in support of its claims that it is affiliated with an institution of higher education. In general, the basis for both agreements is the provision of coordinated clinical and instructional programs for the education and training of college students registered in medical laboratory technician training programs.

Assuming *arguendo* that Barton County Community College and Seward County Community College are institutions of higher education as defined, the AAO first considers whether the petitioner has established that it is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. 214.2(h)(19)(iii)(B): shared ownership or control by the same board or federation. The AAO interprets the terms "board" and "federation" as referring specifically to educational bodies such as a board of education, board of regents, etc. Upon review, the record does not establish that the petitioner and Barton County Community College or Seward County Community College are owned or controlled by the same boards or federations. The petitioner indicates that it is operated, supervised, or controlled by or in connection with "a Board of Trustees consisting of five members elected by residents of the Hospital District."⁴ The submitted "Clinical Affiliation Agreement" with Seward County Community College indicates that it is operated and controlled by the "Seward County Community College Board of Trustees." Meanwhile, as the record is devoid of any evidence as to the control of Barton County Community College, it will be presumed that it is a public community

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

⁴ This claim appears to be based on the assumption that Ashland Hospital District 3 is the petitioner. However, as insufficient evidence has been presented to show that the petitioner and Ashland Hospital District 3 are in fact one in the same, this assertion will only be considered with regard to determining who likely controls the petitioner.

college likely controlled by a Board of Trustees for the college. Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

The AAO next considers whether the petitioner has established that it 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 contractual relationships that exist between the petitioner and Barton County Community College and Seward County Community College do not indicate in any way an agreement by the petitioner to be operated by either educational institution. In fact, the agreement with Barton County Community College specifically states that (1) "[t]he College . . . [w]ill comply with current policies and procedures of the [petitioner] and will in no way become involved in the administration or management of any unit within the [petitioner]" and (2) the petitioner "[w]ill maintain complete authority and control over all [petitioner] administration and laboratory service function activities." It cannot be inferred from associations of such a limited scope that the petitioner is being operated by an institution of higher education. Accordingly, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Finally, the AAO considers whether the petitioner has established that it 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 Immigration and Naturalization Service (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 the petitioner, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. Upon reviewing the submitted evidence, there is no indication that the petitioner is a member, branch, cooperative, or subsidiary of Dodge City Community College, Barton County Community College, or Seward County Community College. 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). To the contrary, the agreements between the entities indicate relationships below that of even an agent or principal, wherein their agreements merely indicate cooperation between separately controlled entities and require the educational institutions to maintain liability insurance for their own employees and students. As such, there appears to be no significant relationship between the entities that would resemble one which meets the definitions of "related to" or "affiliated with."

Based on the evidence of record as currently constituted, the AAO finds that the petitioner has failed to establish that (1) it is a nonprofit entity, (2) the named educational institutions qualify as institutions of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or (3) it is related or affiliated with an institution of higher education based on its claimed relationships with Dodge City Community College, Barton County Community College, and Seward County Community College. Therefore, it has not been established that the petitioner is

a nonprofit entity related to or affiliated with an institution of higher education under section 214(g)(5)(A) of the Act and that the beneficiary thereby qualifies for an exemption from the H-1B cap. Accordingly, the director is requested on remand to issue a request for evidence to the petitioner, asking for additional evidence that (1) the petitioner is a nonprofit entity and/or (2) the beneficiary was otherwise exempt from the FY09 H-1B cap at the time the petition was filed on September 21, 2009. The director may also request any other evidence deemed necessary to make an eligibility determination in this matter. *See* 8 C.F.R. § 214.2(h)(9)(i).

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 sustained that burden in part. Accordingly, the decision of the director will be withdrawn and the matter remanded for entry of a new decision.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for the purposes of issuing a request for evidence consistent with the instructions above and the entry of a new decision.