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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 10 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.

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 \$630. 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 director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The basis of the director's decision will be withdrawn, but the appeal will be dismissed and the petition denied.

The petitioner is a public charter school with approximately 44 employees and 440 students in K-12 that seeks to employ the beneficiary as a Computer Science Teacher from March 14, 2010 to March 13, 2013. 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 denied the petition because she found that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment and that the petitioner complied with the terms and conditions of H-1B employment. Specifically, the director found the documentation submitted by the petitioner contained discrepancies with respect to the petitioner's number of employees, the students educated at the petitioner's school, and the petitioner's gross annual income. Additionally, the director found that the petitioner did not compensate one of its H-1B workers at her proffered rate of pay.

Counsel timely filed an appeal on July 9, 2010. On appeal, counsel for the petitioner asserts that USCIS did not give the petitioner an opportunity to respond to the director's findings that there are discrepancies in the documentation submitted by the petitioner. Counsel includes a letter from the petitioner explaining the discrepancies along with supporting documentation. The petitioner argues that it is the actual employer and explains the discrepancies found by the director as follows:

- The difference in gross annual incomes is due to one amount being the estimated gross income and the other amount being the actual gross income.
- The difference between the years of the petitioner's establishment is due to one being the year the initial article of incorporation was filed while the other was the year that a charter was granted.
- The difference in the number of employees between the Form I-129 and the organizational chart is due to the organizational chart listing all titles of positions, a few of which were not filled.
- Regarding the employee listed by the director as not being paid the proffered wage, the W-2 documentation submitted by the petitioner demonstrates that the beneficiary's salary met or exceeded her proffered wage in 2009.

The AAO finds the petitioner's explanations for any discrepancies found by the director to be reasonable in light of the corroborating evidence submitted on appeal. Consequently, the petitioner has demonstrated that a reasonable and credible offer of employment exists and that the petitioner is likely to comply with the terms and conditions of employment. Therefore, the basis of the director's decision will be withdrawn. However, the petition cannot be approved, because the petitioner failed to establish that the beneficiary qualifies for an exemption from the Fiscal Year 2010 (FY10) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) Form I-290B with counsel's brief and supporting materials. The AAO reviewed the record in its entirety before reaching its decision.

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year may not exceed 65,000. On December 21, 2009, 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 FY10, which covers employment dates starting on October 1, 2009 through September 30, 2010.

The petitioner filed the Form I-129 on March 31, 2010 and requested a starting employment date of March 14, 2010. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii)(B), any non-cap exempt petition filed on or after December 21, 2009 and requesting a start date during FY10 must be rejected. However, because the petitioner indicated on the Form I-129 supplement that it is a nonprofit organization or entity related to or affiliated with an institution of higher education, and thereby exempting the beneficiary from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director when it was initially received by the service center.

Upon review, the petitioner has not established that the beneficiary is exempt from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act.

#### I. Law

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, § 103, 114 Stat. 1251, 1252 (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 AC21 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). 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.<sup>1</sup>

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<sup>1</sup> See generally 146 Cong. Rec. S9643-05 (October 3, 2000) (Statements of Senators Harry Reid, John McCain, Spencer Abraham, Sam Brownback, Kent Conrad, Patrick Leahy and Orrin Hatch); 146 Cong. Rec. S9449-01 (September 28, 2000) (Statements of Senator Hatch, Abraham and Edward Kennedy); 146 Cong. Rec. S7822-01 (July 27, 2000) (Statement of Senator John Warner);

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),<sup>2</sup> specifically listed institutions of “primary or secondary education” as exempt from the fee in addition to institutions of higher education. 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.

## II. Analysis

The AAO therefore 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 it 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 claims that its sponsorship by Ball State University is evidence of an affiliation that makes the petitioner an exempt employer.

### A. "Exempt Employers"

If the petitioner is an exempt employer, i.e., an institution of higher education or a related or affiliated nonprofit entity, there is no legal requirement that the beneficiary participate in a particular program. In other words, absent the issuance of regulations to the contrary, the on-site employment by an

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146 Cong. Rec. S538-05 (February 9, 2000) (Statements of Senators Hatch, Abraham and Phil Gramm).

<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.

institution of higher education or a related or affiliated nonprofit entity is sufficient in itself to meet the plain statutory requirements of section 214(g)(5)(A) of the Act.

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.

The AAO, as a component of USCIS, generally follows official statements of policy issued by the agency, provided they are not in conflict with a higher legal authority. *See* USCIS Adj. Field Manual 3.4(b) (2010). 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 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, the AAO finds that USCIS reasonably and persuasively interpreted AC21 to apply the definition of the phrase 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.

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 FY10 H-1B cap. Reducing the provision to its essential elements, the AAO finds 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>3</sup>

The petitioner noted that in Indiana, “charter schools can be established with the approval and sponsorship of a university.”<sup>4</sup> The petitioner submitted documentation in support of its claim that it is affiliated with an institution of higher education, including its Charter, which is a contract between Ball State University and the petitioner’s Board of Directors. The Charter distinguishes the petitioner’s Board of Directors (called the “Organizer” in the Charter) from the Board of Trustees of Ball State University (called the “University Board”). Therefore, even though the university is considered the petitioner’s sponsor for the purpose of establishing a charter school under Indiana law, it is clear that the petitioner and Ball State University do not share a Board. Additionally, under the Charter, the petitioner “agrees to indemnify and hold the University and its trustees, officers, employees, agents and representatives harmless from all claims, demands, or liability, including attorney fees, and related expenses, on account of injury, loss or damage . . . .”

As discussed, the petitioner has been established as a charter school under Indiana law. Indiana Code § 20-24-3-16, as *added by* P.L.1-2005, Sec. 8, states that “[a]n entity or multiple divisions of the same entity may not serve simultaneously as both the organizer and the sponsor of the same charter school.” Additionally, even though Ball State University decided to sponsor the petitioner, if Ball State University rejects a proposal made by the petitioner, the petitioner can appeal to the charter school review panel, which will make a decision by majority vote. The charter school review panel is made up of the Indiana governor or his/her designee, the state superintendent, a member of the state board who is appointed by the state superintendent, a person with financial management experience who is appointed by the governor, and a community leader with knowledge of charter school issues who is appointed jointly by the governor and the state superintendent. Indiana Code § 20-24-3-12, as *added by* P.L.1-2005, Sec. 8. In other words, Ball State University does not have the final say if it objects

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<sup>3</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).

<sup>4</sup> The AAO notes that although charter schools in Indiana can be established with the approval and sponsorship of a state university, other bodies can also sponsor an Indiana charter school. Under Indiana Code § 20-24-1-9(2):

“Sponsor” means, for a charter school, one (1) of the following:

- (1) A governing body.
  - (2) A state educational institution that offers a four (4) year baccalaureate degree.
  - (3) The executive (as defined in IC 36-1-2-5) of a consolidated city.
- As added by* P.L.1-2005, Sec. 8. *Amended by* P.L.2-2007, Sec. 208.

to one of the petitioner's proposals and, as such, it lacks even de facto control over this aspect of the petitioner's operations.

Turning to the definition of an "affiliated or related nonprofit entity," the AAO must first consider 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 notes that it cannot be found that the petitioner meets the definition of related or affiliated nonprofit entity simply because both the petitioner and Ball State University are both public educational entities in Indiana. Accepting this argument concerning some type of shared ownership or control would allow virtually any state government agency in Indiana, 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. This overly expansive interpretation would undermine the clear Congressional intent to grant an exemption for institutions of higher education. *See generally* 146 Cong. Rec. S9643-05, *supra* fn 2 and related text. The AAO, therefore, 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 Ball State University are owned or controlled by the same board or federation.

Moreover, the record does not establish that public institutions of higher education and public charter schools are owned or controlled by the same boards or federations in the State of Indiana. Indeed, as discussed previously, the Indiana Code specifically states that the same entity may not serve as both organizer and sponsor of the same charter school and the petitioner's and university's boards are distinguished in the petitioner's charter. Moreover, the university is not accountable for any claims, demands, or liability made or found against the petitioner. Thus, there is no evidence to establish that the two educational entities are associated through control by the same board or federation. Consequently, the AAO finds that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, the AAO must consider 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, a non-profit public charter school, within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and the institution of higher education is one between two separately controlled and operated entities. It cannot be inferred from associations of such a limited scope that the petitioner is being operated by the institution of higher education named herein. Although Ball State University has sponsored the petitioner, as noted above, it does not have the final say, and as such lacks even de facto control, over the petitioner's proposals. If the petitioner makes a decision that Ball State University does not agree with, the petitioner can appeal to an independent body. Accordingly, the AAO finds that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and 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 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, a public charter school, is not attached to an institution of higher education in a manner consistent with these terms. 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). There is no indication whatsoever from the evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of Ball State University. Again, the Indiana Code specifically states that the same entity or divisions of the same entity may not serve as both organizer and sponsor of the same charter school. Therefore, if the petitioner and Ball State University were part of the same entity, the petitioner's charter would be invalid.

Based on the evidence of record as currently constituted, the AAO cannot find that the petitioner should be included in the statutory definition of an institution of higher education based on its sponsorship by Ball State University. Therefore, the beneficiary does not qualify for an exemption from the H-1B cap under section 214(g)(5)(A) of the Act.

### III. Conclusion

Upon review, the petitioner has not established that the beneficiary is exempt from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act. Accordingly, the petition must be denied.<sup>5</sup> The AAO notes, however, that the fiscal year 2011 allocation of H-1B visas has not been exhausted as of the date of this decision. This decision shall not serve to bar the petitioner from re-filing a new petition, accompanied by evidence to show eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 sustained that burden.

**ORDER:** The basis for the director's decision is withdrawn. However, the appeal is dismissed and the petition denied.

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<sup>5</sup> It is noted that a review of a petitioner's exemption claim is considered to be an adjudication for purposes of determining eligibility for the benefit sought. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B); 73 Fed. Reg. 15389, 15393 (Mar. 24, 2008). As such, the proper action was to receipt in and adjudicate the instant petition instead of rejecting it outright when it was received by USCIS.