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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

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Dr

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUL 01 2010

IN RE:

Petitioner:

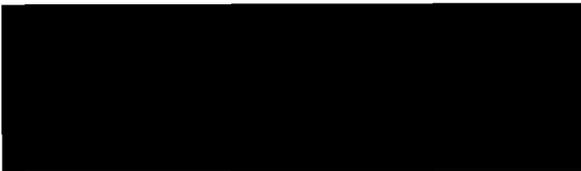


Beneficiary:

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:



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 the petitioner stated that it performs health care recruitment for hospitals. To employ the beneficiary in a position designated as a Registered Nurse – Pediatric Specialty (RN-PS) at the Children’s Medical Center, a hospital in Dallas, Texas, 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 because she found that the petitioner was subject to numerical limitations under section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A). On appeal, counsel asserted that the beneficiary is exempt from the H-1B cap.

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. The petition was filed for an employment period to commence in May 2009. 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 March 23, 2009, requesting a start date of May 25, 2009. Unless the visa petition is exempt from the cap, therefore, it cannot be approved. The primary 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)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

Section 214(g)(5) of the Act states, in pertinent part,<sup>1</sup>

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

Only the beneficiary’s prospective employer or its agent has standing to file an H-1B visa petition for her. This issue is discussed further below. By filing this petition, the petitioner asserts that it would be the beneficiary’s employer or its agent. The petitioner would not otherwise have standing to file.

In a letter dated March 20, 2009, and submitted with the visa petition, counsel referred to the Clinical Practice Policy of the Children’s Medical Center as evidence that the visa petition in the instant case is exempt from the cap. A copy of that policy was provided with the visa petition. That

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<sup>1</sup> Section 214(g)(5) of the Act also exempts aliens who work at nonprofit research organizations or have advanced degrees. The record contains no assertion that those exemptions are relevant to the instant case.

policy states that the hospital is the primary pediatric teaching facility for the University of Texas Southwestern Medical Center at Dallas, and that it conducts research instrumental to developing treatment, therapies, and a greater understanding of pediatric medicine.

The director found that the beneficiary does not qualify for an exemption from the cap because the petitioner's employer, the petitioner itself, is not cap-exempt.

On appeal, counsel cited a [REDACTED] internal memorandum for the proposition that, under these circumstances, the beneficiary is exempt from the cap. See Interoffice Memorandum from Michael Aytes, Assistant Director for Domestic Operations, *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 106-133)*, HQ PRD 70/23.12 (June 6, 2006) (hereinafter Aytes memo).

Counsel cited the Aytes memo for the proposition that “. . . petitioners that are not themselves a qualifying institution also claim this exemption because the alien beneficiary will perform all or a portion of the job duties at a qualifying institution” and that

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.

Pursuant to the language of section 214(g)(5) of the Act, the exemption is available only to the beneficiary if the employer, the petitioner, is either an institution of higher education or a nonprofit entity related or affiliated with such an institution.

The AAO notes that, in addition to satisfying the perceived Congressional intent of the statute, this interpretation is consistent with the statutory language, which speaks of an alien who is employed at an institution of higher education or a related or affiliated institution, rather than an alien who is employed by such an institution.

The record shows that, if the petition were approved, the beneficiary would work at the Children's Medical Center of Dallas. As the petitioner in this matter, HCCA International, is by its own admission neither an institution of higher education nor a nonprofit entity related to or affiliated with one, the issue then is whether the Children's Medical Center at which the beneficiary would work qualifies as such. As it is not an educational institution, as such, but rather a hospital, the issue is narrowed to whether it is a nonprofit entity that is related to or affiliated with an institution of higher education within the meaning of section 214(g)(5) 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) (2009). 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 interprets AC21 to refer to 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 relies upon the relationship between the Children’s Medical Center in Dallas, where the beneficiary would work, and the University of Texas Southwestern Medical Center at Dallas in claiming that the beneficiary is exempt from the H-1B cap. The petitioner must, therefore, establish that the hospital 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. Reducing the provision to its essential elements, the AAO finds that 8 C.F.R. § 214.2(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>2</sup>

<sup>2</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).

In support of the claim that the Children's Medical Center is related to or affiliated with the University of Texas Southwestern Medical Center at Dallas, the petitioner submits the Children's Medical Center's Clinical Practice Policy, which states in pertinent part the following:

Children's Medical Center (Children's) is private, non-for-profit, and one of the largest pediatric healthcare providers in the nation. . . . As the primary pediatric teaching facility for the University of Texas Southwestern Medical Center at Dallas (UT Southwestern), the medical staff at Children's conducts research that is instrumental in developing treatments, therapies, and greater understanding of pediatric medicine.

\* . \* \*

The annual appraisal of the Plan for the Provision of Care is reported to . . . the Board of Directors.

As a preliminary matter, it is noted that this statement by itself is insufficient to establish that Children's Medical Center is a nonprofit entity. Such a claim must be supported by corroborating evidence, such as a copy of the appropriate Internal Revenue Service (IRS) ruling or determination letter recognizing the nonprofit status of the Children's Medical Center. 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)).

Next, assuming *arguendo* that Children's Medical Center's nonprofit status had been established by a preponderance of the evidence, the petitioner has still failed to establish that the Children's Medical Center is related to or affiliated with the University of Texas Southwestern Medical Center at Dallas pursuant to 8 C.F.R. § 214.2(h)(19)(iii)(B). First, the submitted Clinical Practice Policy does not establish that the University of Texas Southwestern Medical Center at Dallas and the Children's Medical Center at Dallas have common ownership or are controlled by the same board. As indicated above, the Clinical Practice Policy only refers to "the Board of Directors." It does not state that this board is the same board, presumably the Board of Regents, which governs or controls the University of Texas Southwestern Medical Center at Dallas. Nor has any corroborating evidence been submitted to support such a claim.

Second, the record does not establish that the University of Texas Southwestern Medical Center at Dallas operates the Children's Medical Center in Dallas. Again, the submitted Clinical Practice Policy only indicates that it is the "primary pediatric teaching facility for the University of Texas Southwestern Medical Center at Dallas." There is no indication in the policy that the hospital is operated by the University of Texas Southwestern Medical Center at Dallas, and no corroborating evidence has been submitted to support such a conclusion.

Third, the record does not show that the Children's Medical Center in Dallas is a member, branch, cooperative, or subsidiary of the University of Texas Southwestern Medical Center at Dallas. With regard to this eligibility criterion, the Clinical Practice Policy is silent; again, there is no evidence in the record that the Children's Medical Center in Dallas is a member, branch, cooperative or subsidiary of the University of Texas Southwestern Medical Center at Dallas.

As such, the AAO hereby withdraws the statement made by the director implying that the Children's Medical Center of Dallas is affiliated with the University of Texas Southwestern Medical Center at Dallas. Although the director was correct in finding that the beneficiary is not exempt from the H-1B cap, the basis provided was incorrect. The AAO hereby concludes that the petitioner has instead failed to establish that the beneficiary is exempt from the H-1B cap under section 214(g)(5)(A) of the Act on the basis that the Children's Medical Center in Dallas, i.e., the location at which the beneficiary would work, has not been established as being a nonprofit entity related to or affiliated with an institution of higher education.

As the visa petition is subject to the FY09 cap and was filed after the cap for the FY09 was exhausted, and as the beneficiary does not qualify for an exemption from the cap, the appeal must be dismissed and the petition must be denied for this reason.

The record suggests additional issues that were not addressed in the director's decision.

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. Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which (1) 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 (2) 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."

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.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations.<sup>3</sup> As to the education required for entry into registered nurse positions in general, the *Handbook* states,

There are three typical educational paths to registered nursing—a bachelor's of science degree in nursing (BSN), an associate degree in nursing (ADN), and a diploma. BSN programs, offered by colleges and universities, take about 4 years to complete. ADN programs, offered by community and junior colleges, take about 2 to 3 years to complete. Diploma programs, administered in hospitals, last about 3 years.

In a letter dated March 20, 2009, and provided with the visa petition, counsel asserted the following about the USCIS November 27, 2002 guidance memorandum issued by [REDACTED]

The memorandum notes that certain specialized nursing occupations are likely to require a bachelor's or high [sic] degree, and, accordingly, be H-1B equivalent due "to an advanced level of education and training required for certification."

The record contains an evaluation from an associate professor of nursing at Wegman's School of Nursing, St. John Fisher College, Rochester, New York. That letter lists various duties of an RN-PS, and abstractly states, "Skills in these areas can be acquired only through Bachelor's-level classes in those areas." The professor did not indicate which of the listed duties could not be performed by a

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<sup>3</sup> The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed June 30, 2010.

registered nurse who did not have a minimum of a bachelor's degree or the equivalent in nursing or a related discipline. The professor further stated, "The skills for the position are developed in the junior and senior years of an undergraduate program, as well as in a graduate program in Nursing, or a related field," but did not indicate which skills are not taught in, for instance, a two or three year registered nurse program at a junior college. She also did not explain why these skills could not be obtained through additional credentialing or on-the-job experience by a registered nurse (RN) with only an associate degree.

The professor also stated, "Companies seeking to employ [an RN-PS] require prospective candidates to possess a Bachelor's degree in the area of Nursing, Pediatric Nursing, or a related field, from an accredited institution of higher learning." The professor did not indicate whether she was asserting this requirement as a universal requirement, as common in the industry, or merely as a requirement of some companies, and, in any event, provided no support for that conclusory statement.

The AAO may, in its discretion, use advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The AAO agrees that a RN-PS position may qualify as a specialty occupation. As correctly detailed in Part E of the Williams memorandum, to which counsel referred, "the petitioner may be able to demonstrate that the H-1B petition is approvable" for nursing specialties, including pediatrics, by establishing, pursuant to the pertinent statutes and regulations, set out above, that a particular position qualifies as a specialty occupation.

The petitioner and counsel have not stated which of the duties of the proffered position could not be performed by a RN without a bachelor's degree or the equivalent in nursing, pediatric nursing, or a related field. The petitioner has not listed any duties of the proffered position that they claim cannot be performed by a RN who graduated, for instance, from a two or three-year program in nursing at a junior college. Even if such duties had been identified, the petitioner failed to demonstrate why a RN without a bachelor's degree cannot perform these skills after obtaining credentialing in pediatrics or after gaining the requisite experience, such experience not being equivalent to a bachelor's degree in nursing. The *Handbook*, for instance indicates that credentialing in pediatrics may be more than sufficient in this case.

For the aforementioned reasons, the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar companies, and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence pertinent to anyone that the petitioner has previously hired to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has not demonstrated that the proffered position or its duties are so complex, unique, or specialized that they can only be performed by a person with a minimum of a bachelor's degree in a specific specialty or the equivalent or that performance of the duties is usually associated with a minimum of a bachelor's degree in a specific specialty or the equivalent. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) or the criteria of the second clause of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation within the meaning of section 101(a)(15)(H)(i)(b) of the Act. For this additional reason, the appeal will be dismissed and the petition will be denied.

The record suggests another issue that was not discussed in the decision of denial. The evidence demonstrates that the beneficiary would work exclusively at the named pediatric hospital which is a client of the petitioner.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines an H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . , who meets the requirements of the occupation specified in section 1184(i)(2) . . . , and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

The regulation at 8 C.F.R. § 214.2(h)(1)(i) states:

(h) Temporary employees--(1) Admission of temporary employees--(i) General. Under section 101(a)(15)(H) of the Act, an alien may be authorized to come to the United States temporarily to perform services or labor for, or to receive training from, an employer, if petitioned for by that employer. . . .

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(A) identifies a "United States employer" as authorized to file an H-1B petition. "United States employer" is defined at 8 C.F.R. § 214.2(h)(4)(ii) as follows:

*United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
- (3) Has an Internal Revenue Service Tax identification number.

The record demonstrates that the beneficiary would work at the hospital, rather than at the petitioner's own location. The record contains no allegation that the petitioner, rather than an employee of the hospital, would control or supervise the beneficiary's work and, in any event, that arrangement does not appear to be feasible. The AAO finds that the petitioner would not, in fact, be the beneficiary's employer within the meaning of 8 C.F.R. § 214.2(h)(2)(i)(A). The AAO further finds that the petitioner does not appear, and does not claim, to be filing as an agent pursuant to 8 C.F.R. § 214.2(h)(2)(i)(F). The petitioner is not, therefore, permitted to file an H-1B visa petition for the beneficiary. The appeal will be dismissed and the petition denied for this additional reason.

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 (9<sup>th</sup> 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.