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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: JUN 01 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 \$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 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 appeal will be dismissed. The petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of occupational therapist as an H-1B nonimmigrant 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 petitioner is a rehabilitation facility with a staff of 30 employees.

The director denied the petition based on the petitioner's failure to establish that: (1) that the proffered position qualified as a specialty occupation; (2) the beneficiary is qualified to perform the services of the specialty occupation of occupational therapist as it has not been established that she possesses the equivalent of a master's degree in the specialty; or (3) it met the requirements specified in section 214(g)(5) of the Act, 8 U.S.C. § 1184(g)(5), and thus the beneficiary was subject to the 2009 fiscal-year cap for the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A).

On appeal, counsel asserts that a bachelor's degree is sufficient to be employed as an occupational therapist and that the beneficiary possesses the requisite state license. In addition, counsel contends that it is a cap exempt employer based on its relationship with the [REDACTED]

The AAO bases its decision upon its consideration of all of the evidence in the record of proceeding, including: (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and supporting documentation.

This matter presents a novel issue. While the law governing the H-1B visa category requires the AAO to examine the specific degree required as a minimum for entry into a professional occupation, the educational requirements for occupational therapists are in transition to a higher and more rigorous standard. Prior to 2008, the minimum acceptable degree for an occupational therapist position was a bachelor's degree in occupational therapy, *infra*. Currently, however, the minimum level of education for individuals pursuing a career as an occupational therapist is a master's degree or higher in occupational therapy from an accredited occupational therapy program. See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2008-09 Edition, "Occupational Therapists," <<http://www.bls.gov/oco/ocos078.htm>> (accessed October 5, 2009).

Despite the evolution of a particular profession, USCIS is required to follow long-standing legal standards and determine first, whether the proffered position is a specialty occupation, and second, whether an alien beneficiary is qualified for the position at the time the nonimmigrant visa petition is filed. See *Matter of Michael Hertz Assoc.*, 19 I&N Dec. 558, 560 (Comm. 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

After determining that the position is a specialty occupation, USCIS must then ensure that the beneficiary is qualified to perform the services as an occupational therapist by holding the required degree, an unrestricted State license, or a combination of education, training and experience that is equivalent to completing the required degree. 8 C.F.R. § 214.2(h)(4)(iii)(C). As will be discussed, USCIS should assess a beneficiary's qualifications within the context of: (1) the industry standard in the United States at the time the beneficiary entered the specialty occupation; and (2) the accreditation status of the program from which the beneficiary graduated at the time the degree was conferred. To do otherwise, would potentially prevent many educated and highly experienced individuals from qualifying under current industry standards to enter a profession which, for all practical purposes, they entered many years before.

### **I. Specialty Occupation**

The first issue in this matter is whether the proffered position is a specialty occupation.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

*Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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:

- (I) 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.

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.<sup>1</sup> 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.

In determining the minimum degree required for entry into the position of occupational therapist, the director consulted the 2008-2009 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*.<sup>2</sup> The director properly noted that the 2008-2009 edition of the *Handbook* reports that a master's degree or higher in occupational therapy is the minimum requirement for entry into the field. Noting that the beneficiary did not possess a master's degree, and noting that the petitioner did not require a master's degree

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<sup>1</sup> The AAO notes that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). 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 (5<sup>th</sup> 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.

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).

<sup>2</sup> The *Handbook* is also available at <http://www.bls.gov/oco/>.

of its newly hired employees, the director concluded that the proffered position did not qualify as a specialty occupation.

On appeal, counsel asserts that a bachelor's degree is sufficient to be employed as an occupational therapist and that the beneficiary possesses the requisite state license. Therefore, counsel concludes, the position is a specialty occupation and the beneficiary is qualified to be employed in the position. In support of this contention, counsel states that the petitioner's past hiring practices indicate that only a bachelor's degree, and not a master's degree, has been the minimum educational requirement for its occupational therapist employees. In addition, it is noted that the record contains a letter dated March 10, 2009 from the National Board for Certification in Occupational Therapy, Inc. (NBCOT), which indicates that individuals certified prior to January 1, 2008 are not required to meet the new post-baccalaureate degree requirements for certification.

Before a specialty occupation analysis can be performed, it must first be determined whether or not the proffered position is in fact an occupational therapist position. In other words, in a situation such as this one, in which a petitioner claims to require a degree that is lower than the current U.S. standard for entry into the occupation, the question that is usually asked is whether the proffered position is in fact an occupational therapist position as claimed by the petitioner.

Upon review, as described and documented in the petition, the beneficiary will be employed as an licensed "occupational therapist" and will provide a full range of occupational therapy services, including patient assessment, treatment planning, therapeutic interventions, evaluations of patient response, documenting the course of patient care, providing patient and family education, and coordinating treatment activity with other disciplines and team members. The petitioner's detailed description of the position, as well as the evidence of record, is consistent with the description of the "occupational therapist" position in the Department of Labor's *Handbook*. See "Occupational Therapists" at <<http://www.bls.gov/oco/ocos078.htm>>.

The AAO further notes that there is nothing in the record to indicate that the employer is artificially inflating the nature of the duties and would employ the beneficiary in a lower level position, such as an occupational therapist assistant or aide. There is nothing in the record that would lend doubt as to whether the beneficiary will actually be employed as an occupational therapist. *Cf. Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."). As such, the AAO finds that the proffered position is in fact an occupational therapist position.

Since it has been established that the beneficiary is to be employed as an occupational therapist, the AAO can now address whether an occupational therapist is a specialty occupation position. As described in both the record of proceeding and the *Handbook*, this position is a specialty occupation that requires the "theoretical and practical application of a body of highly specialized knowledge" and the "attainment of a bachelor's or higher degree in the specific specialty." Section 214(i)(1) of the Act.

As previously noted, the *Handbook* currently describes the required education for this position as "a master's degree or higher" in occupational therapy. See "Occupational Therapists" at <<http://www.bls.gov/oco/>

ocos078.htm>. Instead of pointing to an inadequate job description or to inconsistencies or conflicting evidence, the director found that the position is not a specialty occupation because the beneficiary possessed, and the petitioner required, a bachelor's degree and not the master's degree that is noted as the minimum in the 2008-09 edition of the *Handbook*. While the director's interpretation that occupational therapist occupations currently require the minimum of a master's degree is in accord with current and evolving industry standards, this standard is only relevant in determining whether the beneficiary is qualified for the position. Regardless of whether a baccalaureate or a master's degree is deemed the minimum education required for entry into the profession, the occupation requires the "attainment of a bachelor's or higher degree in the specific specialty." Section 214(i)(1) of the Act.

Accordingly, as the petitioner has established that the beneficiary is to be employed as an occupational therapist and as the *Handbook* clearly indicates that the position requires a baccalaureate or higher degree or its equivalent in a specific specialty as the normal minimum requirement for entry into the particular position, it must be found that the proffered position is a specialty occupation. The director's determination that the proffered position is not a specialty occupation was incorrect and the director's first ground for denial will be withdrawn.

## **II. Beneficiary Qualifications**

The second issue in this matter is whether the beneficiary is qualified to perform the duties of an occupational therapist.

In order to determine whether the beneficiary is qualified to perform the duties of an occupational therapist in the United States, the AAO must first determine the current U.S. industry standard applicable for entry into this occupation. The regulations specifically allow consideration of "industry standards," or whether "[t]he degree requirement is common to the industry in parallel positions among similar organizations." 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). For positions that are in transition to a more stringent professional standard, such as the case at hand, the AAO finds that industry standards are especially appropriate for determining the minimum education required to perform the duties of an employer's proffered position.

The statute qualifies the degree requirement based on the "minimum for entry into the occupation in the United States." Section 214(i)(1)(B) of the Act. In addition, the statute provides that the requirement of a specialty occupation can be "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." Section 214(i)(2)(A) of the Act. These requirements show Congressional intent for the use of industry standards as a guideline for determining a specialty occupation and evaluating whether a beneficiary is qualified to enter and perform the duties of such an occupation.

That being said, the director's conclusion regarding the master's degree requirement is correct only with regard to exactly that: the current standard for "entry" into the position of occupational therapist in the United States.<sup>3</sup> As counsel correctly observes, the industry still employs many occupational therapists who only have

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<sup>3</sup> The 2008-2009 edition of the *Handbook* indicates that the "training, other qualifications, and advancement section explains all of the steps necessary to enter and advance in an occupation." As such, it is clear that the

a U.S. bachelor's degree in occupational therapy or its equivalent. Thus, while the director is correct with regard to the current minimum education for entry into the occupation, the director should not necessarily have applied this current industry standard to this particular position being offered to the beneficiary, as it is reasonable for a petitioner to employ occupational therapists who possess a bachelor's degree from an occupational therapy program that was accredited under the older, pre-2008 standards. In other words, while the "current industry standard" is the standard that should always apply, that current standard may be different when applied to recent graduates entering a chosen field for the first time versus experienced individuals who graduated and began working in the field many years ago.

In this matter, because the petitioner has demonstrated that the educational requirements for occupational therapists are in transition to a higher standard as of 2008, it is reasonable for the petitioner to currently require only a bachelor's degree when seeking to fill the position with someone who is grandfathered under the pre-2008 industry standard which, as explained above, is the current industry standard applicable to these aliens. In this matter, the beneficiary received her degree in occupational therapy well before the January 1, 2008 cut-off date established by NBCOT. As such, the AAO finds that the current U.S. industry standard applicable to the beneficiary to perform the duties of an occupational therapist in the United States is a bachelor's degree in occupational therapy, not a Master's Degree.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding indicates that the beneficiary received a Bachelor of Science degree in Occupational Therapy from Cebu Doctors' College in Cebu, Philippines, on March 24, 2001. In addition, the record

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Handbook's "Training, Other Qualifications, and Advancement" section pertaining to occupational therapists reflects what is currently required to "enter and advance" in the occupation, not the minimum education that all practicing occupational therapists currently possess.

indicates that the beneficiary passed NBCOT's certification exam and became certified as an occupational therapist on October 29, 2007.

Based on the NBCOT certification, the beneficiary possesses a foreign degree equivalent to a pre-2008 U.S. bachelor's degree in occupational therapy. As such, the beneficiary meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), i.e., the beneficiary possesses a "foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university."

The record further indicates that the beneficiary intends to practice in the State of Arizona. The record contains a copy of the beneficiary's unrestricted license as an occupational therapist, issued by the State of Arizona's Board of Occupational Therapy Examiners on January 12, 2009 and valid until January 11, 2011. As such, the beneficiary meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), i.e., the beneficiary holds "an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment."

Therefore, the second basis for the director's recommended denial of this petition must also be withdrawn.

The final issue in this matter is whether the petitioner is a nonprofit entity related or affiliated with an institution of higher education, and thus has established that it meets one of the exemption categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

The annual fiscal-year cap on the issuance of H-1B visas, set by section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), was reached on April 7, 2008. Although the petitioner filed the Form I-129 petition on February 17, 2009, the petition was accepted and adjudicated because the petitioner indicated on the Form I-129 that the beneficiary met the cap exemption criterion at section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), as a beneficiary who, in the words of the Act, "is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity."

The director denied the petition on the ground that the petitioner did not establish that it meets any of the employer categories specified in section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A), and thus the beneficiary was subject to the annual cap.

On appeal, counsel states that the petitioner operates and manages the Rehabilitation Department at Yuma Regional Medical Center (YRMC), a nonprofit institution. Counsel contends, therefore, that the petitioner qualifies as an employer within the meaning of section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) by virtue of its affiliation with YRMC.

For the reasons discussed below, the AAO finds that the evidence of record does not establish that the beneficiary would be so employed as to qualify for cap exemption by being employed "at" an 8 U.S.C. § 1184(g)(5)(A) entity. Consequently, the beneficiary does not qualify for exemption from the H-1B cap.

As stated above, section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A) as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who “is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)), or a related or affiliated nonprofit entity . . . .”

Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor’s degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

The governing statute, 8 U.S.C. § 1184(g)(5)(A), contains no definitions for determining if an employer qualifies as a “related or affiliated nonprofit entity” of an institution of higher education under 20 U.S.C. § 1001(a).

USCIS provided guidance in a June 2006 memorandum from [REDACTED] U.S. Department of Homeland Security, to Regional Directors and Service Center Directors, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) HQPRD 70/23.12* (June 6, 2006) (hereinafter referred to as “Aytes Memo”). 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.

By including the phrase “related or affiliated nonprofit entity” in the language of the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000), 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 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 the beneficiary will be employed "at" an entity that 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(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>4</sup>

Similarly, the H-1B regulation at 8 C.F.R. § 214.2(h)(19)(iv) on fee exemption should be applied to determine whether the petitioner has established that the beneficiary will be employed at a “nonprofit” entity for purposes of cap-exemption determinations:

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<sup>4</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).

*Non-profit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii)(B) and (C) of this section, a nonprofit organization or entity is:

- (A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and
- (B) Has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.

The petitioner is not a 20 U.S.C. § 1001(a) institution of higher education. However, contrary to the director's findings, the record indicated that YRMC is a nonprofit entity, and the record of proceeding contains a letter from the Internal Revenue Service (IRS) indicating that on May 29, 1967, YRMC was granted exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code. The letter from the IRS corroborates counsel's characterization of YRMC as a nonprofit, tax exempt, organization. Because the petitioner claims to operate the rehabilitation center "at" YRMC, a nonprofit entity as defined at 8 C.F.R. § 214.2(h)(19)(iv), and further indicates that is where the beneficiary will be employed, the petition merits further consideration, to determine the type of relationship, if any, that YRMC has with any institution of higher education.

The record contains three agreements submitted by the petitioner in support of its claimed H-1B cap exempt status: (1) an agreement between YRMC and Arizona Western College "to affiliate" the education of nursing and/or nursing assistant students; (2) an agreement between YRMC and Northern Arizona University for the purpose of providing clinical practicum and/or internship/externship education; and (3) a Clinical Experience Agreement between YRMC and Maricopa County Community College District.

On the basis of the documentation submitted, the AAO finds that the organizations named in the above agreements appear to be institutions of higher education within the meaning of 20 U.S.C. § 1001(a) and, thereby, 8 U.S.C. § 1184(g)(5)(A). Therefore, the AAO must next inquire into the nature of the relationship YRMC has with these institutions of higher education. In other words, the AAO must next determine whether YRMC 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.

It should first be noted, however, that the director based his decision in part on the petitioner's failure to submit evidence of a contractual affiliation with a university. However, the regulation cited above does not require a contract for purposes of establishing an affiliation; it requires instead evidence that the nonprofit entity is (1) associated with an institution of higher education, through shared ownership or control by the same board or federation; (2) operated by an institution of higher education; or (3) attached to an institution of higher education as a member, branch, cooperative, or subsidiary. See 8 C.F.R. § 214.2(h)(19)(iii)(B). The director's statement with regard to the requirement for contractual evidence of affiliation, therefore, is withdrawn.

Upon review, the AAO finds that the evidence submitted does not establish that YRMC falls within any of the qualifying categories at 8 C.F.R. § 214.2(h)(19)(iii)(B).

As indicated above, the petitioner submits three agreements in support of its eligibility in this matter: (1) an agreement between YRMC and Arizona Western College “to affiliate” the education of nursing and/or nursing assistant students; (2) an agreement between YRMC and Northern Arizona University for the purpose of providing clinical practicum and/or internship/externship education; and (3) a Clinical Experience Agreement between YRMC and Maricopa County Community College District.

The AAO first considers whether the petitioner has established that YRMC 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 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 YRMC and Arizona Western College, Northern Arizona University, or Maricopa County Community College are owned or controlled by the same boards or federations. According to an excerpt from YRMC’s website contained in the record, YRMC is governed by a 12-member volunteer Board of Directors. In addition, an excerpt from a column entitled “From the Chairman’s Desk” in YRMC’s publication entitled *Your Health* from Spring 2008 states that, “YRMC has no shareholders. We answer to and are owned by the community we serve.” It appears, therefore, that YRMC is likely operated, supervised, or controlled by volunteers from the local community. Meanwhile, the record is devoid of any evidence as to the control of Arizona Western College, Northern Arizona University, or Maricopa County Community College District. 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 non-profit 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 YRMC within the common meaning of this term. For example, the Clinical Experience Agreement between YRMC and Maricopa County Community College District states that “The parties are not business associates under the Health Insurance Portability and Accountability Act.” Moreover, the agreement includes an independent contractor provision, which specifically states that “college faculty, staff, and students are not officers, agents, or employees of the Agency.”

Additionally, the agreements between YRMC and Arizona Western College and Northern Arizona University contain no provisions indicating that YRMC is operated by either of these institutions. The agreement between YRMC and Arizona Western College contains a cooperation clause (Article XIII), which states that, “The Director of Nursing, or official representative, namely, the instructional faculty member, will cooperate with and work closely with the Health Agency Assistant Administrator in Charge of Patient Care or official representative, namely, the staff nurses and Supervisors, in the conduct of the clinical experience.” The agreement between YRMC and Northern Arizona University indicates that neither party to the agreement shall use the name of the other in publicity or advertising without prior written approval, and further indicates that each party will maintain their own insurance for liabilities arising from their own employees and agents.

None of these agreements indicate that YRMC is or will be operated by the institutions of higher education named therein. It cannot be inferred, therefore, from associations of such a limited scope, that YRMC is being operated by any of these institutions 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 YRMC, 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 YRMC is a member, branch, cooperative, or subsidiary of Arizona Western College, Northern Arizona University, or Maricopa 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 YRMC and the above-named entities indicate relationships below that of even an agent or principal, particularly since the agreement between YRMC and Maricopa County Community College specifically states that an independent contractor relationship exists between YRMC and the college's faculty and staff. As such, there appears to be no significant relationship between YRMC and any of the three 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 YRMC is not included in the statutory definition of an institution of higher education based on its claimed relationship with Arizona Western College, Northern Arizona University, or Maricopa County Community College. Therefore, the petitioner does not qualify for an exemption from the H-1B cap as a third-party employer employing a beneficiary at a nonprofit entity related to or affiliated with an institution of higher education under section 214(g)(5)(A) of the Act.

As the evidence of record does not substantiate that YRMC is related or affiliated with Arizona Western College, Northern Arizona University, or Maricopa County Community College District, the petitioner has not established that the beneficiary qualifies for exemption from the H-1B cap under 8 U.S.C. § 1184(g)(5)(A).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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