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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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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 05 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,

Michael T. Kelly
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 is a non-profit acute care hospital with 185 employees. It seeks to employ the beneficiary as a medical technologist 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 concluding that the petitioner failed to establish that the beneficiary qualifies for an exemption to the numerical cap because of the petitioner's affiliation with an institution of higher education. The director bases this conclusion on her finding that the beneficiary will not be "working in the actual program administered and managed jointly by the petitioner and institution of higher education"

On appeal, counsel argues that there is no requirement that the beneficiary work in the actual program administered and managed jointly by the petitioner and institution of higher education, as long as the petitioner is a qualifying institution, and not a third-party petitioner.

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 documentation. The AAO reviewed the record in its entirety before reaching its decision.

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2009 (FY09) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

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. On April 7, 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, which covers employment dates starting on October 1, 2008 through September 30, 2009.

The petitioner filed the Form I-129 on December 28, 2008 and requested a starting employment date of December 15, 2008. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 7, 2008 and requesting a start date during FY09 must be rejected. However, because the petitioner indicated on the Form I-129 that it is a nonprofit organization or entity related to or affiliated with an institution of higher education, and thus exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director when it was initially received by the service center.

The petitioner indicated that the beneficiary would be employed at its location in Hugo, OK. The support letter stated that the beneficiary will work as a medical technologist, including analyzing human fluid samples, assisting doctors and nurses in choosing the correct lab tests, interpreting results, recognizing abnormalities, and monitoring analytical devices. The petitioner also submitted the beneficiary's credentials, including CGFNS Certification as a Clinical Laboratory Scientist and Certification as a Medical Technologist from the American Medical Technologists, and an education evaluation finding that the beneficiary has the U.S. equivalent of a bachelor's degree in medical technology from a regionally accredited college or university in the United States.

On January 2, 2009, the director issued an RFE requesting evidence that the petitioner qualifies for an exemption to the H-1B cap. In response, counsel submitted, in pertinent part, the following documentation:

- A Clinical Rotation Agreement between Kiamichi Technology Center School of Practical Nursing (KTC) and the petitioner;
- A letter from KTC, which states that the petitioner's facility is the chief learning site for their practical nursing students;
- A copy of an Agreement between Eastern Oklahoma State College and the petitioner; and
- A letter from Eastern Oklahoma State College and the petitioner, which states that 18% of Eastern's nursing program students gain their clinical experience at the petitioner's facilities.

The director denied the petition on January 21, 2009.

On appeal, counsel argues that there is no requirement that a beneficiary work in the actual program that is administered and managed jointly by the institution of higher education.

While the AAO agrees with counsel that there is no requirement that a beneficiary work in the actual program that is administered and managed jointly by the institution of higher education, the AAO still finds that, upon review, the petitioner has not established that it is exempt from the FY09 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 (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).

II. Analysis

The AAO finds that neither the statutory language nor the legislative history demonstrates that Congress intended to exempt all nonprofit organizations that provide educational benefits to the United States. Rather, the “[c]ongressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities” Memo from Michael Aytes, Assoc. Dir. for Domestic Operations, U.S. Citizenship and Immigration Services, U.S. Dept. Homeland Sec., to Reg. Dirs. & Serv. Ctr. Dirs., *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-*

First Century Act of 2000 (AC21) (Public Law 106-313) at 3 (June 6, 2006) (hereinafter referred to as "Aytes Memo").

In this matter, counsel for the petitioner asserts that the petitioner 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, counsel claims that the affiliation between the petitioner and KTC as well as Eastern Oklahoma State College qualifies the petitioner to file H-1B cap-exempt petitions.

A. "Exempt Employers"

If the petitioner is an exempt employer, i.e., an institution of higher education or a related or affiliated nonprofit entity, then 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 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.

As such, while the AAO does not disagree with the director's conclusion in this matter, the director should have first determined whether the petitioner is "related to or affiliated with" KTC or Eastern Oklahoma State College, such that it could be considered an exempt employer under 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* 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 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") (June 6, 2006) (hereinafter referred to as "Aytes Memo").

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 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 it satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act in order for the beneficiary to be exempt from the FY09 H-1B cap. 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.¹

As indicated above, the petitioner submitted copies of its agreements with KTC and Eastern Oklahoma State College in support of its claim that it is affiliated with an institution of higher education.

First, the AAO will consider the relationship between the petitioner and KTC. It should be noted that the petitioner did not demonstrate that KTC is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that KTC is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the agreement with KTC states, in pertinent part, as follows:

[11.] DISCLAIMER OF INTENT TO BECOME PARTNERS

The Facility and the School shall not by virtue of this Agreement be deemed to be partners or joint venturers. Neither party shall incur any financial obligation on behalf of the other.

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 by the same board or federation.

¹ This reading is consistent with the Department of Labor's regulation at 20 C.F.R. § 656.40(e)(ii), which is identical to 8 C.F.R. § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated". The Department of Labor explained in the supplementary information to its ACWIA regulations that it consulted with the former INS on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

Upon review, the record does not establish that the petitioner and KTC are owned or controlled by the same boards or federations. 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 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 the petitioner within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and KTC is one between two separately controlled and operated entities. According to the Agreement, the petitioner and KTC are not even partners in a joint venture. 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, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. There is no indication whatsoever from the evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of KTC. 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).

Next, the AAO will consider the relationship between the petitioner and Eastern Oklahoma State College. The letter from Eastern Oklahoma State College states that the petitioner is one of a number of hospitals where Eastern Oklahoma State College nurses receive clinical experience. Eastern Oklahoma State College estimates that approximately 18% of its nursing students receive clinical training at the petitioner's facility. The Agreement between Eastern Oklahoma State College and the petitioner does not clarify whether a partnership exists and states that the general purpose of the agreement is for the petitioner to provide facilities and resources for clinical laboratory experience in nursing. Moreover, other than providing space and opportunities for observation, it does not appear that the petitioner will have an active role in Eastern Oklahoma State College's program. According to the Agreement, all instruction and supervision of students is provided by school faculty.

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 by the same board or federation.

Upon review, the record does not establish that the petitioner and the Eastern Oklahoma State College are owned or controlled by the same boards or federations. 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 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 the petitioner within the common meaning of this term. As depicted in the record, the relationship that exists between the petitioner and the Eastern Oklahoma State College is one between two separately controlled and operated entities. It is not even clear that the petitioner has a role in the Eastern Oklahoma State College's program other than to provide space and opportunities for observation. 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, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms. There is no indication whatsoever from the evidence submitted that the petitioner is a member, branch, cooperative, or subsidiary of the Eastern Oklahoma State 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; *see also Webster's New College Dictionary* at 699.

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. Therefore, the petitioner does not qualify for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act.

B. "Jointly Administered Program"

The decision of the director appeared to bypass this analysis and instead focused on whether the beneficiary would be working in a jointly administered program. According to the Aytes Memo, however, the analysis of program participation only occurs when it has been determined that the beneficiary will be employed on-site "at" an institution of higher education or a related or affiliated nonprofit entity by a third party petitioner. In other words, according to the Aytes Memo, the *locus actus*, or place of performance, is paramount in determining whether a petitioner qualifies for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act. It is clear from the evidence presented in this matter that the beneficiary will be employed at the petitioner's facilities and, therefore, does not qualify for the third-party employer exception discussed in the Aytes Memo. As such, while the director's conclusion that the petitioner failed to establish it is exempt from the H-1B cap pursuant to section 214(g)(5)(A) of the Act will be affirmed, the director's analysis regarding the beneficiary's program participation or lack thereof will be withdrawn.

III. Conclusion

Upon review, the petitioner has not established that it is exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act. Accordingly, the petition must be denied.² 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 with a start date of October 1, 2010, accompanied by evidence to show eligibility under the technical requirements at 8 C.F.R. § 214.2(h).

The appeal will be dismissed and the petition denied. 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.

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

² 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 generally* USCIS Adj. Field Manual 31.3(g)(13) (2009). 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.