

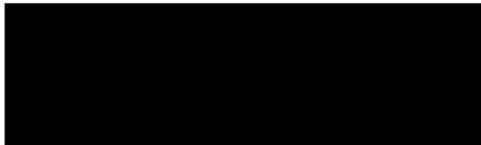
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: [REDACTED] Date: SEP 30 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)

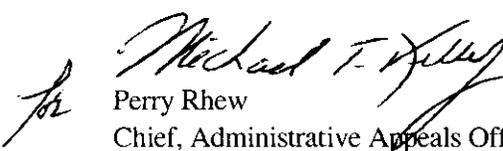
ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 visa petition the petitioner stated that it is a hospital. In order to employ the beneficiary in a position it designates as a medical technologist, 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, finding that its approval is barred by the numerical cap on H-1B visa petitions. On appeal, the petitioner asserted that the petitioner is exempt from the numerical cap. In support of that contention, the petitioner submitted additional evidence.

The AAO bases its decision upon its review of the entire record of proceedings, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's attached exhibits in support of the appeal.

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 November 2008. 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 November 10, 2008. Unless this visa petition is exempt from the cap, therefore, it cannot be approved. At 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) of the Act, 8 U.S.C. § 1184(g)(5).

Section 214(g)(5) of the Act states, in pertinent part:

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

(A) 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.

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization; or

(C) has earned a master's or higher degree from a United States institution of higher education . . . until the number of aliens who are

exempted from such numerical limitation during such year exceeds 20,000.

The petitioner is a hospital. The record contains no indication that the petitioner is a nonprofit research organization or a governmental research organization, nor does it claim to be. The beneficiary does not, therefore, qualify for an exemption pursuant to section 214(g)(5)(B) of the Act. The record contains no indication that the beneficiary has a master's or higher degree from a U.S. institution of higher education, and the beneficiary has not, therefore, been shown to qualify for an exemption pursuant to section 214(g)(5)(C) of the Act. The issue is narrowed to whether the beneficiary qualifies for an exemption pursuant to section 214(g)(5)(A) of the Act based on the petitioner. The petitioner is not, itself, an institution of higher learning. The issue is narrowed, yet further, to whether the petitioner is a nonprofit entity that is related or affiliated to an institution of higher education.

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

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 Interoffice Memorandum from ██████████ 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 ██████████ 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 record contains a document issued to the petitioner by the U.S. Internal Revenue Service (IRS) on February 10, 1965. Although that document is imperfectly legible, it appears to indicate that the IRS held that the petitioner was an organization described in section 501(c)(3) of the Internal Revenue Code, that is, a tax-exempt nonprofit organization. Another document issued by the IRS on December 17, 2008, and submitted on appeal, reiterates that the petitioner was accorded that status during February 1965. The AAO finds that the petitioner is a nonprofit entity.

The record contains an agreement, dated March 25, 2003, between the petitioner and ██████████ Community College. That agreement delineates the college's responsibilities in providing student nurses to the petitioner and the petitioner's responsibilities in accepting those student nurses.

The record contains another agreement, effective August 16, 2007, delineating the responsibilities of the ██████████ Department of Radiology Education in providing radiologic technician students to the petitioner and the petitioner's responsibilities in accepting them.

The petitioner, which is the hospital at which the beneficiary would work, relies upon the relationship between itself and the two colleges in claiming that the beneficiary is exempt from the H-1B cap. Therefore, in order for the beneficiary to be exempt from the FY09 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. 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>1</sup>

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<sup>1</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).

Notwithstanding that both of the petitioner's agreements with colleges refer to the petitioner as the "Affiliate," they do not demonstrate that the petitioner is affiliated with an institution of higher education within the meaning of section 214(g)(5) of the Act. Neither agreement suggests that the petitioner is associated with the colleges, or either of them, through shared ownership or control by the same board or federation, or that either college operates the petitioner, or that the petitioner is a member, branch, cooperative, or subsidiary of either college. That the colleges send students to the petitioning hospital to gain experience is insufficient to qualify the petitioner as an affiliate within the meaning of section 214(g)(5)(A) of the Act.

For the reasons discussed above, the AAO finds that the director was correct in her determination that the record before her established that the beneficiary is subject to the numerical cap. The AAO also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the director's decision to deny the petition shall not be disturbed. The appeal will be dismissed and the petition denied on this basis.

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.