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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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Services



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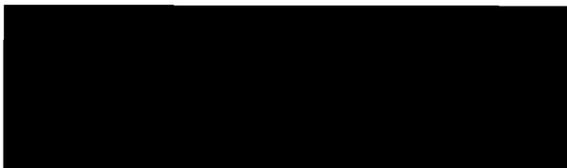
IN RE:

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.

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 sustained, and the petition will be approved.

I. Procedural and Factual Background

The petitioner is a private non-profit pediatric healthcare provider with 4,526 employees that seeks to employ the beneficiary from July 25, 2009 to July 24, 2012. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on July 3, 2009, because she found that the petitioner failed to establish that the beneficiary qualifies for exemption to the numerical cap on H-1B nonimmigrants based on the petitioner's relation to or affiliation with an institution of higher education. Specifically, the director found that the evidence fails to demonstrate that the beneficiary is in or directly involved with the pediatric training program of the [REDACTED]

On appeal, counsel for the petitioner claims that the petitioner meets the requirements for H-1B cap-exempt status on the basis of its university affiliation. Counsel further contends that the director's interpretation of the regulatory definition governing related and affiliated nonprofit entities was erroneous, thereby resulting in an unwarranted denial of the petition.

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. As of April 7, 2008, U.S. Citizenship and Immigration Services (USCIS) had received sufficient numbers of H-1B petitions to reach the general 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 March 23, 2009 and requested a starting employment date of July 25, 2009. 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 H-1B Data Collection and Filing Fee Exemption Supplement 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.

On May 2, 2009, the director issued a request for evidence (RFE) asking the petitioner to submit substantiating documentary evidence that the petitioner qualifies for an exemption to the H-1B cap. Specifically, the director found that the petitioner indicated that it is exempt as a third party

entity related to or affiliated with the [REDACTED] and is not itself a qualifying institution. Therefore, the RFE requested that the petitioner provide a copy of the contract showing where the work will be performed as well as how the beneficiary's duties are related to the furtherance of the [REDACTED] as well as the percentage of time that the beneficiary will work at [REDACTED]

In response, counsel argued that the petitioner is not a third party petitioner, but instead is a qualifying cap-exempt entity. In support of this argument, counsel submitted inter alia the petitioner's Affiliation Agreement with [REDACTED], which is a medical school of the [REDACTED]. The Agreement indicates in part the following:

- The petitioner's [REDACTED] must be a full-time faculty member at [REDACTED] preferably [REDACTED]. Further, although [REDACTED] is appointed by the petitioner's Board, the appointment must be based in part upon the recommendation of the President of [REDACTED].
- All of the full-time salaried pediatric faculty of [REDACTED] have had appointments as members of the petitioner's medical staff and constitute one half of the petitioner's medical staff.
- All members of the petitioner's clinical leadership staff must have an appointment to the faculty of [REDACTED].
- Any dispute that results in a claim by the petitioner will be examined by the Chief Business Officer of [REDACTED]. Any dispute that results from the Agreement may be referred to mediation.

The director found counsel's response to the RFE insufficient, and denied the petition on July 3, 2009.

On appeal, counsel notes that the petitioner is still located on [REDACTED] Medical School's campus and has provided a copy of a map of the campus.¹ Counsel points out that under a Texas statute, "[t]he sole consideration for this grant of land was the condition that [the petitioner] would 'construct and operate a children's hospital as a teaching hospital fully integrated with the medical program of the [REDACTED]'" Tex. Rev. Civ. Stat. Ann. art. 2603j, §§ 1-4. Counsel also includes evidence that all research conducted at the petitioner's facilities is reviewed by UTSW's Institutional Review Board. Counsel argues that "[t]he cumulative total of the associations between [the petitioner] and UTSW reveals a deeply imbedded relationship. . . ."

II. 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

¹ It is noted that the evidence of record indicates that the land the hospital is located on technically belongs to the petitioner, [REDACTED]. The land was conveyed to the petitioner in exchange for, inter alia, (1) another plot of land located elsewhere, (2) the construction of a children's hospital on the land being conveyed by [REDACTED] and (3) the children's hospital being made available as a full-time teaching facility for [REDACTED]. See Tex. Rev. Civ. Stat. Ann. art. 2603j, § 2 (1961).

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.

Pursuant to 8 C.F.R. § 214(h)(19)(iv), a nonprofit organization or entity is defined as:

- (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.

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of the American Competitiveness and Workforce Improvement Act of 1998, 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 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). It is presumed that Congress is aware of USCIS regulations at the time it passes a law. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

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) Connected or 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.²

III. Analysis

As a preliminary matter, it must first be determined (1) whether [REDACTED] is an institution of higher education and (2) whether the petitioner is a nonprofit entity. First, sufficient evidence has been submitted to establish that [REDACTED] is an institution of higher education as that term is defined at section 101(a) of the Higher Education Act of 1965. Second, the petitioner has also demonstrated that it qualifies as a nonprofit entity for purposes of 8 C.F.R. § 214(h)(19)(iii)(B) as (1) it is currently exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code and (2) its Internal Revenue Service 501(c)(3) designation is based in part on the petitioner's organization and operation for educational and/or research purposes. *See* 26 C.F.R. §§ 1.501(c)(3)-1(d)(3) and (5)

Further, it must also be noted that, 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

² 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).

related or affiliated nonprofit entity is sufficient in itself to meet the plain statutory requirements of section 214(g)(5)(A) of the Act. The AAO finds that the director applied an incorrect analysis of the cap-exemption issue here, in that she focused on the question of whether the beneficiary would be working in a “jointly managed program that is affiliated with an institution of higher education.” Accordingly, the AAO withdraws the director’s analysis.

Next, it must now be determined whether the petitioner, a nonprofit entity, is related to or affiliated with UTSW, an institution of higher education, pursuant to one of the three prongs of 8 C.F.R. § 214(h)(19)(iii)(B). Upon review, it cannot be found that the petitioner is related to [REDACTED] under the first prong of 8 C.F.R. § 214(h)(19)(iii)(B) in that the petitioner and [REDACTED] have different boards that ultimately control these two separate entities. It also cannot be found that the third prong has been satisfied in that there is insufficient evidence to find that the petitioner is attached to [REDACTED] as a member, branch, cooperative, or subsidiary.

With regard to the second prong, the common meaning of the term “operate,” as defined in *Webster’s New College Dictionary*, 3rd edition, is “[t]o control or direct the functioning of” or “[t]o conduct the affairs of : MANAGE <operate a firm>.” Thus, while an institution of higher education may not have ownership and/or ultimate control of a nonprofit entity, a petitioner may still qualify under this second prong of the definition of affiliated or related nonprofit entity by establishing that the institution of higher education directs the day-to-day functioning of and/or manages the daily affairs of the nonprofit entity.

Here, although the petitioner and [REDACTED] do not have shared ownership or control by the same board or federation, the AAO finds that sufficient evidence was submitted to establish that the petitioner and [REDACTED] are related based on the finding that the petitioner is operated by [REDACTED] which is an institution of higher education. Under a Texas statute, the petitioner was established to be a full-time teaching facility for [REDACTED] fully integrated with the medical program of [REDACTED]. More importantly, however, the petitioner’s CMO is an employee of [REDACTED] and all of the petitioner’s clinical leadership staff members are required to be faculty of [REDACTED]. The Chair of each academic department of [REDACTED] is also appointed as the Chair of the petitioner’s corresponding clinical department. In essence, the petitioner’s day-to-day functions and affairs are controlled or directed by [REDACTED] staff, with daily management of care residing in [REDACTED]. The AAO therefore finds sufficient evidence in the record to conclude that [REDACTED] operates the petitioner. Therefore, under the appropriate three-prong test of 8 C.F.R. § 214.2(h)(19)(iii)(B), it is evident that the petitioner is a nonprofit entity related to an institution of higher education in that it has satisfied the requirements of the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

IV. Conclusion

Consequently, the petitioner has demonstrated that it is a nonprofit entity related to an institution of higher education under 8 C.F.R. §214.2(h)(19)(iii)(B) and is therefore exempt from the FY09 H-1B cap pursuant to section 214(g)(5) of the Act. The director’s finding to the contrary is hereby withdrawn.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the director's decision will be withdrawn, and the petition will be approved.

ORDER: The appeal is sustained. The director's decision is withdrawn, and the petition is approved.