



U.S. Citizenship
and Immigration
Services

(b)(6)



DATE **MAY 14 2014**

OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner submitted a Petition for a Nonimmigrant Worker (Form I-129) to the California Service Center on June 27, 2013. On the Form I-129 visa petition, the petitioner describes itself as a "medical" organization established in 2005. In order to employ the beneficiary in what it designates as a computer system designer position, the petitioner seeks 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on August 16, 2013, finding that its approval is barred by the numerical limitation, or "cap," on H-1B visa petitions. Specifically, the director determined that the petitioner had not established that it was a nonprofit entity related to or affiliated with an institution of higher education. On appeal, counsel for the petitioner asserts that the director's basis for denial of the petition was erroneous and contends that the petitioner satisfied all evidentiary requirements.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

I. Introduction

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2013 (FY13) 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. The numerical limitation does not apply to a nonimmigrant alien issued a visa or otherwise provided status under § 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," or "is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization." Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000).

On June 11, 2012, U.S. Citizenship and Immigration Services (USCIS) issued a notice that it had received a sufficient number of H-1B petitions to reach the H-1B cap for Fiscal Year 2013 (FY13), which covers employment dates from October 1, 2012 through September 30, 2013.

The petitioner filed the Form I-129 on June 27, 2013 and requested an employment date of June 1, 2013. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after June 12, 2012 and requesting a start date during FY13 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 FY13 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director. The director denied the petition on August 16, 2013 and the decision is now before the AAO on appeal.

Upon review, the petitioner has not established that it is exempt from the FY13 H-1B cap pursuant to section 214(g)(5) of the Act.

II. Factual and Procedural Background

On the Form I-129 H-1B Data Collection Supplement (page 17), the petitioner checked the box for "Yes," in response to the question, "Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)?" for both Part B (Fee Exemption and/or Determination) and Part C (Numerical Limitation Exemption Information).

In its letter of support dated June 4, 2013, the petitioner provided a summary of the terms of its oral agreement with the beneficiary, which identifies the goals, duties, and salary of the proffered position, as well as the beneficiary's qualifications. Other than indicating on the Form I-129 that the petitioner's business was "medical," no explanation or additional information regarding the nature of the petitioner's operations, or its claimed affiliation with or relation to an institution of higher education, was submitted.

In further support of the petition, the petitioner provided a Labor Condition Application (LCA); documents regarding the beneficiary's credentials: the petitioner's certificate of incorporation and bylaws; and an undated seven-page document entitled "Agreement" between the petitioner and the [REDACTED] of the [REDACTED] (hereinafter referred to as [REDACTED]). According to Exhibit A of the Agreement, the petitioner, as a vendor, will perform a non-governmental clinical study for the sponsor, [REDACTED]. The stated validity date of the agreement is from January 15, 2013 through January 14, 2014; however, none of the submitted documents are signed by the parties.

The director issued an RFE on July 8, 2013. The director requested, *inter alia*, additional documentation to establish that the petitioner qualified for cap exemption as claimed in the petition, specifically noting that the agreement with the [REDACTED] was not sufficient to establish the existence of an affiliation with or relationship to an institute of higher education.

In a response dated July 31, 2013, the petitioner again addressed the details of the proffered position, and noted that the petitioner "has been outsourcing our computer software design to [REDACTED] (hereinafter referred to as [REDACTED]). The petitioner submitted a copy of a Product Development Services Agreement between [REDACTED] and the [REDACTED] dated February 15, 2011 in support of this statement. In its response letter, the petitioner claimed that the beneficiary would work closely with its team of computer software

consultants at [REDACTED] as well as with the [REDACTED] information technology team "in designing, creating, and maintaining the human interface program/device between our patent-protected chest pain algorithm software (the SYSTEM) and the hospital's EMR (CERNER system)." The petitioner described in further detail the nature of the duties of the proffered position, and submitted copies of job advertisements for similar positions in support of the contention that the proffered position qualifies as a specialty occupation.

The petitioner also submitted a copy of its organizational chart, an additional letter from its Chief Executive Officer discussing his personal knowledge of the beneficiary's qualifications, additional information pertaining to the [REDACTED] and [REDACTED] and copies of the petitioner's various tax documents, including copies of its request for federal tax exempt status on Internal Revenue Service (IRS) Form 1023, and its New York State Department of Law Form CHAR410, Registration Statement for Charitable Organizations. The petitioner omitted, however, a specific statement outlining the petitioner's affiliation with or relationship to an institute of higher education.

The director denied the petition on August 16, 2013, finding that the evidence of record did not establish that the petitioner was related to or affiliated with an institution of higher education. Specifically, the director found that the [REDACTED] did not appear to qualify as an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

On appeal, counsel states on the Form I-290B that "the [REDACTED] is affiliated with the [REDACTED] (a highly recognized national institution of higher learning awarding bachelor and advanced degrees)" and that "[t]he [REDACTED] and [REDACTED] share board members." Counsel concludes that based on this evidence, "it is clear that the petition should have been approved."

III. Law and Analysis

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.

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 Michael Aytes, Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, 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 [entity] 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 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

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:

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:

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).

- (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.

Although not addressed by the director, the AAO will first address the issue of whether the petitioner qualifies as a nonprofit or tax exempt organization as set forth above.

A review of the record demonstrates that the petitioner failed to establish that it is a nonprofit entity. Specifically, the petitioner provided its Internal Revenue Service (IRS) Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, and a copy of its Form 990-N, Electronic Notice (e-Postcard) for Tax Exempt Organizations not Required to File Form 990 or 990-EZ. The record does not contain, however, evidence such as documentation from the IRS indicating that the petitioner in fact was granted federal tax exempt status under section 501(c)(3) of the Internal Revenue Code after applying for said status in 2007. Moreover, the copy of its Form 990-N submitted in the record clearly states that "this image is provided for your records only" and that it is not to be mailed to the IRS. The petitioner has not demonstrated that it filed a Form 990-N to corroborate the assertion that it held federal tax exempt status. Based on this lack of evidence, the AAO cannot find that the petitioner meets the definition of a nonprofit entity as defined at 8 C.F.R. § 214.2(h)(19)(iv).

Turning to the director's basis for denial, the AAO finds, upon a complete and thorough review of the record of proceeding, that the petitioner has not provided sufficient probative evidence of a relationship to or affiliation with an institution of higher education as that term is defined by section 101(a) of the Higher Education Act of 1965. The petitioner represents that it has engaged in an "Agreement" with the [REDACTED]. However, this agreement does not establish an affiliation with or relationship to an institution of higher education as described above.

The [REDACTED] of the [REDACTED] is, according to its website, "a 501(c)(3) non-profit educational corporation."² Although it also claims on its website that it is "[REDACTED]", it is not an institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. § 1001(a). To satisfy this definition, the institution must meet all five prongs of the definition. In this case, the petitioner has failed to demonstrate that the [REDACTED] 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, as required under subsection (1); is legally authorized within the State of New York to provide a program of education beyond secondary education under subsection (2); provides an educational program for

²See [https://\[REDACTED\]](https://[REDACTED])

which the institution awards a bachelor's degree nor does it provide not less than a 2-year program that is acceptable for full credit toward such a degree under subsection (3); is accredited by a nationally recognized accrediting agency or association nor has it been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status under subsection (5).

Although counsel on appeal asserts that the [REDACTED] and the [REDACTED] are affiliated and that they share board members, this assertion is not at issue here. The issue before the AAO is whether the *petitioner*, the entity which will employ the beneficiary onsite at its office in [REDACTED] New York, is affiliated with or related to an institute of higher education. The fact that the petitioner has an "agreement" with an educational corporation that may or may not be "connected" to an institute of higher education will not satisfy the petitioner's burden of proof under these circumstances.³

The record lacks evidence demonstrating that the petitioner's agreement is with an institution of higher education as defined under section 101(a) of the Higher Education Act of 1965. As previously noted, there is no claim or contention at any time in the record that the petitioner is affiliated with or related to an institution of higher education, aside from checking the corresponding boxes in Parts B and C on the H Supplement to the Form I-129.

The petitioner has not provided sufficient evidence to establish that the instant petition seeks an H-1B visa for a nonimmigrant alien who will be employed by a nonprofit organization or entity related to or affiliated with an institution of higher education. The AAO thus finds that the evidence of record does not establish that this petition is exempt from the H-1B visa cap for this additional reason.

Further, since the petitioner has failed to demonstrate exemption from the numerical cap, the petition must also be denied for failure to submit the required filing fee. That is, the Omnibus Appropriations Act of FY 2005 was signed into law on December 8, 2004, which reinstated and raised the ACWIA fee for H1-B petitions to \$1,500. Petitioners who employ a total of no more than 25 full-time equivalent employees in the United States, including any affiliate or subsidiary, may submit a reduced ACWIA fee of \$750. According to section 214(c)(9)(A) of the Act, certain entities, including nonprofit organizations or entities related to or affiliated with an institution of higher education, are still exempt from the ACWIA fee.

As discussed above, the petitioner failed to demonstrate that it is a nonprofit organizations or entities related to or affiliated with an institution of higher education. Therefore, the petitioner was

³ The petitioner claims that the beneficiary will be employed onsite at its offices in [REDACTED] New York, on both the Form I-129 petition and the certified LCA. Therefore, further analysis of whether the petitioner qualifies 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 is not warranted here.

not exempt from the ACWIA fee requirement and failed to pay the required filing fee for this petition. For this additional reason, the petition may not be approved.

IV. Conclusion

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Moreover, when the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.⁴ In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

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

⁴ As the grounds identified are dispositive of the petitioner's eligibility, the AAO need not address the additional issues in the record of proceeding that preclude approval of the H-1B petition.