



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: OCT 17 2014

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

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: SELF-REPRESENTED

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 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 submitted a Petition for Nonimmigrant Worker (Form I-129) to the California Service Center on December 2, 2013. On the Form I-129 visa petition, the petitioner describes itself as a [REDACTED] non-profit high school" established in [REDACTED]. In order to employ the beneficiary in what it designates as a special education teacher 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 March 19, 2014, 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, 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 us 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, Notice of Appeal or Motion, and supporting materials. We reviewed the record in its entirety before issuing our decision.¹

I. INTRODUCTION

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) 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 8, 2013 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 FY14, which covers employment dates starting on October 1, 2013 through September 30, 2014.

The petitioner filed the Form I-129 on December 2, 2013 and requested a starting employment date of November 20, 2013. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after April 8, 2013 and requesting a start date during FY14 must be rejected. However, in this matter the petitioner indicated on the Form I-129 that it was a nonprofit 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). Thus, the petition was adjudicated by the director as a cap exempt case,

¹ We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

even though the petition was filed after April 8, 2013. The director denied the petition on March 19, 2014 and the decision is now before us on appeal.

Upon review, the petitioner has not established that it is exempt from the FY14 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 (pages 18-19), the petitioner checked the boxes for "Yes" in response to the questions, "Are you a primary or secondary education institution?" and "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 Part B (Fee Exemption and/or Determination). On the Form I-129 H-1B Data Collection Supplement (page 19), the petitioner checked the box indicating that "The petitioner is a nonprofit 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 Part C (Numerical Limitation Exemption Information).

In its letter of support dated November 25, 2013, the petitioner claimed that it is "a public charter high school, i.e., a public, nonreligious, nonprofit educational institution that is fully accredited by, and operates within the [REDACTED] being funded by state and county per pupil allotments, as well as federal grants."

Regarding the proffered position, the petitioner stated that it required the services of the beneficiary as a special education teacher, and claimed that her duties would include the following:

Teach high school subjects to educationally and physically disabled students, using special education techniques to meet the students' special needs. Adapt curriculum and develop individual special education plans to ensure optimal academic progress and to improve the development of students' skills and abilities. Teach and enforce rules for socially acceptable behavior. Maintain academic records and prepare reports on students and activities.

In further support of the petition, the petitioner submitted additional evidence, including a Labor Condition Application (LCA); copies of the beneficiary's resume, diplomas, and transcripts; a copy of the beneficiary's foreign academic credentials evaluation; a copy of a July 25, 2013 letter from the Internal Revenue Service (IRS) verifying the petitioner's tax exempt status; a copy of a Memorandum of Understanding (MOU) between the petitioner and [REDACTED]; and a copy of the petitioner's "Operational Plan."

On December 12, 2013, the director issued a request for evidence. Specifically, the director requested additional evidence in support of the petitioner's contention that it was a nonprofit organization or entity related to or affiliated with an institution of higher education. In a facsimile response submitted on March 6, 2014, the petitioner contended that it participates in a cooperative with [REDACTED] and thus is exempt from the annual numerical limitation.

The petitioner also submitted two letters from [REDACTED] in support of its claimed affiliation, as well as a copy of the beneficiary's educator license.

On March 19, 2014, the director denied the petition, finding that the evidence of record was insufficient to establish that the petitioner was a nonprofit organization or entity related to or affiliated with an institution of higher education. On appeal, the petitioner contends that the denial was erroneous, and requests that we reconsider the evidence previously submitted with regard to its relationship with [REDACTED]

III. LAW

The petitioner claims that it is a nonprofit 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).

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 memo from Michael Aytes. 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,² 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, we find 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 we will defer to the Aytes Memo in making our 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 FY14 H-1B cap. Reducing the provision to its essential elements, we find 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:

² Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

- (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.³

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:

- (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 issue before us, therefore, is whether the petitioner is 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.

IV. ANALYSIS

Turning to the director's basis for denial, we find that her conclusion that the petition was not exempt from the FY14 cap was correct.

A. Non-Profit Status

One of the first factors to address is whether the petitioner has established that it is a nonprofit entity. We observe that the petitioner has submitted a letter from the Internal Revenue Service dated July 25, 2013 confirming that it has been granted tax exempt status under section 501(c)(3)

³ This three-part reading is consistent with the Department of Labor's regulation at 20 CFR § 656.40(e)(ii), which is identical to 8 CFR § 214.2(h)(19)(iii)(B) except for an additional comma between the words "federation" and "operated." The Department of Labor explains in the supplementary information to its American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) regulations that it consulted with the former Immigration and Naturalization Service (INS) on the issue, supporting the conclusion that the definitions were intended to be identical. See 65 Fed. Reg. 80110, 80181 (December 20, 2000).

of the Internal Revenue Code. Therefore, we find that the petitioner has established that it is a nonprofit organization as defined at 8 C.F.R. § 214(h)(19)(iv).

B. Related to or Affiliated with an Institution of Higher Education

However, upon a complete and thorough review of the record of proceeding, we find that the petitioner has failed to submit sufficient 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.

In this matter, the petitioner asserts that it 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, the petitioner claims that its cooperative agreement with [REDACTED] qualifies it to file H-1B cap-exempt petitions.

As noted previously, when determining whether a nonprofit entity is related to or affiliated with an institution of higher education, one of the following must be demonstrated:

1. The nonprofit entity is connected or associated with an institution of higher education through shared ownership or control by the same board or federation;
2. The nonprofit entity is operated by an institution of higher education; or
3. The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

In order to meet item one, above, shared ownership or control may be demonstrated when it is shown that the same "board" or "federation," such as a board of education or a board of regents, operates both the nonprofit entity and the institution of higher education. When deciding whether a nonprofit entity is operated by an institution of higher education under item two, above, adjudicators should use the common meaning of the term "operate" defined in *Webster's New College Dictionary*, 3rd edition, as "[t]o control or direct the functioning of" or "[t]o conduct the affairs of : MANAGE <operate a firm>." When evaluating whether a nonprofit entity qualifies under item three, above, we will rely on the definitions of member, branch, cooperative, and subsidiary outlined in *Black's Law Dictionary*, Ninth Edition⁴:

Member. One of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization—including the rights of making, debating, and voting on motions—except to the extent that the organization reserves those rights to certain classes of membership.

⁴ In the supplementary information to the interim regulation now found at 8 CFR § 214.2(h)(19)(iii)(B), the former INS stated that it drafted the regulation "drawing on generally accepted definitions of the terms." See 63 Fed. Reg. 65658 (November 30, 1998).

Branch. An offshoot, lateral extension, or division of an institution.

Cooperative. An organization or enterprise owned by those who use its services.

Subsidiary. A corporation in which a parent corporation has a controlling share.

All four of the above described terms indicate, at a bare minimum, some type of shared ownership or control or both.

We will now consider the relationship between the petitioner and [REDACTED]. It should be noted that the petitioner did not demonstrate that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner could demonstrate that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the record fails to establish that the entities are affiliated as required by 8 C.F.R. § 214.2(h)(19)(iii)(B).

As previously noted, the petitioner submitted a copy of its MOU with [REDACTED] executed in August of 2013. The two-page MOU indicates that the purpose of the agreement is to outline the roles and responsibilities of both parties with regard to the provision of Service Learning opportunities to [REDACTED] students. Specifically, the MOU states, in the section entitled "Joint Responsibilities," in relevant part:

- A. The UNIVERSITY and the AGENCY enter into this affiliation for the purpose of educating and training a [REDACTED] hereinafter referred to as "student(s)".
- B. Both the UNIVERSITY and the AGENCY agree that the education and training of the student will complement the services and educational activities of the AGENCY; however, it is understood that the student will be under the supervision of an AGENCY staff member acceptable to the UNIVERSITY, and the UNIVERSITY will designate a faculty supervisor acceptable to the AGENCY;
- C. Both the UNIVERSITY and the AGENCY will maintain confidentiality of consumer and student records at all times.
- D. The UNIVERSITY is responsible for dismissal of a student for academic or disciplinary reasons, but the AGENCY maintains the right to remove a student from an affiliation if the student does not comply with the rules, policies, procedures, or standards of the AGENCY. In the event of the student's dismissal by the AGENCY, the UNIVERSITY must be notified. Both the UNIVERSITY and the AGENCY will determine jointly if and when a student should be permitted to return to the AGENCY and continue the Service Learning experience.

The petitioner also submitted several pages from its "Operational Plan," namely, pages 100 to 103, which discuss the petitioner's budget and accounting system. This document refers to the "Governing Board" as the body who will determine the protocol for the petitioner's business and financial services.

The petitioner also submitted two letters from [REDACTED]. The first letter, dated February 25, 2014, is from [REDACTED] Chair. Mr. [REDACTED] states in his letter that [REDACTED] "has a cooperative alliance with [the petitioner], pertaining to the joint operation of Research Programs, sharing control, proprietary responsibility, costs, benefits, resources, facilities, staff, faculty and students; additionally, both institutions utilize the results of the aforementioned research, which is fundamental for achieving our mutual fundamental goals of active learning and continuous innovation."

The second letter, dated March 5, 2014, is from [REDACTED], Associate Dean. Mr. [REDACTED] also describes [REDACTED] relationship with the petitioner, stating that "we participate in an affiliation cooperative with the [petitioner], a nonprofit charter school that provides its educational facility and designated active classrooms to approved university students, allowing them to experience a project based learning environment under the supervision and guidance of the partner school's designated teachers and coordinated by the university's responsible faculty."

Turning to the definition of an "affiliated or related nonprofit entity," we must first consider whether the petitioner has established that it is related to or affiliated with an institution of higher education 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 petitioner must establish that the same board or federation owns, directs, or otherwise exercises direct control over both the nonprofit entity and the institution of higher education. Nothing in the record, however, demonstrates or implies that the petitioner and [REDACTED] share common ownership or are controlled by the same board. Although the petitioner's Operational Plan refers to a "Governing Board" that has the authority to oversee the petitioner's budget and accounting systems, there is no evidence demonstrating that this Governing Board also owns or controls [REDACTED].

The record does not include evidence suggesting that the petitioner and [REDACTED] share common ownership or are controlled by the same board. Consequently, we find that the petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we must consider whether the petitioner has established that it is a related or affiliated nonprofit 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. Although the MOU outlines joint responsibilities shared by these two entities, it appears that the petitioner and [REDACTED] are separately controlled and operated entities. Although Mr. [REDACTED] references "sharing control" in his February 25, 2014 letter, he does not explain what "sharing control" pertains to or means. There is no provision in the MOU granting the [REDACTED] the right to manage the daily activities or functions of the petitioner. Instead, it appears that the petitioner allows [REDACTED] to assign current undergraduate or graduate students to work as "student-teachers" at the petitioner's charter school as part of a practical learning experience. While the MOU allows [REDACTED] to oversee students enrolled in this particular program at the petitioner's school, it does not grant [REDACTED] the right to operate or manage the petitioner's charter school as a whole. Accordingly, we find that the petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we consider whether the petitioner 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. As footnoted above, 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. Again 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* (9th Ed. 2009)(defining the terms member, branch, cooperative, and subsidiary).

We note specifically that the petitioner and the representatives of [REDACTED] contend that the petitioner is attached to [REDACTED] as a cooperative. However, as stated earlier, we interpret the term cooperative, as used in 8 C.F.R. § 214(h)(19)(iii)(B) cited above, to mean "an organization or enterprise owned by those who use its services." There is no evidence in the record to establish that the parties meet this definition. By definition, the users of the petitioner's and [REDACTED] services would be its students, and the students here do not own either organization. While the petitioner and [REDACTED] may collaborate generally in the education and training of [REDACTED] students, the petitioner has not demonstrated that it is attached to [REDACTED] in a cooperative relationship. Although the petitioner and [REDACTED] may have, as claimed by Mr. [REDACTED] a "cooperative affiliation," the record contains no evidence that the parties share the requisite ownership and control as required by the terms in this prong as defined above.

The petitioner also references an unpublished, non-precedent decision issued by this office in September 2006, in support of its claim that it has satisfied the third prong of 8 C.F.R. § 214(h)(19)(iii)(B).⁵ The petitioner is free, of course, to demonstrate that the facts of that case is similar to the facts of the instant case, to refer to the reasoning of that case, and to urge that the reasoning be extended to the instant case. However, the case cited has no probative value as precedent. Moreover, the petitioner has not furnished probative evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision and has not furnished evidence that the reasoning in that matter is reasoning that we currently follow. Further, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The record does not contain sufficient probative evidence that the petitioner is a nonprofit entity attached to an institution of higher education as a member, branch, cooperative, or subsidiary. Accordingly, we find that the petitioner has not met the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

C. Late Submitted Evidence

Subsequent to filing the Form I-290B with evidence on April 14, 2014, the petitioner submitted an additional letter, dated September 23, 2014, and a new Memorandum of Agreement between it and [REDACTED]. The new agreement is signed by the petitioner's representative on July 29, 2014 and signed

⁵ The petitioner mistakenly refers to this decision as a precedent decision.

by [REDACTED] representative on August 6, 2014 and covers the 2014-2015 school year. The new agreement establishes [REDACTED] at the petitioner's high school campus for dual-enrollment credit. It appears that [REDACTED] is a class taken by approved high school students for [REDACTED] credit.

Upon review, we find that the new agreement was not in effect when the petition was filed on December 2, 2013. Accordingly, the agreement is not relevant to this proceeding. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. 103.2(b)(1). Moreover, the new agreement sets out different terms and responsibilities between the petitioner and [REDACTED] and thus, appears to be a material change to the relationship between the petitioner and [REDACTED]. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

The petitioner's letter and new agreement do not establish that the beneficiary qualifies for an exemption from the Fiscal Year 2014 (FY14) H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

III. CONCLUSION

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. We thus find that the evidence of record does not establish that this petition is exempt from the H-1B visa cap.

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. at 128. Here, that burden has not been met.

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