



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF R-&S- PA

DATE: DEC. 2, 2015

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a “Physician Practices” firm, seeks to temporarily employ the Beneficiary as a “Physician” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The Petitioner filed a motion to reconsider, and the Director affirmed her decision to deny the petition. The Administrative Appeals Office (AAO) denied a subsequent appeal.¹ The matter is again before us on a combined motion to reopen and reconsider. The motion will be denied.

I. ISSUE

The issue before us is whether the Beneficiary is exempt from the H-1B numerical limitation.²

II. THE H-1B CAP

A. Legal Framework

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for individuals who are coming temporarily to the United States to perform services in a specialty occupation. 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. Section 214(g)(5) of the Act states, in pertinent part:

¹ The appeal was dismissed as moot based upon the approval of a visa petition filed on behalf of the Beneficiary by a different employer. In the instant motion, the Petitioner states that it still wishes to employ the Beneficiary and requests that we adjudicate on the merits.

² We conduct appellate review on a *de novo* basis. *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015); *see also* 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

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.

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 (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 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, 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:

- (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

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(3) Attached to an institution of higher education as a member, branch, cooperative, or subsidiary.³

B. Factual Background

1. H-1B cap

The Petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 20, 2013. The Petitioner indicated that the date of intended employment is from January 15, 2013, which falls under the fiscal year 2013 (FY13).⁴ As of June 12, 2012, U.S. Citizenship and Immigration Services (USCIS) had issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY13.

On the Form I-129 H-1B Data Collection Supplement at Page 19, Part C, the Petitioner checked box 1.d., indicating that it is "CAP Exempt." Also in Part C, the Petitioner checked box 3.d., indicating that the Petitioner would employ the Beneficiary at a qualifying institution that directly and predominantly furthers higher education or government research. The Petitioner did not claim any other exemption from the cap.

2. Place of Employment

In a letter dated October 1, 2013, the Petitioner indicated that it has "a contractual agreement with a non-profit organization, [REDACTED] with a hospital located at [REDACTED] FL [REDACTED] where the [B]eneficiary will work." The Petitioner described [REDACTED] as "one of the leading behavioral health care providers in facilities, services, budget and professional staff in the State of Florida," and claimed that it is an H-1B cap exempt facility affiliated with institutions of higher education.

³ 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 Immigration and Naturalization Service (INS) on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80,110, 80,181 (Dec. 20, 2000).

⁴ On the Labor Condition Application, the Petitioner indicated that the start date is November 15, 2013. While January 15, 2013, date on the Form I-129 may be a typographical error, "it is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

However, even if we assume that the intended start date is November 15, 2013, we note that FY 2014 H-1B cap was reached within the first week of April, and the instant petition is still subject to H-1B cap.

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C. Evidence

The record contains a letter from [REDACTED] dated January 6, 2013, which states that it "has a cooperative relationship with a number of partner institutions of higher education . . . aimed at advancing medical education and clinical practice," and that [REDACTED] and those institutions "jointly operate and share control over many educational programs." Further, it states:

- [REDACTED] is a Board Director of [REDACTED] and also serves as Executive Advisor to the President of [REDACTED] (former [REDACTED] [and]
- [REDACTED] is a Board of Director [sic] of [REDACTED] and also serves as Dean of the College of Psychology and Liberal Arts at the [REDACTED]

The letter also states that "employees of [REDACTED] become faculty members of the affiliated universities, provide clinical instructions to students, and evaluate the progress of students' work."

The Petitioner provided a print-out from a website maintained by [REDACTED] confirming that [REDACTED] is a member of [REDACTED] board of directors and executive advisor to the president and college ambassador of [REDACTED] and that [REDACTED] is dean of the College of Psychology & Liberal Arts at the [REDACTED]. It also indicates that [REDACTED] a member of [REDACTED] board of directors, also sits on the [REDACTED] College Board of Trustees.

The record also contains agreements executed by [REDACTED] and various educational institutions pursuant to which those institutions may assign students for learning experiences at [REDACTED]

D. Analysis

As a preliminary matter, we find that the Petitioner has not submitted sufficient evidence regarding the Beneficiary's place of employment. The Petitioner claimed it has "a contractual agreement" with [REDACTED] which it asserts is an "affiliated or related nonprofit entity." The evidence of record, however, does not include any agreement between the Petitioner and [REDACTED]

Further, the submitted employment agreement between the Petitioner and the Beneficiary states that the Beneficiary will work at [REDACTED] and "any other clinics or hospitals nearby as determined by [the Petitioner] from time to time." The employment agreement further states that the Beneficiary "may perform medical services for other persons or entities (other than Clients of [the Petitioner]) . . . during the term of [the employment agreement]." Based on the lack of evidence regarding the Petitioner's relationship with [REDACTED] and the indications that the Beneficiary may not work solely at the claimed [REDACTED] location, we find

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that the Petitioner has not demonstrated that the Beneficiary will work at [REDACTED] throughout the requested validity period.

However, assuming for the sake of argument that the Beneficiary's place of employment will be a [REDACTED] facility as the Petitioner claims, we will analyze whether the Beneficiary is qualified for an exemption from the H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A). The evidence of record must establish that [REDACTED] 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 FY13 H-1B cap.

Turning to the definition of an "affiliated or related nonprofit entity," we 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 evidence of record does not establish that [REDACTED] and any institutions of higher education are owned or controlled by the same boards or federations. While the record includes evidence indicating that two of [REDACTED] board members are employed by institutions of higher education, the record does not include sufficient evidence that [REDACTED] and any of those schools are owned or controlled by the same boards or federations. The evidence of record does not meet the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we must consider whether the Petitioner has established that [REDACTED] 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 [REDACTED] within the common meaning of this term. As depicted in the record, the relationships that exist between [REDACTED] and the institutions of higher education are between separately controlled and operated entities. While the record includes evidence indicating that two of [REDACTED] board members are employed by institutions of higher education, the record does not include sufficient evidence that those schools "operate" [REDACTED] through those individuals. The agreements in the record between various schools and [REDACTED] indicate that [REDACTED] participates in the education of students by providing its facility for experience in the field; however, those agreements do not establish that [REDACTED] is operated by any of those schools. The evidence of record does not meet the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third and finally, we must consider whether the evidence of record establishes that [REDACTED] 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. *See* 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). It is evident from the foregoing discussion of the evidence that [REDACTED] is not attached to an institution of higher education in a manner consistent with these terms. There is no indication from the evidence submitted that [REDACTED] is a member, branch, cooperative, or subsidiary of the institutions of higher education. All four of these

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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).

In a letter dated January 14, 2013, the Petitioner referred to non-precedent AAO decisions, to state that some members of the Petitioner's board of directors have positions with colleges and that [REDACTED] and the various educational institutions have a "cooperative" relationship. However, the Petitioner has furnished insufficient evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. While the Petitioner is permitted to show that the salient facts of the unpublished decisions are similar to those of the instant case and to assert that the reasoning of those cases was sound and should be extended, the unpublished decisions cited have no value as precedent.

Based on the evidence of record as currently constituted, we cannot find that [REDACTED] should be included in the statutory definition of an institution of higher education or a related or affiliated nonprofit entity based on its relationships with schools in the State of Florida. Therefore, the Beneficiary does not qualify for an exemption from the FY13 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A). As was explained above, absent such exemption, the visa petition may not be approved.

III. CONCLUSION

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 motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of R-&S- PA*, ID# 13002 (AAO Dec. 2, 2015)