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



U.S. Citizenship
and Immigration
Services



DATE: **MAY 28 2015**

PETITION RECEIPT #: 

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)

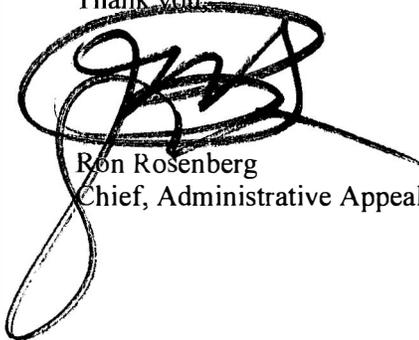
ON BEHALF OF PETITIONER:

NO REPRESENTATIVE OF RECORD

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you.



Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On the Petition for a Nonimmigrant Worker (Form I-129), the petitioner describes itself as a physician's office established in 2011. In order to employ the beneficiary in what it designates as a nurse practitioner 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The Director denied the petition on September 25, 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 Notice of Appeal or Motion (Form I-290B) and supporting materials.¹ We reviewed the record in its entirety before issuing our decision.²

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 June 17, 2014 and requested a starting employment date of June 16, 2014. 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 reviewed by the Director as a cap exempt case, even

¹ The appeal was not accompanied by a properly executed Notice of Entry of Appearance as Attorney or Accredited Representative (Form G-28).

² We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

though the petition was filed after April 8, 2013. Subsequently, the Director denied the petition and the decision is now before us on appeal.

Upon review, we conclude that 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. 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 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 June 9, 2014 letter of support, the petitioner claimed that it is a nonprofit healthcare organization. Specifically, it described its organization as follows:

We are a nonprofit healthcare organization, founded in 2011, serving the needs of the communities in the [REDACTED]. We seek to be a part of healing ministry of Jesus through excellence in prevention & promotion of health, clinical research and education. Our desire is to serve in the spirit of Christ and bring about relief of suffering. Our health care clinics are in the rural setting in the State of California.

The petitioner claimed that it is affiliated with [REDACTED] "for the purpose of training nurse practitioners, so they can utilize our facilities for clinical experience under supervision of our employees." The petitioner submitted a copy of its agreement with [REDACTED] executed by the parties in July 2012.

Thereafter, in response to the Director's RFE, the petitioner submitted a new agreement between itself and [REDACTED] which was executed by the parties approximately in July 2014 (thus, one month after the H-1B petition was filed). The Director denied the petition, concluding that the petitioner had not met its burden of proof to demonstrate eligibility for the benefit sought.

III. THE LEGAL FRAMEWORK

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, (Pub. Law 89-329), 20 U.S.C. § 1001(a). Section 101(a) of the Higher Education Act of 1965 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 on the definitions of "related" and "affiliated" 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 entit[y] 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,³ 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, 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, 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.

Reducing the provision to its essential elements, 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.⁴

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:

³ 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.

⁴ 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).

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

A. Non-Profit Status

One of the first factors to address is whether the petitioner has established that it is a nonprofit entity. The petitioner's asserts in its support letter and appeal brief that it is a nonprofit entity; however, it did not provide evidence to support a finding that it is a 501(c)(3) tax exempt organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). For this reason alone, the petition must be denied, since the record contains no evidence confirming that the entity "at" which the beneficiary will provide her services 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

Assuming, *arguendo*, that the petitioner had established it is tax exempt, the petition would still fall short in establishing that the petitioner is a related or affiliated nonprofit entity of an institution of higher education. 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 Agreement with [REDACTED] qualifies it to file H-1B cap-exempt petitions.

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 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 Edition⁵:

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.

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]. The petitioner did not provide documentation establishing that [REDACTED] is an institution as defined under Section 101(a) of the Higher Education Act of 1965. However, even if the petitioner had demonstrated that [REDACTED] is an institution of higher education as defined under Section 101(a) of the Higher Education Act of 1965, the record does not establish that the entities are affiliated as required by 8 C.F.R. § 214.2(h)(19)(iii)(B).

The petitioner submitted a copy of its Agreement with [REDACTED] executed in July of 2012, and a new, revised Agreement executed in July 2014 (thus, it was executed after the H-1B petition was filed). USCIS regulations, however, affirmatively require a petitioner to establish eligibility for the benefit

⁵ 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).

it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(1). 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 five-page Agreement executed in 2012 indicates that it is based on [REDACTED] need for additional facilities to provide clinical experiences for its nursing students, and the petitioner's willingness, as a means of community service, to provide certain facilities for the use of nursing students under certain conditions.

Section 1 of the Agreement, which outlines the nature of the relationship between the parties, indicates that the education program conducted pursuant to the Agreement is a program belonging to [REDACTED] not the petitioner. The Agreement stresses that the participating students will be under the jurisdiction of [REDACTED]

Sections 2 and 3 of the Agreement set forth the roles and responsibilities of both parties. Specifically, Section 2 outlines the responsibilities of [REDACTED], and provides, in pertinent part, that [REDACTED] "will retain responsibility for the control and supervision of students when assigned to these clinical responsibilities" and "inform students that they are not employees of [the petitioner]." Section 3 of the Agreement outlines the role of the petitioner, and provides, in pertinent part, that the petitioner will "maintain at all times full responsibility for patient and client care" and will coordinate working relationships with [REDACTED] between a liaison of the petitioner. Generally, these sections confirm that [REDACTED] will select the experiences its nursing students will receive within the petitioner's health-related program, and that the petitioner will provide the clinical experiences that conform to the specific objectives submitted by [REDACTED]

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. As the record does not include evidence suggesting that the petitioner and [REDACTED] share common ownership or are controlled by the same board, 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 Agreement

outlines joint responsibilities shared by these two entities, it appears that the petitioner and [REDACTED] are separately controlled and operated entities. There is no provision in the Agreement granting [REDACTED] the right to manage the daily activities or functions of the petitioner. Instead, we note that Section 3 of the Agreement specifically states that the petitioner will at all times maintain responsibility for patient and client care. There is nothing in the Agreement, or in the record, that allows [REDACTED] to oversee, operate, or manage the petitioner's organization 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).

On appeal, the petitioner suggests that it is attached to [REDACTED] through a "cooperative arrangement," and relies upon an unpublished decision. The petitioner, however, has not furnished any evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. 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 petitioner states that it maintains a close affiliation with [REDACTED]. However, the record does not establish that this claimed affiliation between the parties meets any of the defined relationships as set forth above. Although the petitioner and [REDACTED] may have a close affiliation, the record does not demonstrate that the parties share the requisite ownership and control as required by the terms in this prong as defined above. That is, 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, the petitioner has not met the third prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

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

VI. CONCLUSION

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NON-PRECEDENT DECISION

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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.