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

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

MATTER OF T-C-

DATE: JULY 25, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a for-profit [REDACTED] company, seeks to temporarily employ the Beneficiary as a [REDACTED] under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Beneficiary does not qualify for an exemption from the Fiscal Year 2016 (FY16) H-1B cap based on the Beneficiary's proposed employment.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and asserts that the Director erred in finding the Beneficiary does not qualify for an H-1B cap exemption.

Upon *de novo* review, we will dismiss the appeal.¹

I. LEGAL FRAMEWORK

In general, H-1B visas are numerically capped by statute. Pursuant to section 214(g)(1)(A) of the Act, 8 U.S.C. § 1184(g)(1)(A), the total number of H-1B visas issued per fiscal year may not exceed 65,000.

Section 214(g)(5)(A) of the Act, as modified by the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Pub. L. No. 106-313 (Oct. 17, 2000), states, in relevant part, that the H-1B cap shall not apply to any nonimmigrant individual issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) of the Act who "is employed (or has received an offer of

¹ This decision does not prejudice or otherwise prevent the Petitioner from filing a new petition on behalf of the Beneficiary or other individuals, especially if the facts and circumstances have since changed such that eligibility for the immigration benefit can be established.

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. L. No. 89-329, 20 U.S.C. § 1001(a), defines an institution of higher education as an educational institution in any state that:

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor’s degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

Pursuant to 8 C.F.R. § 214.2(h)(19)(iv), 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.

II. BACKGROUND

In section 2, “Fee Exemption and/or Determination,” of the Form I-129, H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement, the Petitioner checked the boxes for “No” in

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response to all fee-exemption questions asking if it is a qualifying entity. At section 3, "Numerical Limitation Information," of the same supplement, the Petitioner checked the box in response to the statement: "The petitioner will employ the beneficiary to perform job duties at a qualifying institution . . . that directly and predominately furthers the normal, primary, or essential purpose, mission, objectives, or function of the qualifying institution, namely higher education or nonprofit or government research."

In the H-1B petition and labor condition application, the Petitioner stated that the Beneficiary would not work off-site, and would only work at its offices located in [REDACTED] California.

In its support letter, the Petitioner stated that its product "is the leading organ, tissue and eye donation [REDACTED] that is being used by Organ Procurement Organizations, Tissue Banks and Eye Banks." Further, in a letter submitted in response to the Director's request for additional evidence (RFE), the Petitioner stated:

The relationship of the Organ Procurement Organizations [OPOs], which are nonprofit entities within the [Institution of Higher Education (IHE)] are described in **Exhibits 3a-c**. Please note that these are not "affiliated" organizations of the IHE but are departments or subunits of departments directly within the IHE. Therefore, these OPOs fall within the definition of an institution of higher education and not as affiliate or related nonprofit entities

Please also note that the beneficiary will not work physically on site at these institutions but will be working only at petitioner's work location. Please also note that the nature of the beneficiary services with respect to the [REDACTED] utilized by the [OPOs] working within the IHE, does not require that he work on site

The Petitioner included copies of its [REDACTED] and services agreements with OPOs as well as three letters from universities within which the OPOs are located, which state that the universities are nonprofit. The [REDACTED] agreements indicated that the Petitioner granted to the OPOs "a renewable, nonexclusive license to use the System," and that the Petitioner "shall be responsible for hosting and maintaining the online, Web-based System."

In addition, the Petitioner submitted a copy of its employment agreement with the Beneficiary, which stated that the "[e]mployee shall perform [work as a [REDACTED] on a full-time basis from [the Petitioner's] offices on the work schedule to be set by [the Petitioner]."

On appeal, the Petitioner claims:

[T]he Service erroneously concludes that under 8 CFR 214.2(h)(19)(iii)(B), petitioner's location does not qualify as a nonprofit organization related to or affiliated with an [IHE]. Petitioner's response to the Service's request for evidence clearly points out that the relationship of the [OPOs] which are nonprofit entities

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within the definition of an institution of higher education are not affiliated organizations of the IHE but are departments or subunits of departments directly within the IHE. The Service in its decision seems to ignore this distinction. The Service then erroneously concludes that because the beneficiary will not work physically on site at these institutions but will only be working at petitioner's work location that the alien does not qualify for cap exemption *under section 214(g)(5) of the INA* which requires that the beneficiary must be working at a qualifying location.

Petitioner contends that there is nothing in the Aytes Interoffice Memorandum (which provides guidance regarding eligibility for exemption from the H1B cap based on section 103 of the AC21), which requires that the beneficiary must be working on-site at the qualifying institution in order to be considered to be working at the qualifying location

. . . [T]he nature of the beneficiary's services with respect to the [REDACTED] utilized by the [OPOs] working within the IHE, does not require that he work on site, although there are some organizations which do request the beneficiary's on-site presence which he provides. Evidence of his need to be onsite at one or more locations is available on request.

We contend that beneficiary's work is in furtherance of the central mission of the qualifying institutions for which he provides [REDACTED] that are performed mostly remotely from petitioner's location. As previously stated, the beneficiary's work is to maintain and improve the iTransplant system in order to create and manage interfaces with various organ procurement organizations previously mentioned. Therefore, there is a logical nexus between the beneficiary's duties and the normal mission of the qualifying entity, which is to further their mission as eye, organ and tissue donors.

III. ANALYSIS

The Petitioner does not claim to be an IHE or a related or affiliated nonprofit entity pursuant to 8 C.F.R. § 214.2(h)(19)(iii)(B). Instead, the Petitioner states that the Beneficiary will be working "at" an IHE and so qualifies for H-1B cap exemption under AC21. Therefore, our analysis will focus on whether the Beneficiary's employment at the Petitioner's office, which is where the Petitioner claimed the Beneficiary would be "working only at," constitutes working "at" an IHE. Section 214(g)(5)(A) of the Act.

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The Petitioner references a June 6, 2006, memorandum authored by Michael Aytes (Aytes memo), interpreting the term “employed at” a qualifying institution under AC21.² Contrary to the Petitioner’s assertion that “nothing in the Aytes [memo] . . . requires that the beneficiary must be working on-site at the qualifying institution in order to be considered to be working at the qualifying location,” the Aytes memo emphasizes the physical location of a beneficiary’s work: if a beneficiary spends more than half the time working physically on-site “at” the qualifying entity, then he or she may qualify for H-1B cap exemption under AC21 while working for a for-profit entity. Conversely, if a beneficiary does not physically work on-site “at” the qualifying entity for a majority of the time, then the beneficiary is not exempt from the cap. The Aytes memo’s focus on the physical location of the employment is consistent with the plain meaning of the word “at” as found in section 214(g)(5)(A) of the Act.

The Petitioner’s contracts for development, housing, and maintenance of technology on behalf of OPOs do not turn its office space into an IHE worksite. Therefore, since the evidence demonstrates the Beneficiary will be primarily working on-site at the Petitioner’s office, we do not find, and the Petitioner provides insufficient evidence to show, that the Beneficiary is physically working the majority of the time “at” a qualifying institution.

On appeal, the Petitioner states for the first time that the Beneficiary works off-site upon request. However, the Petitioner does not further quantify the amount of off-site time, nor provide corroborating evidence that this is the case.³ Moreover, the Petitioner cannot materially a position’s job responsibilities, work locations, or other salient aspects of the position after the initial petition is filed. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l 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). Accordingly, we cannot properly consider the Petitioner’s newly made claims regarding the Beneficiary’s off-site work.⁴

The Petitioner also refers to the Aytes memo for the proposition that “a logical nexus between the beneficiary’s duties and the normal mission of the qualifying entity, which is to further their mission as eye, organ and tissue donors,” is sufficient to establish H-1B cap exemption under AC21. However, the Aytes memo does not support the Petitioner’s position. Instead, the Aytes memo

² Memorandum from Michael Aytes, Associate Director for Domestic Operations, HQPRD 70/23.12, *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)* (June 6, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/ac21c060606.pdf.

³ The Petitioner reported on the Form I-129 and LCA that the Beneficiary’s work site would be at its office. Thereafter, the Petitioner stated that “evidence of his need to be onsite at one or more locations is available upon request,” but it did not submit this “available” evidence for the record. Further, the burden is on the Petitioner to establish eligibility when the petition is filed. “[G]oing 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 Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

⁴ If it is the Petitioner’s claim that the Beneficiary mainly works at IHE locations rather than the Petitioner’s offices, the Petitioner would need to file a new H-1B petition with a corresponding labor condition application and itinerary covering the IHE worksites. Again, the Petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249.

states that if a petitioner is not a qualifying institution, the burden is on the petitioner to “demonstrate how the beneficiary’s duties are directly and predominately related to, and in furtherance of, the normal, primary or essential purpose, mission, objectives or function of the qualifying institution, namely, *higher education or nonprofit or governmental research* (emphasis added).”⁵ The Petitioner must demonstrate the nexus between the Beneficiary’s duties and the mission of *higher education or nonprofit/governmental research*, not the mission of the IHE’s particular department or subunit of organ procurement.

Although the Petitioner states that the OPOs use its system to perform research, insufficient evidence was provided to further explain and demonstrate the research functions of this system. Thus, even if the Petitioner had provided sufficient evidence that the Beneficiary would work more than half of his time at an IHE (which it did not do), the Petitioner has not demonstrated that the Beneficiary would perform duties that are directly and predominantly related to, and in furtherance of, higher education or nonprofit/governmental research.

IV. CONCLUSION

The evidence presented in this matter demonstrates that the Beneficiary will be primarily employed at the Petitioner’s office space, which, as discussed above, houses a for-profit entity that does not qualify for an H-1B cap exemption under AC21. Furthermore, the Petitioner has not adequately demonstrated the nexus between the Beneficiary’s duties and the mission of higher education or nonprofit/governmental research. Therefore, the Beneficiary is not exempt from the H-1B cap pursuant to section 214(g)(5) of the Act.

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.

Cite as *Matter of T-C-*, ID# 17156 (AAO July 25, 2016)

⁵ Memorandum from Michael Aytes, Associate Director for Domestic Operations, HQPRD 70/23.12, *supra*.