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

U.S. Citizenship and Immigration Services

[redacted]

[redacted] [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 09 2010

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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:

MARY M. O'LEARY
LAW OFFICE OF MARY O'LEARY
621 MADISON STREET
EVANSTON, IL 60202

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director of the California Service Center recommended the denial of the nonimmigrant visa petition and certified the decision to the Administrative Appeals Office (AAO) for review. Upon review, the decision of the director will be withdrawn. The petition will be approved.

The petitioner, a nonprofit religious organization, filed this nonimmigrant petition seeking to employ the beneficiary in the position of associate pastor (Roman Catholic Priest). The petitioner, therefore, endeavors to employ the beneficiary as an H-1B nonimmigrant 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 recommended the denial of the petition, finding the petitioner failed to establish that the beneficiary qualifies for exemption to the numerical cap on H-1B nonimmigrants based on of the petitioner's relation to or affiliation with an institution of higher education. Additionally, the director found that based on its failure to meet the regulatory definition of a nonprofit entity related to or affiliated with an institution of higher education, the petitioner was required to pay the required American Competitiveness and Workforce Improvement Act (ACWIA) fee of $1,500. The director cited the petitioner's failure to submit the required fee as an additional basis for denial of the petition.

Counsel for the petitioner submitted a brief in response to the notice of certification, and claims that the petitioner meets the requirements for H-1B cap-exempt status on the basis of its university affiliations. Counsel further contends that the director's interpretation of the regulatory definition governing related and affiliated nonprofit entities was erroneous, thereby resulting in an unwarranted denial of the petition.

The primary issue in this matter is whether the beneficiary qualifies for an exemption from the Fiscal Year 2010 (FY10) 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 December 22, 2009, 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 FY10, which covers employment dates starting on October 1, 2009 through September 30, 2010.

The petitioner filed the Form I-129 on January 8, 2010 and requested a starting employment date of January 12, 2010. Pursuant to 8 C.F.R. § 214.2(h)(8)(ii), any non-cap exempt petition filed on or after Dec. 22, 2009 and requesting a start date during FY10 must be rejected. However, because the petitioner indicated on the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement that it is a nonprofit organization or entity related to or affiliated with an institution of higher education, and thus exempt from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act, the petition was not rejected by the director when it was initially received by the service center. In support of the petition, the petitioner submitted a letter of support from counsel dated January 5, 2010, as well as documentation regarding the petitioner's claimed control and ownership of the [redacted] Seminary ([redacted]) and [redacted] College.

On January 13, 2010, the director issued a request for evidence (RFE) asking the petitioner to submit substantiating documentary evidence that the petitioner qualifies for an exemption to the H-1B cap. Specifically, the director found that the evidence submitted in support of the petition was insufficient, and consequently the director requested documentation such as copies of agreements or contracts between the parties demonstrating that the petitioner is:

- Connected or associated with [redacted] and [redacted] College through shared ownership or control by the same board or federation operated by an institution of higher education;
- Attached to an institution of higher education as a member, branch, cooperative or subsidiary of that institution of higher education; or
- Connected by way of affiliation with [redacted] and [redacted] College

In a response dated January 18, 2010, counsel submitted additional evidence and claimed that the beneficiary would be employed at a worksite that is owned and operated by the petitioner, the same nonprofit corporate entity that allegedly also owns and operates [redacted] and [redacted] College.

The director found counsel's response to the RFE insufficient, and denied the petition on January 29, 2010.

Upon review, the petitioner has established that it is exempt from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act.

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 . . . ."

In this matter, counsel asserts that the petitioner 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. The AAO notes that, while the director did not dispute that the petitioner owns and operates both [redacted] and [redacted] College as well as [redacted] the proposed worksite of the petitioner, it concluded that [redacted] and [redacted] College's lack of control or ownership over the petitioner and [redacted] rendered the petitioner's claim of exemption insufficient under the director's interpretation of the regulation at 8 C.F.R. § 214(h)(19)(iii)(B).

Title 8 C.F.R. § 214.2(h)(19)(iii)(B), which, as noted by counsel, was promulgated in connection with the enactment of the American Competitiveness and Workforce Improvement Act of 1998, 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). 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).

Counsel, however, does not contend that the definition found at 8 C.F.R. § 214.2(h)(19)(iii)(B) should not be applied to the primary issue in this matter. Instead, in the brief submitted in response to the notice of certification, counsel contends that the director's decision utilized an impermissible interpretation of this pertinent regulation relating to H-1B cap exempt petitioners, thus contravening the plain language of the statute. Specifically, counsel noted that the omission of a comma between the words "federation" and "operated" in 8 C.F.R. § 214(h)(19)(iii)(B) resulted in a redundant definition mandating a two-prong test, requiring examination as to whether the petitioner is:

(1) 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

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

By interpreting the definition in a two-prong fashion, and thus requiring the petitioner to demonstrate that it is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation, while simultaneously being operated by an institution of higher education, counsel contends that the director contravened congressional intent as expressed in section 214(g)(5) of the Act.

Counsel contends, and the AAO agrees, that such an interpretation is internally inconsistent. Reducing the provision to its essential elements, the AAO finds that 8 C.F.R. § 214(h)(19)(iii)(B), as argued by counsel, 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

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

As noted by counsel, 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 the 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).

Turning, therefore, to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B), the AAO will now consider whether the petitioner has established that it is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation.

The evidence submitted in support of the petition and in response to the RFE, discussed previously, outlines the organizational structure of the petitioner and sufficiently demonstrates by a preponderance of the evidence that the petitioner, [redacted] and [redacted] College, the institutions of higher education, as well as [redacted] the proposed worksite of the petitioner, are all connected through their shared control by the same board, which in this unique case appears to be composed of one individual, [redacted] the Archbishop of [redacted].[1] Therefore, under the appropriate three-prong test of 8 C.F.R. § 214.2(h)(19)(iii)(B), it is evident that the petitioner is a nonprofit entity related to an institution of higher education in that it has satisfied the requirements of 8 C.F.R. § 214.2(h)(19)(iii)(B)(*1*).

Consequently, the petitioner has demonstrated that it is a nonprofit entity under 8 C.F.R. §214.2(h)(19)(iii)(B), and is therefore exempt from the FY10 H-1B cap pursuant to section 214(g)(5) of the Act. The director's finding to the contrary is hereby withdrawn.

The second basis for denial was the petitioner's failure to submit the required filing fee.

As stated by the director, the Consolidated Appropriations Act, 2005 was signed into law on December 8, 2004, which reinstated and raised the ACWIA fee for H-1B 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, 8 U.S.C. § 1184(c)(9)(A), certain entities, including nonprofit entities related to or affiliated with an institution of higher education, are excluded from the ACWIA fee.

As discussed above, the petitioner has demonstrated that it is a nonprofit entity related to an institution of higher education. Therefore, the petitioner is exempt from the ACWIA fee requirement, and the director's conclusions regarding this issue will hereby be withdrawn.

---

[1] As indicated previously, the director found in her decision dated January 29, 2010 that "the petitioner owns and operates the [redacted] Seminary and [redacted] Seminary College." This specific finding, however, will be withdrawn. Upon review, the evidence of record only establishes that the nonprofit entities discussed herein are controlled, not owned, by the same board.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. Accordingly, the director's decision will be withdrawn, and the petition will be approved.

ORDER: The director's decision is withdrawn. The petition is approved.