



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

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

MATTER OF C-M-C-F-

DATE: JAN. 19, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a non-profit community health care center, seeks to temporarily employ the Beneficiary as a "resident physician" 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 Petitioner had not demonstrated that the Beneficiary is entitled to an exemption from the general limit on the number of H-1B visas issued per year (the cap).

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the evidence of record was sufficient to establish eligibility for the exemption sought.

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

**I. LAW**

Section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for foreign nationals 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.

In general, section 214(g)(5) of the Act provides that:

The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who—

- (A) 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;
- (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 (as defined in section 101(a) of the Higher Education Act of 1965 (20 [§] U.S.C. 1001(a))), until the number of aliens who are exempted from such numerical limitation during such year exceeds 20,000.

The term "related or affiliated," section 214(g)(5)(A) of the Act, is not defined specifically for purposes of determining whether a nonprofit entity is exempt from the H-1B cap. However, the regulation at 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 for purposes of the H-1B fee exemption provisions. 8 C.F.R. § 214.2(h)(19)(iii)(B) states:

*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 ACWIA 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 ACWIA: 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. § 214.2(h)(19)(iii)(B) allows a petitioner to demonstrate that it is an affiliated or related nonprofit entity if it establishes that it is 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.<sup>1</sup>

## II. ANALYSIS

The record does not demonstrate that the Petitioner is related to or affiliated with an institution of higher learning. Accordingly, the record does not demonstrate that this petition is exempt from the numerical cap.

The Petitioner filed the H-1B petition in June 2016 for an employment period to commence in June 2016 and indicated that the instant petition is exempt from the cap. The 2016 fiscal year (FY16) extends from October 1, 2015, through September 30, 2016. On April 7, 2015, USCIS issued a notice that it had received sufficient numbers of H-1B petitions to reach the H-1B cap for FY16. Therefore, the instant petition is subject to the FY16 H-1B cap, unless exempt.

Here, the Petitioner asserts that it is exempt from the cap because it is a nonprofit organization related to or affiliated with an institution of higher education, namely, [REDACTED] (University). The Petitioner has demonstrated that it is a nonprofit organization or entity. The issue at hand is whether the Petitioner is “related or affiliated” with the University.

First, we consider whether the Petitioner and the University are connected or associated through shared ownership or control by the same board or federation. The Petitioner submitted an “educational affiliation agreement” with the University. The agreement indicates that the Petitioner and the University wish to “enter into a formal affiliation agreement for the conduct of clinical training in educational programs.” The educational programs include: “postdoctoral (Graduate) medical education in the medical specialties”; “postdoctoral (graduate) medical education in the other medical specialties for which board certification is available in the United States”; “predoctoral (i.e., “undergraduate” or M.D. candidates) education for medical students enrolled in the [University]”; “educational services to practicing physicians via continuing medical educational programs”; and, “to provide training and educational program in other related health professions.”

However, we find that the agreement between the Petitioner and the University, and the supporting documents, are limited in scope. Although the agreement outlines educational goals and a few responsibilities for both parties, they are insufficient to show that the Petitioner and the University are under shared ownership or control by the same board or federation. For example, the agreement states that the “corporate autonomy of each party is recognized,” and the parties “recognize that any

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<sup>1</sup> This reading is consistent with the Department of Labor’s regulation at 20 C.F.R. § 656.40(e)(ii), which is essentially identical to 8 C.F.R. § 214.2(h)(19)(iii)(B). 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 Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110-11 (proposed Dec. 20, 2000) (to be codified at 20 C.F.R. pts. 655-56).

successful affiliation for the conduct of health care and medical education program is dependent on freedom of action and mutual trust requiring consideration of each party in its policy making decisions as to the effect of such decisions upon the activities and objectives of the other.” Thus, the agreement emphasizes that the Petitioner and the University are autonomous, and does not show a shared ownership or control by the same board or federation.

Second, we consider whether the Petitioner has established that it is an affiliated or related 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. With regard to this prong, the common meaning of the term “operate,” as defined in *Webster’s New College Dictionary*, 3<sup>rd</sup> edition, is “[t]o control or direct the functioning of” or “[t]o conduct the affairs of : MANAGE <operate a firm>.” Thus, while an institution of higher education may not have ownership or ultimate control of a nonprofit entity, a petitioner may still qualify under this second prong of the definition of affiliated or related nonprofit entity by establishing that the institution of higher education directs the day-to-day functioning, or manages the daily affairs, of the nonprofit entity.

Here, the agreement states that the Petitioner provides clinical experience in conjunction with the University, and the University provides educational programs to the clinic staff, but it does not state the University operates the Petitioner. On appeal, the Petitioner states that the two entities share control and responsibilities over the educational program, and the University “retains significant control and authority over the faculty appointment process.” Specifically, the agreement states that the University will approve the faculty appointment, and the Petitioner and the University require joint agreements and approval of student and resident rotations. However, as discussed above, the relationship that exists between the Petitioner and the University is one between two separately controlled and operated entities. Further, the relationship between the two entities is limited to the clinical program. There is nothing in the affiliation agreements granting the University the right to manage the daily activities or functions of the Petitioner. Thus, the evidence does not establish that the Petitioner is operated by an institution of higher education.

The remaining prong pursuant to which the Petitioner could show that the instant visa petition is exempt from the cap is to demonstrate that the Petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary. All four of these terms indicate at a minimum some type of shared ownership 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).

The Petitioner refers to our unpublished decisions from 2006 and 2010 to claim that the Petitioner is attached to the University as a cooperative. However, the Petitioner did not submit sufficient documentation to establish that the facts of the instant petition are analogous to those in the unpublished decisions. 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.

We find that the Petitioner has not established that it is a cooperative. That is, the Petitioner has not sufficiently demonstrated that the contracts' provisions for collaboration and shared resources amount to shared control or ownership. For example, on appeal, the Petitioner states that the University and the Petitioner share a "common vested interest in addressing the training needs and shortage of primary care physicians for rural and underserved populations." However, there is insufficient information regarding how much or what percentage each party contributes, and each party's role, responsibilities, and authority, to establish shared ownership or control. The Petitioner has not sufficiently explained how these aspects demonstrate shared ownership or control.

On appeal, the Petitioner states that the evidence demonstrates a "long standing affiliation and business arrangement which rises to the level of attachment." However, upon review of the affiliation agreement and the program letters, we note that they were entered into between 2014 and 2016 and thus, do not indicate a "long standing affiliation." The Petitioner also stated that the program letters are valid for a period of 5 years, but there is insufficient evidence to substantiate that the University and the Petitioner will continue this program for the entire period. In addition, there is no further evidence in the record that shows how these programs are actually utilized. Therefore, the nature of the relationship between the University and the Petitioner is not sufficiently demonstrated.

On appeal, the Petitioner also asserts that the University "retains significant control over the faculty appointment process." As noted above, this joint control is limited to a very small scope of approving faculty for the specific clinical rotation program. Further, we do not have sufficient information as to how many faculty members are selected through this process or even whether the program is active. The Petitioner also submitted program letters of agreement for graduate medical education offered to the Petitioner's staff with certain University departments. The letters stated that the "educational program covered by this agreement will consist of the rotation of Family Medicine Residents through the Participating Group's respective academic and/or clinical practice setting." Again, the letters indicate a medical study program offered to participants from the Petitioner but does not provide any evidence that the program is established and running, or specific details of how the program works. A petitioner's unsupported statements are of very limited weight and normally will be insufficient to carry its burden of proof, particularly when supporting documentary evidence would reasonably be available. *See 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)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support its assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

On appeal, the Petitioner cites a decision from the Board of Alien Labor Certification Appeals (BALCA), *Matter of Children's Hospital Corporation*, 2011-PER-01338 (BALCA Nov. 15, 2011), and asserts that this case established that a consistent collaboration between two entities can establish a member relationship. However, the Petitioner does not state how a decision from BALCA is binding in our proceedings. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding.

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Further, even if we were to consider the above-referenced case, the facts of the decision can be distinguished. Specifically, the BALCA decision indicates a consistent collaboration between the two entities since 1949. In the current petition, the affiliation agreement was signed on July 17, 2014, only 2 years prior to filing the petition. In addition, the program letters are mostly all from 2016 with one letter from 2014. Thus, the current Petition does not provide evidence of the same consistent collaboration evidenced the BALCA decision. Further, in the BALCA decision, the entities formed a standing committee consisting of representatives of Harvard University and the teaching hospitals which was responsible for making plans and recommendations to the medical school. In addition, an executive committee was created consisting of the heads of each of the medical school departments at the teaching hospitals to review common problems. In the current petition, the agreement indicated a shared cooperation in delegating faculty appointments; thus, the cooperation is very specific to this one program. The Petitioner has not demonstrated the same level of collaboration and history with the University as seen in the BALCA decision.

In addition, in the cited case, both entities held itself out to be in an affiliate relationship. In the case, the employer's letterhead indicated that it is a teaching affiliate of the school and the domain name of its executive employees' email had the ".edu" suffix, providing further evidence that it is a member of the school's consortium of teaching hospitals. Here, the Petitioner stated that the University website indicated the relationship with the Petitioner. However, upon review of the website page submitted by the Petitioner, it only stated that the "[redacted]" also established in 2008, enables resident physicians to gain 24 months of hands-on experience in a rural clinic in [redacted] Alabama." Thus, the University website does not specifically name the Petitioner. This differs from the cited case whereby the affiliate relationship was listed on the University letterhead and the parties both utilized emails with the ".edu" suffix.

Upon review of the record of proceedings, and as discussed above, the Petitioner did not submit sufficient documentation to establish that it is "related or affiliated with" an institution of higher learning. Overall, the Petitioner has not demonstrated that the Petitioner and the University have shared ownership or control, such that the Petitioner can be considered "related or affiliated with" an institution of higher learning.

Moreover, on appeal, the Petitioner states that alternatively, it qualifies as a cap exempt institution of higher education as a non-profit graduate training program accredited by a nationally recognized accrediting agency under 20 U.S.C. § 1001(a) and (b). However, section 214(g)(5)(A) of Act specifically states that the cap does not apply to individuals "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))." Therefore, for purposes of H-1B cap exemption only 20 U.S.C. § 1001(a) definition of institution of higher education applies. Here, the Petitioner has not established that it meets all five criteria under 20 U.S.C. § 1001(a).

Finally, on appeal, the Petitioner cites to a policy memorandum from April 28, 2011, entitled "Additional Guidance to the Field on Giving Deference to Prior Determination of H-1B Cap Exemption Based on Affiliation," and states that Director partially based the denial on the

Petitioner's failure to provide evidence of prior cap exempt approvals. The Petitioner notes that USCIS guidance calls only for deference to prior H-1B cap exemption determinations, but does not require the Petitioner to "show prior cap exempt approvals or that a denial is automatic in the absence of such prior approvals." In the decision, the Director simply noted that the Petitioner did not provide evidence of prior cap approvals and thus, does not qualify under this section of the USCIS guidance. Instead, the Director evaluated eligibility of cap exemption based on the current petition. However, as discussed above, the Petitioner did not sufficiently establish the requirements for a cap exemption.

### III. CONCLUSION

The record does not demonstrate that the Petitioner is related to or affiliated with an institution of higher learning. Accordingly, the record does not demonstrate that this petition is exempt from the numerical 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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of C-M-C-F-*, ID# 152333 (AAO Jan. 19, 2017)