



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

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

MATTER OF H-C-S-

DATE: JAN. 26, 2017

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a public school system, seeks to temporarily employ the Beneficiary as a “high school Spanish teacher” 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, concluding that the Petitioner had not established that it qualifies as an organization that is exempt from the H-1B numerical limitation. The matter is now before us on appeal. In its appeal brief, the Petitioner asserts that the Director is required to follow the interim guidance on H-1B cap exemptions issued April 28, 2011, and in doing so must give deference to a previous determination by U.S. Citizenship and Immigration Services (USCIS) that the Petitioner is affiliated with institutions of higher education.¹

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

I. 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 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.

The petition in this matter was filed on April 1, 2016, for an employment period to commence in fiscal year 2016 (FY16). On April 7, 2015, USCIS issued a notice that it had received sufficient

¹ The Petitioner is referring to USCIS Policy Memorandum PM-602-0037, *Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation* (Apr. 28, 2011), <https://www.uscis.gov/laws/policy-memoranda>.

numbers of H-1B petitions to reach the H-1B cap for FY16. Unless this visa petition is exempt from the cap, it cannot be approved. Therefore, at issue in this matter is whether the Beneficiary qualifies for an exemption from the FY16 H-1B cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

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 regulation at 8 C.F.R. § 214.2(h)(8)(ii)(B) reads, in pertinent part, as follows:

When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded.

II. ANALYSIS

A. The Petitioner's Prior Affiliated Status

The first issue we will discuss is whether USCIS must give deference to a 2008 decision wherein the agency found the Petitioner to be "cap exempt" as an organization affiliated with or related to

institutions of higher education, when the Petitioner has self-identified as a non-cap exempt organization in the intervening years.

On the H-1B Data Collection Supplement (page 20) to the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner checked box “d” in Section 3, question 1, indicating that it is “CAP Exempt.” In Section 3 of the supplement (page 21), the Petitioner checked box “b” in response to question 3, thus specifying that it “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).” The Petitioner submitted a copy of its Form I-129 filed on behalf of another beneficiary which was approved on October 8, 2008 ([REDACTED]). In the supplementary information for the approved petition, the Petitioner specified that it 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).

In a request for evidence (RFE), the Director notified the Petitioner that a review of its filing history revealed that the Petitioner had filed several petitions with the Vermont Service Center, an office that does not accept “cap exempt” petitions, and as recently as February 1, 2016, had filed a petition wherein it had not identified itself as an organization affiliated with an institution of higher education. The Director informed the Petitioner that because of the inconsistency regarding its “cap exempt” status, USCIS could not determine that the Petitioner is cap exempt based on its previous filing as outlined in the guidance issued on April 28, 2011.² The Director further noted that the evidence in the record did not establish the Petitioner as an organization affiliated with or related to an institution of higher education and requested that the Petitioner submit documentation to establish the affiliation or relationship.

In response to the RFE, the Petitioner implicitly acknowledged that it did not always claim to be cap exempt as an organization affiliated with institutions of higher education. The Petitioner asserted that claiming to be cap exempt is an option, and although it did not always claim to be a cap exempt organization affiliated with institutions of higher education, that it continues to qualify as a cap exempt entity. The Petitioner emphasized that when it chooses to identify as a cap exempt entity, USCIS should defer to its previous determination (in 2008) that the Petitioner is cap exempt as directed in the April 28, 2011, policy memorandum.

Upon review of the Petitioner’s response, the Director determined that the Petitioner could not claim to be both “cap exempt” and “cap subject” and found that the inconsistency regarding the Petitioner’s cap status precluded a decision based solely on the April 28, 2011, policy memorandum. The Director noted that despite being requested to do so, the Petitioner had not submitted documentation in the present case to establish that it qualifies as a nonprofit organization related or affiliated with an institution of higher education as defined in 8 C.F.R. § 214.2(h)(19)(iii)(B) and thus it is not “cap exempt.”

² The Director refers to this guidance as issued on March 16, 2011; however, the policy memorandum referenced and submitted by the Petitioner is dated April 28, 2011.

Matter of H-C-S-

On appeal, the Petitioner reiterates that USCIS is required to follow the interim guidance issued on April 28, 2011, that there has been no change in circumstances in its affiliation with institutions of higher education since the prior approval in 2008, and that there is no requirement that a cap exempt organization must always claim to be cap exempt.³

Upon review, we find that the Petitioner's inconsistent identification as either "cap exempt" or "cap subject" raises legitimate questions regarding its current eligibility as "cap exempt." The Director properly determined that the Petitioner's inconsistent identification as either cap exempt or cap subject created uncertainty regarding its actual status and precluded deference to one decision issued more than 8 years ago in order to accord the Petitioner current cap exempt status. Although the April 28, 2011, guidance states that USCIS officers should give deference to prior determinations, "unless evidence suggests that the prior cap exemption determination was clearly erroneous or that there has been a significant change in circumstances related to the affiliation of the petitioner to an institution of higher education," based on the Petitioner's inconsistent identification as either "cap exempt" or "cap subject," it was appropriate for the Director to issue an RFE.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When material inconsistencies arise regarding the Petitioner's cap status, the proper course is to request evidence to establish whether the Petitioner qualifies as "cap exempt," or not. The April 28, 2011, policy memorandum does not prohibit the Director from eliciting evidence to clarify inconsistencies in the record when those inconsistencies materially affect eligibility. In the RFE, the Director requested further evidence that the Petitioner is related or affiliated with institution(s) of higher education and thus is eligible as "cap exempt" despite previously indicating on H-1B petitions that it is not an organization related to or affiliated with institution(s) of higher education. The Petitioner, however, did not submit further evidence to establish that it continued to qualify as "cap exempt."

The Petitioner's reliance on the April 28, 2011, policy memorandum and one prior approval as the sole means of establishing its cap status is misplaced. More specifically, when the Petitioner in the eight or so intervening years between a cap exempt approval and a new petition routinely indicates it is not cap exempt, the Petitioner must submit probative evidence establishing that it currently qualifies as "cap exempt."⁴ The Petitioner has not done so in this matter.

Accordingly, we will continue with our *de novo* review of the remaining evidence in the record to determine whether the record is sufficient to establish that the Petitioner is cap exempt as a nonprofit

³ We have reviewed the Petitioner's copy of the 2008 approved petition including agreements with [REDACTED], and [REDACTED] all of which have now expired. We also reviewed website printouts of other universities and colleges that were included in the submission. However, the printouts do not reference the Petitioner.

⁴ We note, for example, that the Petitioner no longer appears to have relationships or affiliations with [REDACTED] or [REDACTED] the institutions of higher education on which the prior cap exempt approval was based.

organization related to or affiliated with an institution of higher education as defined in 8 C.F.R. § 214.2(h)(19)(iii)(B).

B. Related To or Affiliated With Institutions of Higher Education

The Petitioner asserts that it is a nonprofit organization related to or affiliated with seven different institutions of higher education, namely, [REDACTED]

[REDACTED] and the

[REDACTED]⁵

The Petitioner has sufficiently demonstrated that it is a nonprofit organization or entity. The Petitioner submitted copies of agreements with each of the institutions listed. However, the agreements do not establish that the Petitioner is related to or affiliated with these institutions, as required.

The term “related or affiliated,” in 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, 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 as follows:

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 above 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:

⁵ As the Director found, the [REDACTED] is a for-profit institution and thus does not qualify as an institution of higher education as defined in section 101(1) of the Higher Education Act of 1965, 20 U.S.C. 1001(a). Accordingly, the agreement with [REDACTED] will not be discussed further.

Matter of H-C-S-

- (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.⁶

Each of the Petitioner's agreements with these institutions indicates the purpose of the agreement is to provide the institutions' students with an opportunity to student teach and otherwise obtain field experience in a classroom setting. [REDACTED], and [REDACTED] agreements also state that "[t]his is an Agreement of Collaboration between two independent parties" while also outlining the general responsibilities of the Petitioner and each institution. The [REDACTED] agreement similarly provides a general understanding of the responsibilities of each party to the agreement while recognizing that neither party is an agent, employee, or servant of the other. The [REDACTED] and [REDACTED] agreements expire June 30, 2016, and July 1, 2016, respectively and the record does not include evidence that either agreement has been extended. Moreover, these agreements like the other agreements in the record generally outline the obligations of the parties and do not include information regarding the affiliation of the parties. Each of these documents is limited in scope and none of the agreements include information demonstrating that the Petitioner and any of the institutions of higher education are under shared ownership or are controlled by the same board or federation, or that the institutions of higher education operate the Petitioner.

The record also does not include probative evidence that the Petitioner is attached to any of the institutions of higher education as a member, branch, cooperative, or subsidiary. All four of these terms indicate at a minimum some type of shared ownership and/or control, which has not been presented in this matter. *See generally Black's Law Dictionary* 182, 336, 1442 (7th ed. 1999) (defining the terms branch, cooperative, and subsidiary); *see also Webster's New College Dictionary* 699 (3rd ed. 2008) (defining the term member).

Upon review, the Petitioner has not established that it is related to or affiliated with an institution of higher education and exempt from the H-1B cap pursuant to section 214(g)(5) of the Act. The appeal will be dismissed for this reason.⁷

⁶ 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 the regulation at 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).

⁷ We note that a new regulation regarding H-1B cap exemption for nonprofit entities went into effect on January 17, 2017. Although this regulation is not retroactive, the Petitioner may be eligible for cap exemption under the new regulation.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of H-C-S-*, ID# 65752 (AAO Jan. 26, 2017)