



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

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

MATTER OF C-C-S-D-59

DATE: FEB. 17, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a public school district, seeks to temporarily employ the Beneficiary as a “bilingual teacher” under the H-1B nonimmigrant classification. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The Director, California Service Center, denied the petition. The matter is now before us on appeal. Upon *de novo* review, we will dismiss the appeal.

I. ISSUE

The issue before us is whether the Beneficiary qualifies for an exemption from the Fiscal Year 2015 (FY15) H-1B cap based on the Petitioner’s relation to or affiliation with an institution of higher education.

II. H-1B CAP EXEMPTION

A. 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 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.

Title 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 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

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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 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 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.¹

B. Factual Background

At “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 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)?” At “Section 3. Numerical Limitation Information” of the same supplement, the Petitioner checked the box in response to the statement, “The [P]etitioner 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 letter dated March 18, 2015, the Petitioner stated that it:

[H]as students from [redacted] completing their teacher-training requirement in our classrooms. Pursuant to the arrangement the university sends students to [the Petitioner] as part of its teacher-training program. This program serves the essential educational objectives of the university by allowing education students to observe classroom teachers as part of the program requirements.

¹ 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).

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The Petitioner also submitted a letter from [REDACTED] dated April 28, 2015. The letter confirms the existence of the teacher-training arrangement described by the Petitioner by stating the following:

This is to confirm that [the Petitioner] has an affiliation with [REDACTED] [REDACTED] for our student teachers. Our university sends students to [the Petitioner] as part of our teacher training program. . . . This arrangement serves the essential educational objectives of the university by allowing education students to observe classroom teachers as part of the program requirements.

The Petitioner, however, has not submitted any contracts with [REDACTED]

C. Analysis

We will first consider whether the Petitioner has established that it is a related or affiliated nonprofit entity pursuant to the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B): shared ownership or control by the same board or federation. In response to the Director's request for evidence (RFE), the Petitioner asserted that it is related to the [REDACTED]. In support, the Petitioner submitted some general information about the Illinois General Assembly and a printout which states that the [REDACTED] is a public research university, ultimately responsible to the citizens of Illinois and the Illinois General Assembly.”

However, we cannot find that the Petitioner meets the definition of related or affiliated nonprofit entity simply because the Petitioner and the [REDACTED] are both public educational institutions in the State of Illinois governed and/or regulated by the Illinois General Assembly. We interpret the terms “board” and “federation” as referring specifically to educational bodies such as a board of education or a board of regents. Accepting an argument concerning some type of shared ownership or control through the government of the State of Illinois would allow virtually any state government agency in Illinois, or in any other state for that matter, to claim exemption from the H-1B cap regardless of whether the agency had any connection to higher education, a result that would be inconsistent with the intent of AC21. This overly expansive interpretation would undermine the clear congressional intent to grant an exemption for institutions of higher education.²

Upon review, the record does not establish that the Petitioner and the [REDACTED] are owned or controlled by the same boards or federations. The Petitioner also did not indicate that it

² See generally 146 Cong. Rec. S9643-05 (October 3, 2000) (Statements of Senators Harry Reid, John McCain, Spencer Abraham, Sam Brownback, Kent Conrad, Patrick Leahy and Orrin Hatch); 146 Cong. Rec. S9449-01 (September 28, 2000) (Statements of Senator Hatch, Abraham and Edward Kennedy); 146 Cong. Rec. S7822-01 (July 27, 2000) (Statement of Senator John Warner); 146 Cong. Rec. S538-05 (February 9, 2000) (Statements of Senators Hatch, Abraham and Phil Gramm).

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shares the same board or federation with [REDACTED]. Consequently, we find that the Petitioner has not met the first prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Second, we consider whether the Petitioner has established that it is a related or affiliated 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. The evidence in the record does not demonstrate that an institution of higher education operates the Petitioner, a public school district, within the common meaning of this term. The Petitioner did not provide any agreements between itself and [REDACTED]. The letter from [REDACTED] only states that it “sends students to [the Petitioner] as part of [its] teacher training program.”

While [REDACTED] may send student teachers to observe at the Petitioner’s school, it cannot be inferred from associations of such a limited scope that the Petitioner is being operated by [REDACTED]. 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 has established that it 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. 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, a public school district, is not attached to an institution of higher education in a manner consistent with these terms. There is no probative evidence submitted that the Petitioner is a member, branch, cooperative, or subsidiary of [REDACTED]. 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* at 212, 384, 1565 (9th Ed. 2009) (defining the terms branch, cooperative, and subsidiary); *see also Webster's New College Dictionary* at 699 (3rd Ed. 2008) (defining the term member).

In response to the RFE, the Petitioner asserted that it has “a cooperative attachment to [REDACTED] based on consistent collaboration for the training of student teachers.” However, the purpose of the collaboration is to provide on-the-job training experience for future teachers. The letter from [REDACTED] states “[t]his arrangement serves the essential educational objectives of the university by allowing education students to observe classroom teachers as part of the program requirements.” It is not indicative of intent to share ownership or control.

On appeal, the Petitioner refers to a “very similar” non-precedent decision where we held that an individual employed in a joint teacher training program at a petitioning public school to be exempt from the H-1B cap based on attachment to an institution of higher education. However, 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, non-precedent decisions are not similarly binding.³

Further, on appeal, the Petitioner refers to an internal USCIS memorandum to assert that “the present case . . . clearly falls within the scope of H-1B workers that Congress intended to exempt from the H-1B cap based on the Beneficiary’s direct contribution toward the educational objectives of the United States.” However, we note that according to the memo, the analysis of the program participation occurs only when it has been determined that a beneficiary will be employed on site “at” an institution of higher education or a related or affiliated nonprofit entity by a third party petitioner. In other words, the *locus actus*, or place of performance is paramount in determining whether a petitioner qualifies for an exemption from the H-1B cap as an institution of higher education under section 214(g)(5)(A) of the Act. It is clear from the evidence presented in this matter that the Beneficiary will be employed at the Petitioner’s facilities and therefore, does not qualify for the third-party employer exception in the memo.

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.

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; *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 C-C-S-D-59*, ID# 15632 (AAO Feb. 17, 2016)

³ For more information about our precedent and non-precedent decisions, see USCIS Policy Memorandum PM-602-0086.1, *Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO)*, November 18, 2013. http://www.uscis.gov/sites/default/files/files/nativedocuments/PM-602-0086-1_AAO_Precedent_and_Non-Precedent_Decisions_Final_Memo.pdf.