



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

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

MATTER OF C-F-I-H-, INC.

DATE: FEB. 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a not-for-profit corporation, seeks to temporarily employ the Beneficiary 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 is whether the Petitioner has established that the petition is exempt from the H-1B numerical limitations under section 214(g)(5)(B) of the Act.

II. THE H-1B CAP

A. Legal Framework

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 (“H-1B Cap”).

An exemption from the H-1B is available for certain petitions. Section 214(g)(5) of the Act states, in pertinent part:

The numerical limitations . . . shall not apply to any nonimmigrant alien issued a visa or otherwise provided [H-1B status] who-

- (A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 1001(a) of Title 20), 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

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(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.

A non-profit research organization or governmental research organization is defined as follows:

A nonprofit research organization is an organization primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

8 C.F.R. § 214.2(h)(19)(iii)(C). Notably, 8 C.F.R. § 214.2(h)(8)(ii)(B) states, in part:

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 and refunded.

In visa petition proceedings, the burden is on the Petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)).

B. The Petitioner

The Petitioner claimed that it is exempt from the H-1B cap as a “nonprofit research organization” that is primarily engaged in basic research. On the Form I-129, the Petitioner reported that it was established in [REDACTED] (approximately [REDACTED] years prior to this H-1B filing) and that it has four employees. On the Form I-129, the Petitioner stated that its gross annual income is \$97,000, and its net annual income is \$1,000. The Petitioner’s 2014 Federal Tax Return indicates that it provided \$9,410 in a grant to the [REDACTED] and that it paid \$24,620 in international recruitment costs. The Petitioner is located in [REDACTED] Florida.¹ The tax return also indicates that its

¹ The Petitioner claimed that the Beneficiary would be employed at a client site in [REDACTED] Indiana (approximately

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chairman and directors devoted an average of .5 hours per week to their positions, the director of administration devoted two hours per week to her position, and the secretary devoted one hour per week to his position.

C. Analysis

The regulation at 8 C.F.R. § 214.2(h)(19)(iii)(C) defines a nonprofit research organization as an organization that is primarily engaged in basic research and/or applied research. The exemption, therefore, is not applicable for those who speculatively may engage in basic and/or applied research. Rather, the exemption is available for an employer who demonstrates, *intra alia*, that it is currently engaged in such research.²

The Petitioner provided several documents in support of its assertion that it is exempt from the H-1B cap, including (1) a document entitled [REDACTED] (2) a document entitled [REDACTED] (3) its 2014 Income Tax Return;³ (4) printouts from its website; and (5) its Articles of Incorporation. We carefully examined each piece of evidence in the record; however, the documentation does not demonstrate that the Petitioner “is primarily engaged in basic research and/or applied research.”

For example, we reviewed the papers entitled [REDACTED] and [REDACTED]. The Petitioner claims that these papers are evidence of its current research. As a preliminary matter, we note that the papers are proposals. A proposal is: “(1) Something offered for consideration or acceptance, a suggestion. (2) The act of putting something forward for consideration.” *Black’s Law Dictionary* 1413 (10th ed. 2014). The papers discuss anticipated start and completion dates for the research, the estimated costs, and possible survey questions. The documents state that “[t]he proposed research will be conducted. . .” and “[t]his proposal aims to test. . .” The Petitioner has not provided evidence to demonstrate that the research projects are in progress or have been conducted.⁴

Furthermore, the paper [REDACTED] does not mention the Petitioner. Rather, the paper specifically states

1,140 miles from the Petitioner’s business operations).

² A petitioner must establish that it is eligible for the benefit request at the time of filing and must continue to be eligible through adjudication. 8 C.F.R. § 103.2(b).

³ We observe that the Petitioner’s total revenue for 2014 came from [REDACTED] a healthcare staffing agency. It appears that some of the Petitioner’s employees are also employed by [REDACTED] as part of its management team.

⁴ The instant H-1B petition was filed on January 28, 2015. Although the Petitioner submitted research proposals, it does not appear that any further action occurred. For example, one of the proposals states that “[w]e hope to conduct the research in June 2013, with subsequent data analysis in July and August, 2013” and that it “will present the finding at a future conference. . . which will be held [REDACTED] 2014 in [REDACTED] Nevada.”

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that it was written by - and the research will be conducted by - [REDACTED] and [REDACTED]. There is no indication that the Petitioner was involved in the preparation of the proposal or that the writers are employees or otherwise affiliated with the Petitioner. There is a lack of evidence supporting a conclusion that the data, evaluation, and/or analysis was prepared by or for the petitioning organization as the document does not contain any information connecting it to the Petitioner.

The document [REDACTED] indicates that if the proposal should move forward, then the Petitioner will be responsible for “[t]he development and production of outreach materials. . . [that] consists of printing brochures and flyers and office supplies.” In addition, the document states that the Petitioner will develop a website, “as well as technology to deliver the text messages at the appropriate intervals.” The Petitioner did not provide any further documentation, such as a contract or work statement to demonstrate the nature of its work to be performed on this proposed project. Without more, these tasks do not establish the Petitioner’s role in this proposed study would be to engage in basic research.

Furthermore, the Petitioner has not provided evidence to establish what portion of its time and resources are dedicated to research activities, and what portion of its time and resources are dedicated to other programs and services. While the Petitioner claims in the appeal that “[t]he only activity undertaken by the Petitioner is basic research,” the documentation provided indicates that its operations include placing healthcare workers at third-party client sites, including the Beneficiary in this case. Without more, it has not demonstrated that it is primarily engaged in basic research.

From the evidence provided, we are unable to conclude that the Petitioner is a nonprofit research organization that is primarily engaged in basic research. Therefore, the Petitioner has not established that the petition is exempt from the H-1B cap and the numerical limit has been reached.⁵

III. ADDITIONAL ISSUES

As this basis for denial is dispositive of the Petitioner’s eligibility for the benefit sought, we need not and will not address at this time any additional issues in the record of proceeding. Nevertheless, we will note that there are a number of discrepancies within the filing. For instance:

- The Petitioner stated: (1) in the Form I-129 and appeal brief that the Beneficiary would be employed as a physical therapist; however, (2) in the labor condition application the Petitioner claimed that he would be employed as an occupational therapist. In response to our notice, the Petitioner stated that the Beneficiary will be employed as an occupational therapist.

⁵ USCIS announced that the H-1B cap for fiscal year 2016 was reached on April 7, 2015.

- In the letter of support submitted with the petition, the Petitioner stated that the Beneficiary's education is equivalent to a United States master's degree in physical therapy. However, the National Certification Boards of Occupational Therapists letter submitted by the Petitioner indicates that the Beneficiary's credentials are comparable to a U.S. degree in occupational therapy.
- The Petitioner stated in the appeal that "[it] derives no revenue from staffing and is solely a research organization." The Petitioner, however, submitted an employment agreement between itself and the Beneficiary, stating that the Beneficiary acknowledges that the Petitioner "would suffer significant loss of profits should Employee fail to complete the full term of service at the Assigned Client Facility" and that he would be required to pay \$45,000 in liquidated damages, which would include the Petitioner's "lost profits."
- The Petitioner requested on the Form I-129 that the petition be approved from February 1, 2015 to January 31, 2018. However, in the letter of support, the Petitioner stated that it wished to employ the Beneficiary from February 1, 2015 and extending no longer than January 31, 2016.

Thus, we must question the accuracy of the statements and whether the information provided is correctly attributed to this particular position and Beneficiary. An inaccurate statement anywhere on the Form I-129 or in the evidence submitted in connection with the petition mandates its denial. *See* 8 C.F.R. § 214.2(h)(10)(ii); *see also id.* § 103.2(b)(1).

IV. CONCLUSION AND ORDER

The burden is on the Petitioner to show 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-F-I-H-, Inc.*, ID# 15084 (AAO Feb. 18, 2016)