



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

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

MATTER OF P-I-M-S-

DATE: JULY 14, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

Petitioner, a school, seeks to temporarily employ the Beneficiary as an elementary school 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. 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 asserts that the Director erred in finding that the Petitioner had not established eligibility for the exemption sought.

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

I. H-1B CAP

A. 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 aliens 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 was filed for an employment period to commence in September 2015. The 2015 fiscal year (FY15) extends from October 1, 2014, through September 30, 2015. The instant petition is therefore subject to the 2015 H-1B cap, unless exempt. Further, on April 7, 2014, 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 FY15. The Petitioner filed the instant visa petition on September

10, 2015. Unless this visa petition is exempt from the cap, it cannot be approved. At issue in this matter, therefore, is whether the Beneficiary qualifies for an exemption from the FY15 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.

B. Analysis

The Petitioner filed the H-1B petition on September 10, 2015. The Form I-129 H-1B Data Collection and Filing Fee Supplement (H-1B Supplement), at Section 3, Numerical Limitation Information, reads as follows:

1. Specify the type of H-1B petition you are filing. (*select only one box*):
 - a. CAP H-1B Bachelor's Degree
 - b. CAP H-1B U.S. Master's Degree or Higher
 - c. CAP H-1B1 Chile/Singapore
 - d. CAP Exempt

The Petitioner checked "d," indicating the Petitioner's position that the instant petition is exempt from the cap.

The Petitioner does not claim and does not provide evidence that the Petitioner in this matter is a nonprofit research organization or a governmental research organization. Further, the record contains no indication that the Beneficiary has earned a master's or higher degree from a United States institution of higher education. Further still, the Petitioner does not claim that the Petitioner is, itself, an institution of higher education. In fact, on the H-1B petition, the Petitioner stated that it is not such an entity and that the Beneficiary does not have such a degree. We find insufficient evidence that the instant visa petition qualifies for exemption from the cap pursuant to any of the above tests.

The only remaining test of whether this visa petition is subject to the cap is whether the Petitioner is a nonprofit organization or entity related to or affiliated with an institution of higher education. 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 an institution of higher education.

With the visa petition, in response to the Director's request for evidence, and on appeal, the Petitioner provided briefs addressing whether the Petitioner is related to or affiliated with an institution of higher education. The crux of the Petitioner's position is that the Petitioner is affiliated with St. Joseph's University (the University) based on a contract between one of the Petitioner's managed schools and the University. In support of that contention, the Petitioner points to section 101(e)(2) of the Act, 8 U.S.C. § 1101(e)(2), which, as the Petitioner observes, states that providing anything of value for any purpose to any organization constitutes an "affiliation." Set out in full, section 101(e) of the Act states:

For the purposes of this Act—

- (1) The giving, loaning, or promising of support or of money or any other thing of value to be used for advocating any doctrine shall constitute the advocating of such doctrine; but nothing in this paragraph shall be construed as an exclusive definition of advocating.
- (2) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization

shall be presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

- (3) Advocating the economic, international, and governmental doctrines of world communism means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

Read in context, section 101(e)(2) of the Act plainly refers to “affiliation” in the sense of a person being affiliated with the Communist movement. We do not find this definition of “affiliation” applicable for purposes of determining whether a beneficiary is exempt from the H-1B cap.

However, 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 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 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

(b)(6)

Matter of P-I-M-S-

- (3) Attached to an institution of higher education as a member, branch, cooperative, or subsidiary.¹

The contract between the Petitioner and the University is, at its essence, an agreement to terms pursuant to which the University will recruit and select teaching and administrative fellows to work at the petitioning school under the [REDACTED] program. The contract, entitled “[REDACTED] School Agreement 2015-2017,” states that “[t]his Agreement only pertains to Teaching and Administrative Fellows entering the program in 2015, one for two years.”

The contract between the Petitioner and the University is very limited in scope. It contains terms pursuant to which the University’s students would be employed by the Petitioner (and other closely-related matters) under a two-year fellowship program beginning in 2015. The evidence in the record is insufficient to show that the Petitioner and the University are under shared ownership or control. The evidence is insufficient to show that the University operates the Petitioner.

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 and/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).

Here, the Petitioner asserts that it qualifies as a “cooperative” of the University through the [REDACTED] program. The Petitioner asserts that “[u]nder Pennsylvania law, a cooperative may take the form of an ‘unincorporated non-profit association.’” The Petitioner further states that “[REDACTED] is a non-profit association consisting of [the University] and [the Petitioner] Partner Schools as members. They have a written agreement, which provides for shared control of certain aspects of the ‘cooperative’ as set forth above.” On appeal, the Petitioner advances the position that “[i]t is hard to imagine any reading of the word ‘cooperative’ that would not include an intensive program between two entities, bound by contract, sharing staffing, financial, and educational resources in pursuit of an explicit common goal.”

We find the Petitioner’s assertions unpersuasive; however, as it has not cited any legal authority to support its assertion that, under Pennsylvania law, an unincorporated non-profit association qualifies

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).

(b)(6)

Matter of P-I-M-S-

as a “cooperative.” Nor has the Petitioner cited legal authority to support its loose definition of a “cooperative” as a program between two entities with some common resources and goals.² “[G]oing on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.” *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)).

Moreover, the Petitioner has not sufficiently supported its assertion that it and the University have “shared control” of the [redacted] program. The terms of the contract indicate that the Petitioner has separate and distinct responsibilities, as does the University. There are no terms in the contract indicating that the Petitioner may limit the University’s authority in any way, or vice versa. Without more, we are not persuaded that the contract’s provisions for cooperation between the Petitioner and the University amount to shared control or ownership. The Petitioner has not demonstrated that it is related to or affiliated with an institution of higher learning.

II. PAYMENT OF REQUIRED WAGE

Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A), states that the Petitioner must offer wages that are at least “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater.” The regulation at 20 C.F.R. § 655.731(c)(1) similarly states that “the required wage must be paid to the employee, cash in hand, free and clear, when due.” *See generally* 20 C.F.R. § 655.731 (establishing the wage requirement for labor condition application purposes).

On the Form I-129, Petition for Nonimmigrant Worker, and the LCA, the Petitioner attested that it would pay the Beneficiary a wage of \$32,000 per year. The instructions to the Form I-129 specify that the salary or wages must be expressed in an annual full-time amount and do not include non-cash compensation or benefits.³

The Petitioner declared that it would comply with the statements as set forth in the cover pages of the LCA and the DOL regulations at 20 C.F.R. § 655, Subparts H and I, when it filed and signed the LCA. In addition, the Petitioner signed the Form I-129, H Classification Supplement, thereby certifying under penalty of perjury that it agrees to and will abide by the terms of the LCA for the duration of the Beneficiary’s authorized period of stay for H-1B employment. The Petitioner also signed the Form I-129 certifying under the penalty of perjury that the information supplied to USCIS on the petition and supporting evidence was true and correct.

² The Petitioner refers to two unpublished AAO decisions. One decision, dated August 9, 2010, found that a petitioner qualified as a related or affiliated entity through shared control by the same board pursuant to 8 C.F.R. § 214.2(h)(19)(iii)(B)(1). The other, dated October 5, 2010, found that the petitioner did not qualify as a related or affiliated entity under any prong at 8 C.F.R. § 214.2(h)(19)(iii)(B). In any event, we observe that unpublished AAO decisions are not binding on USCIS employees in the administration of the Act. *Compare* 8 C.F.R. § 103.3(c) (precedent AAO decisions are binding).

³ The Petitioner reported that the prevailing wage is \$30,600 per year.

(b)(6)

Matter of P-I-M-S-

However, under the terms of the [redacted] contract, the Petitioner “shall provide each [redacted] Teaching/Administrative Fellow [i.e., the Beneficiary] with a living stipend . . . in the amount of \$1,000 per month (before taxes), for a total annual stipend (before taxes) of \$12,000.” The Petitioner confirmed in its RFE response that it “is required to provide [the Beneficiary] with a living stipend in the amount of \$1,000 per month (before taxes), for a total annual stipend (before taxes) of \$12,000 [per year].” The Petitioner stated: “The combination of the living stipend to the [redacted] Fellow and the fee to [the University] that [the Petitioner] is required to pay for its participation in the [redacted] program amounts to \$23,000, well below the normal compensation package [the Petitioner] provides to its elementary school teachers.”⁴ The offered stipend of \$12,000 per year, and even the total program cost of \$23,000 per year, is far less than the prevailing and proffered wages attested to on the LCA.

The Petitioner’s employment agreement with the Beneficiary states that she would be paid a salary of “\$32,000 annually, \$1,230.77 bi-weekly.” Nevertheless, the Petitioner has not offered an explanation reconciling its employment agreement with its contractual obligations under the [redacted] program and other statements made in support of this petition. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

In light of the above, the record does not sufficiently demonstrate that the Petitioner would pay the Beneficiary the required wage attested to on the LCA.⁵ The record also does not sufficiently demonstrate that the Petitioner would satisfy the wage requirement at section 212(n)(1)(A) of the Act, i.e., that the actual wage paid to the Beneficiary would be equal to or greater than “the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question” or “the prevailing wage level for the occupational classification in the area of employment, whichever is greater.”

III. CONCLUSION

The record does not demonstrate that: (1) the Petitioner is related to or affiliated with an institution of higher learning and, thus, that this petition is exempt from the numerical cap; (2) the Petitioner would pay the Beneficiary the required wage in accordance with the certified LCA. 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.

⁴ The Petitioner explained that, under this agreement, it “is required to pay the University a fee in the amount of \$13,000 per Fellow per year.” The Petitioner also explained that it is prohibited from providing the Beneficiary with health insurance.

⁵ The record does not demonstrate that the difference between the Beneficiary’s stipend and the required wage, as attested to on the LCA, can be accounted for by “authorized deductions” as set forth in 20 C.F.R. § 655.731(c)(9).

Matter of P-I-M-S-

ORDER: The appeal is dismissed.

Cite as *Matter of P-I-M-S-*, ID# 16977 (AAO July 14, 2016)