



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

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

MATTER OF G-R-S-, INC.

DATE: JULY 18, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a charter school, seeks to temporarily employ the Beneficiary as an “elementary bilingual 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, finding that the Petitioner had not established that the Beneficiary was qualified for the position. The matter is now before us on appeal.

Upon review of the entire record of proceedings, we find that another, more fundamental issue has not been resolved: whether the Petitioner qualifies for an exemption from the Fiscal Year 2016 (FY16) H-1B cap as an entity that is related to or affiliation with an institution of higher education. We are therefore remanding this matter to the Director for further review.

I. THE LAW

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.

(b)(6)

Matter of G-R-S, Inc.

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 U.S. Citizenship and Immigration Services (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

II. THE RELATIONSHIP

The Petitioner claims that U.S. Citizenship and Immigration Services (USCIS) previously determined that it was cap exempt based upon its relationship with [REDACTED]. The Petitioner provided a letter issued by [REDACTED] on August 1, 2014, which describes their relationship as follows:

We appreciate your partnership with us by hiring our graduates, allowing students to observe master teachers in your district, and offering your schools for student teaching.

In support of the assertion that it is cap exempt, the Petitioner references its previously approved H-1B petitions and a USCIS memorandum.² We note, however, that, it would constitute clear error

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).

² For additional information, see 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. 11, 2011), <https://www.uscis.gov/laws/policy-memoranda>.

(b)(6)

Matter of G-R-S-, Inc.

if the prior approvals were based upon the Petitioner's relationship with [REDACTED] as described in this letter.

III. CONCLUSION

Therefore, the matter will be remanded to the Director for further review. The Director may request any additional evidence considered pertinent to the determination.

ORDER: The decision of the Director, California Service Center is withdrawn. The matter is remanded to the Director, California Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of G-R-S-, Inc.*, ID# 18307 (AAO July 18, 2016)