



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

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

MATTER OF M-A-H-

DATE: OCT. 13, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a hospital, seeks to temporarily employ the Beneficiary as a “medical technologist” 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 individual 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 evidence of record does not establish that the Beneficiary qualifies for an exemption from the Fiscal Year 2016 (FY16) H-1B cap based on the Petitioner’s relation to or affiliation with an institution of higher education.¹

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and copies of previously submitted evidence. The Petitioner asserts that the evidence of record “is sufficient in establishing that the Petitioner is attached to institutions of higher education as a cooperative.”

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

I. 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.

¹ U.S. Citizenship and Immigration Services (USCIS) announced that the H-1B cap for FY16 was reached on April 7, 2015.

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 (ACWIA), 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).² 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.³

² 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. 28, 2011), <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Feedback%20Opportunities/Interim%20Guidance%20for%20Comment/Additional-guidance-deference-h1B-cap-PM-602-0037.pdf>. See also Memorandum from Michael Aytes, Associate Director for Domestic Operations, USCIS, HQPRD 70/23.12, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (June 6, 2006).

³ 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 Immigration and Naturalization Service 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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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 response to the Director’s request for evidence (RFE), the Petitioner again asserted that it qualifies as a non-profit entity affiliated with an institution of higher education. The Petitioner pointed to prior petitions it has filed since 2006 which USCIS approved as cap-exempt, and asserted that deference should be accorded to these approvals pursuant to USCIS interim guidance.⁴ The Petitioner also explained that its Federal Employer Identification Number (FEIN) changed after the hospital’s ownership and operations were changed to [REDACTED] effective April 1, 2005. The Petitioner attested that, despite the transfer of ownership and operations, there has been “no significant change in circumstances.”

In support of its petition, the Petitioner submitted, *inter alia*, “affiliation” agreements it has with [REDACTED] and [REDACTED]. The Petitioner also submitted a letter from the [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.

Upon review, the record does not establish that the Petitioner and [REDACTED] or [REDACTED] are owned or controlled by the same boards or federations. We interpret the terms “board” and “federation” as referring specifically to educational bodies such as a board of education or a board of regents. The Petitioner does not expressly claim that it shares the

⁴ USCIS Policy Memorandum PM-602-0037, *supra*. This memorandum sets forth interim guidance on H-1B cap exemptions for non-profit entities “related to or affiliated with” an institution of higher education whereby, until further notice, USCIS should defer to prior cap exemption determinations made on or after June 6, 20016, provided that petitioners can document that they were previously determined to be cap exempt. This interim procedure is meant to promote consistency in adjudications while USCIS reviews its policy on H-1B cap exemptions.

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same board or federation with these institutions, either. 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, which is self-described as a “hospital [which] operates as a governmental organization licensed by the State of Texas as a district-authority owned hospital.” Nor does the Petitioner claim that it is operated by an institution of higher education. Accordingly, we find that the Petitioner has not met the second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

Third, 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 its appeal brief, the Petitioner specifically states that it qualifies as a “cooperative.”

In the supplementary information to the interim regulation now found at 8 C.F.R. § 214.2(h)(19)(iii)(B), the former Immigration and Naturalization Service stated that it drafted the regulation “drawing on generally accepted definitions” of the terms. 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). 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).

Although the Petitioner claims that it qualifies as a “cooperative,” the Petitioner has not further explained why it qualifies as such. That is, other than presenting copies of its “affiliation” agreements with the various institutions of higher education, the Petitioner has not identified and explained which provisions within these agreements establish some type of shared ownership and/or control. Instead, we find that these agreements are very limited in scope. Essentially, they contain terms pursuant to which students from these educational institutions may gain clinical experience at the Petitioner’s facilities. The Petitioner provides the students with access to its facilities and clinical staff supervision, but each educational institution maintains control, authority, and responsibility for the educational programs which are the subject of the “affiliation” agreements. Specifically, all of the “affiliation” agreements contain the same or similar provisions stating that the educational institution will “[m]aintain the authority and responsibility for education programs for its students which may be conducted within [the Petitioner’s] facilities,” or will “control and supervise all clinical learning experiences in the Program.”

The Petitioner submits a letter from the [REDACTED] stating that it has had “a working partnership with [the Petitioner],” and that the joint report with [REDACTED] entitled [REDACTED] was “made possible through a cooperative partnership between [REDACTED] and [the Petitioner].” The Petitioner also submitted a copy of the afore-mentioned joint report as well as additional documentation about the [REDACTED]

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(to which the [REDACTED] belongs). However, the Petitioner has not further explained the nature of its "cooperative partnership" with the [REDACTED] or [REDACTED] nor has the Petitioner submitted documentation demonstrating that a formal partnership or cooperative exists with these entities, and if so, the terms of that formal partnership or cooperative. "[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)).

The record does not demonstrate that the Petitioner is attached to an institution of higher education as a "cooperative," "member," "branch," or "subsidiary" in a manner consistent with the generally accepted definitions of those terms, all of which require some degree of shared ownership and/or control. Accordingly, the Petitioner has not demonstrated that it is exempt from the H-1B cap pursuant to section 214(g)(5) of the Act.

II. PRIOR APPROVALS

The Petitioner asserts that previously filed petitions were approved by USCIS with a determination of cap exemption. The record contains, *inter alia*, copies of the Petitioner's prior approval notices and the underlying petitions. The Petitioner claims that, based on these prior approvals, USCIS must defer to these prior determinations pursuant to USCIS policy guidance.⁵ We disagree.

Generally, USCIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm. 1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). Thus, despite the deference generally afforded to prior approvals pursuant to USCIS interim policy, there is no requirement that such deference be perpetuated when evidence of clear error, as seen here, is demonstrated.⁶

Again, the Petitioner has not adequately explained how the evidence of record demonstrates that the Petitioner qualifies as a "cooperative" (or a "member," "branch," or "subsidiary") with an institution of higher education. On its face, the "affiliation" agreements between the Petitioner and the various institutions of higher education are limited in scope, and do not contain any provisions indicating any sort of shared ownership and/or control. If the Petitioner's previous nonimmigrant petitions were approved by USCIS with a determination of cap exemption based on the same deficient evidence contained in the current record, this would constitute material and clear error on the part of the Director, and we are not required to accord deference in this instance.⁷

⁵ USCIS Policy Memorandum PM-602-0037, *supra*.

⁶ *Id.*

⁷ Several of the "affiliation" agreements were executed *after* the date of the Petitioner's prior approvals. The Petitioner has not clarified which of the submitted "affiliation" agreements it relied upon to obtain the prior approvals. In any

The Petitioner further has not demonstrated that USCIS should accord deference in this instance, as the Petitioner has not overcome the Director's concerns regarding the Petitioner's prior approvals. More specifically, in both her RFE and decision denying the petition, the Director pointed out that the Petitioner had recently filed petitions under the regular H-1B cap, not as a cap-exempt entity. The Director also pointed out that several of the Petitioner's approved cap-exempt petitions were filed under a different FEIN, thus raising questions as to whether there has been a "significant change in circumstances."

In response to the Director's concerns, the Petitioner explained that its prior petitions filed under the regular H-1B cap were all extension petitions, and that its prior attorney failed to indicate the Petitioner's "CAP exempt filing category." The Petitioner further claimed that its use of a new FEIN (75-XXXXXXX) was merely due to its change in ownership and operations, and did not indicate any "significant" changes with respect to its "affiliation" agreements. However, the Petitioner's explanations are not corroborated by and consistent with the submitted evidence.

Here, although the Petitioner claimed that its prior attorney failed to properly indicate the Petitioner's "CAP exempt filing category," the Petitioner did not submit copies of these particular petitions to corroborate its assertions regarding attorney error. We note that several of the Petitioner's prior petitions appear to have been self-prepared as no preparer information or signatures were contained on the forms. In any event, the Petitioner signed each petition under penalty of perjury certifying that the information contained therein was true and correct to the best of its knowledge, and thus, alleging attorney error is not sufficient to absolve the Petitioner of its responsibility for its attestations on the petitions. We also note that extension petitions are statutorily exempt from the H-1B cap, which further raises questions as to why the Petitioner would file at least four cap-subject petitions.⁸

And contrary to the Petitioner's assertion that its FEIN changed with its change in ownership and operations effective April 1, 2005, several of the Petitioner's approved petitions filed *after* April 1, 2005 still identified the Petitioner under its old FEIN number (43-XXXXXXX).⁹ The Petitioner has not explained why it continued to use its old FEIN number in these petitions. Accordingly, the Petitioner has not sufficiently overcome the Director's concerns and demonstrated that its prior cap-exempt determinations should be accorded deference.

For the reasons set forth above, the Petitioner has not established that the Beneficiary qualifies for exemption to the numerical cap on H-1B nonimmigrants based on the Petitioner's relation to or affiliation with an institution of higher education. The USCIS policy memorandum relied upon by the Petitioner does not mandate deference to prior cap-exempt determinations in this case here.

event, we find that none of the affiliation agreements are sufficient to establish the requisite shared ownership and/or control with the educational institutions.

⁸ Section 214(g)(7) of the Act specifically exempts "[a]ny alien who has already been counted, within the 6 years prior to the approval of a petition" from again being counted towards the H-1B cap.

⁹ These petitions were filed in December 2005, December 2008, and April 2007.

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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 M-A-H-*, ID# 12595 (AAO Oct. 13, 2016)