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

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

MATTER OF [REDACTED]

DATE: OCT. 19, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a non-profit public school system, seeks to temporarily employ the Beneficiary as a “French teacher (middle school)” 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 letter and additional evidence, asserting that the Director’s finding was erroneous.

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.

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

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

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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.

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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 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 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.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 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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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 submitted an affidavit by [REDACTED] director of human resources for the Petitioner. [REDACTED] states that the Petitioner currently has a collaboration and affiliation with the [REDACTED] and based on such a relationship, the Beneficiary was eligible for an exemption from the FY16 H-1B cap.

The Petitioner also submitted a letter from the [REDACTED] dated July 18, 2014, which stated that “[t]he College of Education is very proud of the collaborative programs established with [the Petitioner].” The Petitioner, however, has not submitted any contracts, memorandums of understanding, or any additional documentation outlining the nature of its relationship with 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. In response to the RFE, the Petitioner asserted that it has a collaboration and affiliation with the [REDACTED] and relies upon the July 18, 2014, letter written by [REDACTED] the University’s Dean of the College of Education. However, the Petitioner’s assertion that an affiliation exists is insufficient to establish that shared ownership or control by the same board or federation exists for both entities. We interpret the terms “board” and “federation” as referring specifically to educational bodies such as a board of education or a board of regents.

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 shares the same board or federation with the [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

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higher education. The evidence in the record does not demonstrate that an institution of higher education operates the Petitioner, a non-profit public school system, within the common meaning of this term. The Petitioner did not provide any agreements between itself and the [REDACTED]. The letter from the [REDACTED] only states that it “is very proud of the collaborative programs established with [the Petitioner].”

While the [REDACTED] may send student teachers to teach and/or observe in the Petitioner’s school system, it cannot be inferred from associations of such a limited scope that the Petitioner is being operated by the [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 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). It is evident from the foregoing discussion of the evidence that the Petitioner, a non-profit public school system, 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 the [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).

Again, while the Petitioner implies that it has an affiliation with the [REDACTED] the only evidence submitted in support of this contention is a one-page letter from the Dean of the College of Education, which states simply that it is “very proud” of the collaborative programs established with the Petitioner. This letter, by itself, does not establish an affiliation with or relationship to an institution of higher education as described above.

The record contains no other independent documentation of the existence of any collaborative programs. The record further contains no particular documentation outlining the nature of the claimed collaborative programs between the Petitioner and the [REDACTED]. “[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)). Aside from the unsupported claims of the Petitioner, there is no evidence demonstrating that the Petitioner is connected or associated with the [REDACTED] through shared ownership or control by the same board or federation; operated by the [REDACTED] or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

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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.

II. PRIOR APPROVALS

The Petitioner asserts that previously filed petitions were approved by USCIS with a determination of cap exemption based on affiliation. The record contains an affidavit by the director of human resources for the Petitioner's school system, which claims that two prior petitions filed by the Petitioner were approved by USCIS with a determination of cap exemption based on affiliation since June 6, 2006. The Petitioner thus claims that, based on these prior approvals, USCIS must defer to these prior determinations since the petitions were approved based on the same evidence submitted in support of the instant petition.⁴ 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 under USCIS interim policy, there is no requirement that such deference be perpetuated when evidence of clear error, as seen here, is demonstrated.⁵

Here, the Petitioner submits copies of the prior approved petitions, along with a copy of the April 18, 2014, letter from the [REDACTED] which the Petitioner claims is the same evidence submitted in support of the instant petition. For the reasons outlined above, however, this single letter is insufficient to establish that the Petitioner 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. If the previous nonimmigrant petitions were approved by USCIS with a determination of cap exemption based on the same deficient evidence contained in the current record as claimed by the Petitioner, then this constitutes material and clear error on the part of the Director.

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 when those prior determinations were clearly erroneous, as we have determined is the case here.⁶

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, 2006, 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.

⁵ *Id.*

⁶ *Id.*

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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* [REDACTED] ID# 65612 (AAO Oct. 19, 2016)