



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

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

MATTER OF S-C-U-S-D-

DATE: SEPT. 14, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a public school district, seeks to temporarily employ the Beneficiary as a “4th grade Mandarin immersion” teacher under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 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 approval of the petition is barred by 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 evidence submitted does not demonstrate eligibility for an exemption from the cap.

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

I. THE LAW

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 numerical limitation does not apply to a nonimmigrant alien 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,” or “is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization.” Section 214(g)(5)(A-B) of the Act, 8 U.S.C. § 1184(g)(5)(A-B), as modified by the American Competitiveness in the Twenty-first Century Act (AC21), Pub. L. No. 106-313 (October 17, 2000).

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. Law 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.

According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied in this instance is that found at 8 C.F.R. § 214.2(h)(19)(iii)(B).¹ Specifically, 8 C.F.R. § 214.2(h)(19)(iii)(B), which was promulgated in connection with the enactment of American Competitiveness and Workforce Improvement Act (ACWIA),² defines what is a related or affiliated nonprofit entity specifically for purposes of the H-1B fee exemption provisions:

¹ See USCIS Policy Memorandum 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) 3* (June 6, 2006), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/ac21c060606.pdf (Aytes Memo). (“[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities [*sic*] for purposes of exemption from the H-1B cap”).

² Enacted as Title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year

Matter of S-C-U-S-D-

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 a related or affiliated nonprofit entity if it establishes one or more of the following:

- (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;
- (2) The petitioner is operated by an institution of higher education; or
- (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.³

II. THE PROFFERED POSITION

The Petitioner is a public school district, and claims cap exemption based on its affiliation with [REDACTED]. The Petitioner claims “a long standing partnership” with [REDACTED] which includes “student teacher placement opportunities for teacher credential candidates.”

The Petitioner indicates that the Beneficiary will be a part of the Chinese immersion program at [REDACTED] in [REDACTED]. The Beneficiary “will plan, carry out and

1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-641.

³ This three-part reading is consistent with the Department of Labor’s regulation at 20 CFR § 656.40(e)(ii), which is identical to 8 CFR § 214.2(h)(19)(iii)(B) except for an additional comma between the words “federation” and “operated.” The Department of Labor explains in the supplementary information to its American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) regulations that it consulted with the former Immigration and Naturalization Service (INS) on the issue, supporting the conclusion that the definitions were intended to be identical. *See* 65 Fed. Reg. 80110, 80181 (Dec. 20, 2000).

(b)(6)

Matter of S-C-U-S-D-

evaluate instructional activities for elementary school students in both the English Chinese (Mandarin) languages.”

III. ANALYSIS

The Petitioner has not established that it is an affiliated or related nonprofit entity.

Turning to the definition of an “affiliated or related nonprofit entity,” the Petitioner acknowledges that it is not connected or associated with an institution of higher education through shared ownership or control by same board or federation. The Petitioner further states that it is not operated by an institution of higher education. The Petitioner acknowledges that it does not qualify under the first or second prong of 8 C.F.R. § 214.2(h)(19)(iii)(B).

However, the Petitioner asserts 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. Specifically, in response to the request for evidence, the Petitioner indicates that in addition to its student teacher placement program, it partners with [REDACTED] for [REDACTED] along with another school, [REDACTED]

The [REDACTED] provides “guidance for the purpose of boosting college admission and retention rates, aligning K-12 with college curriculum, training teachers, and other endeavors that are essential to the mission of higher education.” The Petitioner states that [REDACTED] has an executive council from all three entities, an executive director funded by all three entities and a nine-person steering committee. Further, the Petitioner provides definition of “member” from the *Black’s Law Dictionary* as follows:

Member: (14c). 1. Parliamentary law. One of the individuals of whom an organization or a deliberative assembly consists, and who enjoys the full rights of participating in the organization – including the rights of making, debating, and voting on motions – except to the extent that the organization reserves those rights to certain classes of membership.

The Petitioner asserts that “it is clear that [the Petitioner] is a ‘member’ of [REDACTED] and that it enjoys full rights of participating in the organization.”

However, we note that [REDACTED] is not the entity employing the Beneficiary nor does it qualify as an institute of higher education.³ Further, while the Petitioner may have certain rights in [REDACTED]

⁴ On appeal, the Petitioner mentions that it is affiliated with [REDACTED] and [REDACTED] through [REDACTED] and student teacher placement program. However, there is no evidence that the Petitioner has an agreement with [REDACTED] for student teacher placement program.

⁵ The Petitioner refers to our unpublished decisions from 2006 and 2010 to claim that the Beneficiary does not have to directly engage in activities that further the purpose of the organization. The Petitioner has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that our precedent decisions are binding on all USCIS employees in the administration of the Act,

Matter of S-C-U-S-D-

there is no evidence that the Petitioner enjoys the full rights of participating in the institutions of higher education, [REDACTED] or [REDACTED]

We further note that all four terms under 8 C.F.R. § 214.2(h)(19)(iii)(B)(3) 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* (10th ed. 2014) (defining the terms member, branch, cooperative, and subsidiary). Here, the partnership agreements do not indicate that the Petitioner may limit [REDACTED] or [REDACTED] authority in any way, or vice versa. The memorandum of understanding regarding [REDACTED] indicates that “the parties are independent contractors and that no relationship of employer-employee exists between the parties hereto.” Without more, we are not persuaded that the partnership between the Petitioner, [REDACTED] and [REDACTED] amounts to shared control or ownership.

The Petitioner asserts that section 101(e)(2) of the Act, 8 U.S.C. § 1101(e)(2), must also be taken into consideration when evaluating whether the Petitioner is related or affiliated to an institution of higher education. Specifically, 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.

unpublished decisions are not similarly binding. Moreover, the cited decision does not support the Petitioner’s position.

(b)(6)

Matter of S-C-U-S-D-

On appeal, the Petitioner asserts that it qualifies as a “cooperative” of [REDACTED] and [REDACTED]. The Petitioner claims that *Black’s Law Dictionary* defines “cooperative” as “the name given to a group of people who have come together to achieve a common goal.” However, this defines “cooperative association” and not “cooperative” which is defined as “an organization or enterprise (as a store) owned by those who use its services.” Therefore, a cooperative, as defined above, would require joint ownership by those who use the cooperative’s services.

We find that the Petitioner has not established that it is a cooperative of [REDACTED] or [REDACTED]. That is, the Petitioner has not sufficiently demonstrated that the contracts’ provisions for collaboration and shared resources amount to shared control or ownership. For example, for the student placement program with [REDACTED] other than stating that the parties will assign supervisors and on-site mentors and participate in planning and implementing a comprehensive and coordinated program of support and mentoring the intern teacher, there is not sufficient information regarding how much and/or what percentage each party contributes, and each party’s role, responsibilities, and authority, to establish shared ownership and/or control. The Petitioner has not sufficiently explained how these aspects demonstrate shared ownership and/or control.

The evidence does not demonstrate that the Beneficiary will be employed at an entity that satisfies the definition at 8 C.F.R. § 214.2(h)(19)(iii)(B) as a related or affiliated nonprofit entity of an institution of higher education under section 214(g)(5)(A) of the Act.

IV. CONCLUSION

The Petitioner has not demonstrated the Beneficiary qualifies for an exemption from the cap pursuant to section 214(g)(5)(A) of the Act, 8 U.S.C. § 1184(g)(5)(A).

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 S-C-U-S-D-*, ID# 17846 (AAO Sept. 14, 2016)