



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

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

MATTER OF S-O-P- INC.

DATE: SEPT. 30, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a non-profit education organization, seeks to temporarily employ the Beneficiary as a "development associate" 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 submits additional evidence and asserts that the evidence of record was sufficient to establish eligibility for the exemption sought.

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

#### I. 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 foreign nationals 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 instant petition was filed for an employment period to commence in January 2016. The 2016 fiscal year (FY16) extends from October 1, 2015, through September 30, 2016. The instant petition is therefore subject to the 2016 H-1B cap, unless exempt. Further, on April 7, 2015, 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 FY16. The Petitioner filed the instant visa petition on January 21, 2016. 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 FY16 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.

## II. ANALYSIS

The record does not demonstrate that the Petitioner is related to or affiliated with an institution of higher learning. Accordingly, the record does not demonstrate that this petition is exempt from the numerical cap.

The Petitioner filed the H-1B petition on January 21, 2016. Section 3, "Numerical Limitation Information," on the Form I-129 H-1B Data Collection and Filing Fee Supplement, reads as follows:

(b)(6)

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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.

Here, the Petitioner asserts that it is a nonprofit organization related to or affiliated with an institution of higher education, namely, [REDACTED] (College). 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 the College.

The term "related or affiliated," section 214(g)(5)(A) of the Act, is not defined specifically for purposes of determining whether a nonprofit entity is exempt from the H-1B cap. However, the regulation at 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 for purposes of the H-1B fee exemption provisions. 8 C.F.R. § 214.2(h)(19)(iii)(B) states as follows:

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

The Petitioner explained the claimed relationship or affiliation with the College as an “alliance” and “collaboration” as follows:

This will be the fourth year of an ongoing collaboration between [the Petitioner] and [the College], in which two students are selected annually to be fellows at [the Petitioner] – spending one month each summer at [the Petitioner] in Maine, and the following month involved in programming on the ground in Israel and the West Bank. The program has had wonderful affects on both [the Petitioner] and [the College] communities, and the details of the partnership can be seen in the attached MOU.

[The Petitioner] also welcomes a number of [College] students as interns at its NY headquarter office each year as well . . . . The students have been tremendous additions to our program, administration, and development teams and we are thrilled to see the relationship continue to grow. And, of course, several [of the Petitioner’s] alumni are now students at [the College].

According to the information provided by the Petitioner, it appears that the Petitioner provides fellowship opportunities to students at the College to learn about peace building and conflict resolution first-hand. It is not clear how the program selects the students, or if the students receive any college credit for participating in the fellowship program. The record contains a “Statement of Understanding” between the Petitioner and the College. However, the document is very limited in scope. It outlines educational goals, structure, travel guidelines, preparatory steps, and other information pertinent to the program. However, it is insufficient to show that the Petitioner and the College are under shared ownership or control. The evidence is insufficient to show that the College operates the Petitioner.

Moreover, the Petitioner did not provide any documentation to indicate that the Petitioner and the College are under shared ownership or controlled by the same board or federation. In response to the Director’s request for evidence (RFE), the Petitioner explained that its Chair of the Board of Director is also a trustee at the College. However, it does not appear that the Petitioner and the

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<sup>1</sup> 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).

College share ownership or are controlled by the same board or federation. Without more, the evidence is also insufficient to show that the College 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).

On appeal, the Petitioner cites to a policy memorandum from April 28, 2011, entitled "Additional Guidance to the Field on Giving Deference to Prior Determination of H-1B Cap Exemption Based on Affiliation." The Petitioner states that it is exempt because it was previously approved as a cap exempt organization since June 6, 2006, on the basis of the same affiliation between the Petitioner and the College. The Petitioner asserts that the "[m]emorandum only permits an officer to re-adjudicate the issue where the prior determination was 'clearly erroneous' or there 'has been a significant change in circumstances related to the affiliation of the petitioner.'" The Petitioner submitted a copy of the previously filed H-1B petition that was cap exempt. The Petitioner claims that two examples of clear error in the memorandum do not apply in this case. The two examples include "evidence of affiliation with an organization that is NOT an institution of higher education" and "evidence of a prior approval that was subsequently revoked on an affiliation ground." The Petitioner states that since the previously approved H-1B petition was automatically revoked based upon withdrawal from the Petitioner, it was not revoked on an affiliation ground, and is not an example of clear error.

We note that in providing examples of "significant changes" and "clear error," the memorandum indicated "examples of clear error in the prior adjudication may include, but are not limited to," suggesting that exceptions to giving deference are not limited to the examples provided in the memorandum. We further note, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the Director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988).

Upon review of the record of proceedings, and as discussed above, the Petitioner did not submit sufficient documentation to establish that it is "related or affiliated with" an institution of higher learning. "[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)). Overall, the Petitioner has not demonstrated that the Petitioner and the College have shared

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ownership or control, such that the Petitioner can be considered “related or affiliated with” an institution of higher learning.

### III. CONCLUSION

The record does not demonstrate that the Petitioner is related to or affiliated with an institution of higher learning. Accordingly, the record does not demonstrate that this petition is exempt from the numerical cap. 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-O-P- Inc.*, ID# 123225 (AAO Sept. 30, 2016)