

U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., NW
Washington, D.C. 20529

BRIEF OF AMICUS CURIAE
American Immigration Lawyers Association

On certification from a decision of the Vermont Service Center
30 Houghton St.
St. Albans, VT 05478-2399

File Nos.: EAC----(I-129)
EAC06----(I-290C)
In the Matter of xxx, Petitioner
yyy, Beneficiary

American Immigration Lawyers Association
918 F Street, NW
Washington, D.C. 20004-1400
August 25, 2006

INTRODUCTION

This brief is submitted by the American Immigration Lawyers Association to address only one issue concerning the H-1B petition filed by Xxx Independent School District (“Xxx”) on behalf of Yyy.¹ Although the Vermont Service Center (“VSC”) challenged both the petitioner’s and the beneficiary’s eligibility for H-1B status on several grounds, our focus will be on just one: Xxx’s eligibility for an exemption from the H-1B cap² based on its affiliation and relationship with an institution of higher education.

This brief argues that the regulatory provision relating to an exemption from a required fee that was relied upon by VSC does not apply to the exemption from the H-1B numerical limitations (for which no regulation exists). Instead, the Administrative Appeals Office (“AAO”) should look to the totality of the relationship between Xxx and certain institutions of higher education, and analyze “affiliated or related” in a manner consistent with the definitions of those terms throughout immigration law and with the ameliorative intent behind the relevant statute. However, even if the fee regulation on which VSC relies were to be the sole definition applied to the numerical limitations, the structure of the Texas education system is such that Xxx is “affiliated” with the universities in that system under that definition.

STATEMENT OF FACTS

Xxx is a nonprofit school district in Texas, educating students in grades kindergarten through twelve (“K-12”). Through the student teaching program that it conducts in conjunction with a number of colleges and universities, including the University of North Texas, Texas Woman’s University, Stephen F. Austin University, and Richland College,

¹ Matter of Xxx Independent School District, Petitioner, Yyy, Beneficiary, EAC-06-183-53821 (VSC July 21, 2006) (hereinafter “VSC Decision”).

² INA § 214(g)(1) imposes a limit on the number of certain H-1B approvals permitted in each fiscal year. That limit is currently set at 65,000. The statute provides:

INA § 214(g)(1): The total number of aliens who may be issued visas or otherwise provided nonimmigrant status during any fiscal year (beginning with fiscal year 1992)-

(A) under section 101(a)(15)(H)(i)(b), may not exceed—

- (i) 65,000 in each fiscal year before fiscal year 1999;
- (ii) 115,000 in fiscal year 1999;
- (iii) 115,000 in fiscal year 2000;
- (iv) 195,000 in fiscal year 2001;
- (v) 195,000 in fiscal year 2002;
- (vi) 195,000 in fiscal year 2003 and
- (vii) 65,000 in each succeeding fiscal year[.]

Xxx has an ongoing affiliation and relationship with institutions of higher education.³ In addition, Xxx, as a school district within the State of Texas, falls under the control of the State Board of Education, the Texas Higher Education Coordinating Board, and the P-16 Council, which serves a state statutory policy that “the entire system of education supported with public funds be coordinated to provide the citizens with efficient, effective, and high quality educational services and activities.”⁴ The authority of these boards and federations extends over both the primary and secondary system and the higher education system in Texas.

Xxx would like to employ the beneficiary as a bilingual education teacher in H-1B status.

THE DECISION RENDERED BY THE VERMONT SERVICE CENTER

The VSC recommended a denial in this matter,⁵ finding, among other things, that the numerical limitation for the current fiscal year had been reached as of August 10, 2005, well before this petition was filed on May 17, 2006, and that the petitioner was not eligible for an exemption from that limitation.⁶ VSC claimed that it “must follow statute and regulations in the adjudication of petitions and applications,” and that since neither states that “primary and secondary schools are exempt [from] the H-1B limitations,”⁷ the petitioner is subject to the cap. It also stated the following:

[T]he H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B *fee* exemption. *The same definition applies when determining whether an entity qualifies as an affiliated nonprofit entity for exemption from the H-1B cap.*⁸

In addition, the VSC also claimed:

The petitioner’s argument that agreements and cooperation between its school district and institutions of higher education for student teaching assignments [sic] is not persuasive in establishing affiliation or relationship within the meaning of the regulations. Student teacher agreements exist throughout the United States among many colleges, universities, elementary and secondary schools. Some student teacher agreements exist between

³ See correspondence between Xxx and, respectively, University of Texas at Dallas, Texas Woman’s University, Richland College, Texas A&M University, and Stephen F. Austin State University.

⁴ Texas Education Code § 61.076. Copies of the relevant Texas Education Code provisions are annexed.

⁵ VSC Decision, *supra* note 1, at 10.

⁶ *Id.* at 2. The announcement that the numerical cap for fiscal year 2006 had been reached was made in a U.S. Citizenship and Immigration Services (“USCIS”) Press Release dated Aug. 12, 2005. *USCIS Reaches H-1B Cap*, available at http://www.uscis.gov/graphics/publicaffairs/newsrels/H-1Bcap_12Aug05.pdf (posted Aug. 12, 2005). As explained in that Release, USCIS will reject any submissions subject to the fiscal year 2006 numerical cap that were received after the announced “final receipt date.” Xxx’s petition was indeed received after the final receipt date, so that the relevant question becomes whether the petition is subject to the fiscal year 2006 cap.

⁷ *Id.* at 4.

⁸ *Id.* at 5 (emphasis added). The H-1B fee regulation at 8 C.F.R. § 214.2(h)(19)(iii)(B) defines “affiliated” and “related” in a narrow and restrictive manner. See discussion *infra*, at pages 6-12.

public schools and private colleges. Such agreements do not constitute affiliation or relationship as a member, branch, cooperative, or subsidiary.⁹

To sum up the VSC's argument, it recommends finding Xxx ineligible for H-1B cap exempt status for the following reasons:

1. Xxx does not meet the definition of "affiliated" or "related" found in the H-1B *fee* regulation, a regulatory provision having nothing to do with exemptions from the H-1B *cap*.
2. The VSC has adopted the H-1B fee regulation and applied it, part and parcel, to questions of cap exemption, even though there has never been a regulation issued—with opportunity for notice and comment—to specify which entities are exempt from the H-1B cap.
3. The VSC seems to fear that if it grants this H-1B petition, too many schools will claim the H-1B cap exemption.¹⁰

The VSC certified this case to the AAO for review.

⁹ *Id.* at 6.

¹⁰ This is a curious concern. Amicus agrees that many schools are indeed nonprofit (such as private not-for-profit schools, public nonprofit schools, not-for-profit charter schools, etc.), and that some of these schools are affiliated with institutions of higher learning through a variety of arrangements. The institutions of higher learning and the K-12 schools enter into these affiliations because they recognize the importance of K-12 education to the national interest. Congress similarly recognized the importance of education, as expressed in INA 286(s)(4), which provides:

National Science Foundation competitive grant program for K-12 math, science and technology education.—

(A) In general—15 percent of the amounts deposited into the H-1B Nonimmigrant Petitioner Account shall remain available to the Director of the National Science Foundation until expended to carry out a direct or matching grant program to support *private-public partnerships in K-12 education*.

(B) Types of programs covered—The Director shall award grants to such programs, including those which support the development and implementation of standards-based instructional materials models and related student assessments that enable *K-12 students* to acquire an understanding of science, mathematics, and technology, as well as to develop critical thinking skills; *provide systemic improvement in training K-12 teachers and education for students in science, mathematics, and technology*; support the professional development of *K-12* math and science teachers in the use of technology in the classroom; stimulate system-wide *K-12* reform of science, mathematics, and technology in rural, economically disadvantaged regions of the United States; *provide externships and other opportunities for students to increase their appreciation and understanding of science, mathematics, engineering, and technology (including summer institutes sponsored by an institution of higher education for students in grades 7-12 that provide instruction in such fields)*; involve *partnerships of industry, educational institutions, and community organizations* to address the educational needs of disadvantaged communities; provide college preparatory support to expose and prepare students for careers in science, mathematics, engineering, and technology.... (emphasis added).

Congress again expressed the importance that it places on education when it exempted institutions of higher learning and their affiliated and related nonprofit entities from the H-1B numerical limitations. That exemption should be given its full effect by the USCIS.

BACKGROUND

The H-1B Fee Regulation and the American Competitiveness and Workforce Improvement Act

In October 1998, Congress enacted the American Competitiveness and Workforce Improvement Act (“ACWIA”).¹¹ Among ACWIA’s provisions was the imposition of an additional fee for H-1B petitions, initially set at \$500, but now set at \$1,500.¹² That training fee was added by § 414(a) of ACWIA, which provided, in pertinent part:

§ 414(a) Imposition of Fee.—Section 214(c) (8 U.S.C. 1184(c)) is amended by adding at the end the following:

“(9)(A) The Attorney General shall impose a fee on an employer (excluding an employer described in subparagraph (A) or (B) of section 212(p)(1)). . . .

The statute refers to INA § 212(p)(1), which was itself added by another provision of ACWIA, § 415(a). That section concerned the calculation of prevailing wages for employees of certain entities. The statute provided:

§ 415(a) In General.—Section 212 (8 U.S.C. 1182) is amended by adding at the end the following:

(p)(1) In computing the prevailing wage level for an occupational classification in an area of employment for purposes of subsections (n)(1)(A)(i)(II) and (a)(5)(A) in the case of an employee of—

(A) an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965), or a related or affiliated nonprofit entity; or

(B) a nonprofit research organization or a Governmental research organization, the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.

Thus, the entities designated for the special calculation of prevailing wages at INA § 212(p) were also exempted from the ACWIA *fee*. In 1998, such entities were not exempted from the H-1B *cap* because cap exemptions did not yet exist.

¹¹ Enacted as title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No. 105-277, 111 Stat. 2681, 2681-641.

¹² The additional filing fee was to be used for scholarships for low-income math, engineering, and computer science students and for job training for U.S. workers. Significantly, underscoring its concern for primary and secondary education, Congress initially designated eight percent of the fee for “grants for science and math development for those in kindergarten through 12th grade through existing programs administered by the National Science Foundation.” See 144 Cong. Rec. S12,755 (daily ed. Oct. 21, 1998) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=1998_record&page=S12755&position=all. By statute, the set-aside is now fifteen percent. INA § 286(s)(4).

The Immigration and Naturalization Service Issues an Interim ACWIA Fee Regulation

On November 30, 1998, the legacy Immigration and Naturalization Service (“INS”) issued an interim regulation implementing the ACWIA fee. Pursuant to the requirements of the Administrative Procedure Act (“APA”),¹³ it provided notice and *asked for comments* on the regulation.¹⁴ Following the statutory mandate of ACWIA, the regulation imposed a \$500 fee on H-1B petitioners, excluding institutions of higher education, their related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations.

The interim regulation contained a definition of those nonprofit entities that are affiliated with or related to institutions of higher education for *fee exemption* purposes, and it is the same regulation found today at 8 C.F.R. § 214.2(h)(19)(iii)(B). It provides:

[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^[15] operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

Bear in mind that the interim regulation with request for comments dealt only with the imposition of what was then a \$500 ACWIA fee. The American Competitiveness in the Twenty-First Century Act *had not yet been enacted*. *Therefore there were no exemptions from the H-1B cap* at that time.

¹³ 5 U.S.C. § 553(c). The statute provides:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

See also, United Steelworkers of America v. Schuylkill Metals, 828 F.2d 314, 317 (5th Cir. 1987) (the notice must “fairly appraise interested persons of the subjects and issues the agency was considering”).

¹⁴ 63 Fed. Reg. 65,657 (Nov. 30, 1998) (supplementary information).

¹⁵ Though not germane to issues raised in this brief, we point out that there is an error in the text of the regulation, and a comma should appear between the words “federation” and “operated.” The same regulatory language, with the comma included, is included in the regulations of the Department of Labor (“DOL”) at 20 C.F.R. § 656.40(e)(ii). Moreover, in the supplementary information to its ACWIA regulations, the DOL explained that it consulted with the INS on this definitional issue, since the INS addressed similar issues with regard to the ACWIA fee. See 65 Fed. Reg. 80,110, 80,181 (Dec. 20, 2000) (supplementary information). With the comma inserted (which is the only way the phrase makes any sense), at least those nonprofit entities that are operated by an institution of higher education qualify for the fee exemption. Without the comma, they do not. Since the DOL consulted with the INS on the definitional issues connected to ACWIA, *id.*, and since that agency includes the comma in its rendition of the definition, one can safely assume that its version is the correct one.

The INS Issues a Final ACWIA Fee Regulation

On February 29, 2000, the INS issued its final rule regarding the ACWIA fee, which was the same as its interim rule.¹⁶ In the supplementary information to the final rule, the Service stated that it had received only eight comments on the interim rule,¹⁷ a rule that dealt only with the ACWIA fee. Of those, only two touched on the Service's definition of "affiliated" and "related."¹⁸ It is no wonder that the Service received only eight comments. All that was at stake at that time was a training fee, and who might be exempt from it. Had exemption from the H-1B cap been at issue, one could only assume that the INS would have been flooded with comments opposing its definitions.

American Competitiveness in the Twenty-First Century Act

In October 2000, two years after the passage of ACWIA, Congress enacted the American Competitiveness in the Twenty-First Century Act ("AC21").¹⁹ That legislation for the first time created certain exemptions from the H-1B cap.²⁰ Codified at INA § 214(g)(5)(B), the statute provides in pertinent part:

(5) 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 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;

.....

There has never been a regulation issued to define which nonprofit entities are "affiliated" with or "related" to institutions of higher education for purposes of this statute.

The USCIS Guidance in its H-1B Cap Memorandum Is Not a Rule

On June 6, 2006, without going through the rulemaking process required by the APA,²¹ the USCIS issued a memorandum on exemptions from the H-1B cap.²² In that

¹⁶ 65 Fed. Reg. 10,678 (Feb. 29, 2000).

¹⁷ *Id.* at 10,679 (supplementary information).

¹⁸ *Id.* at 10,680 (supplementary information).

¹⁹ Pub. L. No. 106-313, 114 Stat. 1251.

²⁰ The limitations on the number of foreign nationals who may be issued H-1B visas or otherwise accorded H-1B status are set forth in INA § 214(g)(1). The number has been set at 65,000 since fiscal year 2004.

²¹ See 5 U.S.C. § 552(a), which provides in pertinent part that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

memorandum, the USCIS specifically adopted the definition of “affiliated nonprofit entities” contained in the H-1B fee exemption regulation. The memo provides:

In addition, the 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. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(B), the following definition applies:

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.²³

We note that the June 6 Memo, while borrowing the definition of “affiliated” that is found in the H-1B fee exemption regulation, did not offer any definition for those nonprofit entities “related” to institutions of higher education. We also note that the statutory provision at INA § 214(g)(5)(A) permits the cap exemption not only for nonprofit entities “affiliated” with institutions of higher education, but also for those “related” to those institutions. In any event, the June 6 Memo, produced without benefit of notice to the public and the opportunity to comment, does not constitute law binding upon the AAO.²⁴

ARGUMENT

The USCIS Definition of Affiliated and Related Is Impermissibly Narrow

It is firmly established that remedial statutes²⁵ should be liberally construed to give effect to the remedial purposes for which they were enacted.²⁶ This is particularly so in the

²² Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, *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)*, HQPRD 70/23.12, AD06-27 (June 6, 2006), available at <http://www.uscis.gov/graphics/lawsregs/handbook/AC21C060606.pdf> and at www.aila.org (document no. 06060861) [hereinafter “June 6 Memo”].

²³ *Id.* at 4 (bold added; underlining in original).

²⁴ USCIS memos are not binding on the Service. *See* Matter of Izummi, 22 I. & N. Dec. 169, 196 (INS Assoc. Comm’r Examinations 1998). (“the opinion in no way modifies existing law, but is intended merely to provide guidance to the Service in understanding many factual issues that have arisen over the years...”).

²⁵ A remedial statute is one designed to remedy a defect in existing laws. *E.g.*, *Nix v. James*, 7 F.2d 590 (9th Cir. 1925). *See generally*, Norman J. Singer, 3 Statutes and Statutory Construction § 60.2 (6th ed. 2001) [hereinafter Singer] (remedial statutes include those intended to correct defects).

²⁶ *See, e.g.*, *Akhtar v. Burzynski*, 384 F.3d 1193, 1200 (9th Cir. 2004) (ameliorative immigration provision designed to forestall harsh result should be interpreted and applied in ameliorative fashion); *David H. v. Spring Ranch Independent School District*, 569 F. Supp. 1324 (S.D. Tex. 1983) (Education for All Handicapped Children Act and § 504 of Rehabilitation Act of 1973 are remedial statutes and should be liberally construed); *Espino v. Besteiro*, 520 F. Supp. 905, 911 (S.D. Tex. 1981) (Education for All Handicapped Children Act a remedial statute and should be broadly applied and liberally construed).

immigration context, where doubts are to be resolved in favor of the foreign national.²⁷ That AC21 is a remedial piece of legislation goes without question. The Senate report accompanying the bill that was ultimately enacted into AC21 makes clear that AC21 was enacted to correct the limitations and harsh results of prior enactments:

In fact, in 1998, *the error Congress made* was in underestimating the workforce needs of the United States in the year 2000. Despite the increase in the H-1B ceiling in 1998, a tight labor market, increasing globalization and a burgeoning economy have combined to increase demand for skilled workers even beyond what was forecast at that time. *As a result, the 1998 bill has proven to be insufficient to meet the current demand for skilled professionals.*²⁸

AC21 Was Remedial Legislation; ACWIA Was Restrictive

1. AC21 Was Remedial

AC21 is perhaps the most liberal H-1B legislation ever enacted. Among its remedial provisions were six major amendments to the law to fix problems that plagued employers and foreign nationals alike:

1. § 102, which increased the annual allotment of H-1B visas;
2. § 103, which provided exemptions from the H-1B cap;
3. § 104, which crafted a remedy for the unavailability of immigrant visa numbers and permitted extensions of H-1B status beyond six years in three-year increments if an employment-based immigrant preference petition filed for the foreign national had been approved;
4. § 105, which created several remedies for agency delays in processing H-1B visa petitions, the so-called “H-1B portability” provision;
5. § 106, which provided a remedy for agency delays in processing labor certification applications and immigrant visa petitions by permitting extensions of H-1B status beyond the normal six-year limitation and provided for so-called “adjustment of status portability;” and
6. § 114, which exempted all physicians receiving INA § 214(l) waivers from the H-1B cap.

Clearly, in enacting AC21, Congress liberalized H-1B law, with every component of that legislation easing up on prior restrictions and roadblocks. Recognizing that the H-1B visa situation had become a crisis, Congress sought to ameliorate the dislocations caused by agency delays and by a paucity of H-1B visa numbers. There is every reason to conclude

²⁷ *E.g.*, *Padash v. I.N.S.*, 358 F.3d 1161, 1173 (9th Cir. 2004) (rules intended to extend benefits are to be interpreted and applied in ameliorative fashion, particularly in immigration context, where doubts are resolved in favor of alien); *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (ameliorative rule designed to forestall harsh results to be interpreted and applied in ameliorative fashion, particularly in immigration context).

²⁸ S. Rep. No. 106-260, at 2 (2000) (emphasis added).

that, when Congress wrote the H-1B cap exempt provision, it meant the statute to have broad application and impact, and that it meant what it plainly said: nonprofit entities related to or affiliated with institutions of higher education are exempt from the cap. Accordingly, the USCIS must give the H-1B cap-exemption provision the broad and liberal construction that Congress intended it to have.²⁹

Instead, the USCIS has adopted narrow, restrictive definitions of “affiliated” and “related,” ones that have almost no bearing on institutions of higher education and the ways that they are organized and structured. Under the USCIS *de facto* rule, almost no entity would qualify, and one would have to search far and wide to find a nonprofit entity that is “attached” to an institution of higher education as a “member,” “branch,” “cooperative,” or “subsidiary.” These formulations simply do not apply in the world of higher education.

2. ACWIA Was Restrictive

While AC21 was a remedial statute, ACWIA was a restrictive one. In keeping with ACWIA’s restrictive tenor, the INS drafted its ACWIA fee regulation, plainly stating that it was applying a *narrow* definition of “related” and “affiliated.” When urged to adopt a broader one by a commenter to the ACWIA fee regulation, the Service said:

The Service will not adopt either of these suggestions because such expansive definitions of the term “affiliate or related non-profit entity” would not reflect congressional intent. Again, the Service interprets the statute to *narrowly define* those entities exempt from paying the \$500 filing fee.³⁰

That narrow interpretation may have had its place in the realm of ACWIA, because apart from raising temporarily the number of H-1B visas available for several years, ACWIA was not a remedial piece of legislation, but rather a restrictive one. For example, it imposed strict rules on H-1B dependent employers, including recruitment attestations, dependency calculations, displacement attestations, and third-party worksite rules.³¹ It also increased and toughened enforcement provisions,³² prohibited “benching,”³³ authorized “spot” investigations by the DOL,³⁴ and imposed the additional training fee.³⁵

²⁹ Congress did not itself define “affiliated” and “related” in AC21, and following the rules of statutory construction, if Congress did not define a term, that term must be given its “plain meaning.” *See generally* Norman J. Singer, 2A Statutes and Statutory Construction § 46.01 (6th ed. 2000). The “plain meaning” rule has been expressed in a number of ways, but generally means that if the language of a statute is clear and unambiguous, it must be held to mean what it plainly expresses, and there is no room for alternate interpretations. *Id.*

³⁰ 65 Fed. Reg. at 10,680 (supplementary information) (emphasis added).

³¹ *Supra*, note 11, § 412.

³² *Id.* at § 413(a).

³³ *Id.* at § 413(a)(vii).

³⁴ *Id.* at § 413(e).

³⁵ *Id.* at § 414.

Statutory Language Must Be Interpreted in Context

When ACWIA and AC21 are compared, it comes as no surprise that the terms “affiliated” and “related” were given such a restrictive interpretation for ACWIA purposes. But it is equally apparent that those definitions have *no place* in the context of AC21, a liberal enactment, which must be construed broadly to ensure that Congressional intent is effected.³⁶ In fact, it is a well-established rule of statutory construction that if the same words are used in different sections of the same overall act, they will be interpreted differently when the context so demands.³⁷ Thus, courts have held that even if two statutory provisions contain the identical language, it does not mean they are subject to the same interpretation.³⁸ In the immigration context, courts have noted that it is not unusual for the same word to have differing connotations in different provisions of the Act, and that a court can attribute to the word the meaning the legislature intended.³⁹ The narrow meaning the USCIS assigned to the words “affiliated” and “related” for ACWIA purposes has no place in the context of AC21’s expansive and liberal purpose. Therefore, the AAO should not hesitate to define those words in a manner that comports with the overall structure and purposes of the latter legislation.

The Meaning of “Affiliated” or “Related” Is Broad and Unambiguous

It’s rather ironic that, when the legacy INS drafted its fee regulation, it claimed it was drawing on generally accepted definitions of the terms “related” and “affiliated,” when in fact, it did not. Had the Service actually referred to the generally accepted definitions and plain meaning of those words, it would have found this:

Black’s Law Dictionary defines “affiliate” this way: “Signifies a condition of being united; being in close connection, allied, associated, or attached as a member or branch.”⁴⁰ And what does “related” mean? Turning again to Black’s, we find: “Standing in relation; connected; allied; akin.”⁴¹ And what does “relate” mean? “To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or

³⁶ *Pacific Far East Line v. U.S.*, 544 F.2d 478 (Ct. Cl. 1976) (investment credit statute must be liberally construed in keeping with its purposes); *Winnebago Industries v. Reneau*, 990 S.W.2d 292 (Ct. of Appeals, Tex, 1998) (court must look to intent of legislature in enacting liberal Lemon Law and give that intent legal effect); *See also*, Singer, 2A Statutes and Statutory Construction § 45.09 (6th ed. 2000) (court must attribute to an enactment the meaning most consistent with obvious intent of the legislature).

³⁷ Singer, 2A Statutes and Statutory Construction (6th ed. 2000) at 2A § 46.05 and 2B § 51.02.

³⁸ *Atlantic Cleaners & Dyers v. U.S.*, 286 U.S. 427 (1932) (identical words in different parts of same act can have different meanings to meet the purposes of the law); *Dailey v. National Hockey League*, 780 F. Supp. 262, 270 (D.N.J. 1991) (when two statutes used identical terms, statutory interpretation is informed by number of factors other than statutory language, including purpose, context, and legislative history of the legislation).

³⁹ *Sherman v. Hamilton*, 295 F.2d 516, 521 (1st Cir. 1961) (when same word used in two different provisions, “no canon of statutory construction forecloses court from attributing to the word the meaning which the legislature intended that it should have in each instance.”).

⁴⁰ Black’s Law Dictionary 54 (5th ed. 1979) (emphasis added).

⁴¹ *Id.* at 1158.

connection with.”⁴² Dictionaries of the English language contain similar definitions. Consider, for example, this definition of “affiliate”: “bring or receive into close connection (*the university would assist in organizing and affiliating high schools*).”⁴³

A definition of affiliated also is contained in the regulations of the Small Business Administration (SBA) at 13 C.F.R. § 121.103. That regulation provides at 13 C.F.R. § 121.103(a)(2) the following:

SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

In telephone communications with the SBA General Counsel’s Office, we were told that that agency’s definition of affiliation was devised to cast a wide net. Since business entities must be “small” to qualify for benefits under the Small Business Act, the agency wants to guard against a claim to “smallness” when in fact, when considered together with its *affiliations*, a business entity was not “small.” Therefore, the agency adopted a “totality of the circumstances” approach to determine affiliation and size, a test the USCIS might be wise to consider adopting for itself.

The Immigration and Nationality Act Defines Affiliation

It is puzzling why the VSC even looked to the regulatory definition of “affiliation” in the ACWIA fee context when Congress has defined the term “affiliation” in the Immigration and Nationality Act (“INA”). Congress having spoken directly to the issue, the USCIS must give effect to the “unambiguously expressed intent” of the legislature.⁴⁴

INA § 101(e)(2) provides:

(e) For the purposes of this Act—

(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.⁴⁵

⁴² *Id.*

⁴³ Webster’s Third New International Dictionary (1976) at 35 (emphasis added).

⁴⁴ *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

⁴⁵ This definition has been specifically adopted by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 at § 428. *See also* INA § 212(a)(3)(D)(i), which provides:

Any immigrant who is or has been a member of or affiliated with the Communist or any other totalitarian party (or subdivision or affiliate thereof), domestic or foreign, is inadmissible.

Certainly, the arrangements between Xxx and a number of institutions of higher education, including Richland College, the University of Texas at Dallas, Texas Woman’s University, Texas A&M University, Stephen F. Austin State University, and the University of North Texas, constitute an “affiliation” within the meaning of the Act. Xxx provides student teaching opportunities to students at these colleges and universities. As a part of these arrangements, the colleges and universities provide technical assistance, training, and/or professional development support for each of the program’s mentor teachers and interns. Xxx, in turn, provides mentor teachers and school principals who orient the teaching interns with the guidelines and procedures of the District and provide them appropriate instruction and supervision in the classroom.⁴⁶

Beyond question, these arrangements meet the statutory definition of “affiliation.” Both the higher education institutions and the school district provide support and value to one another: the higher education institutions provide technical assistance, training and professional development support, as well as classroom personnel in the form of student teachers, to Xxx. That latter organization, in turn, provides orientation, guidelines and a training environment to the student teachers to support the educational objectives of the universities.

Under Other Regulations of the USCIS, “Affiliation” Has a Broad Meaning

It is instructive that the definition that the legacy INS assigned to the word “affiliated” for ACWIA purposes varies so widely from the way this term is defined elsewhere in the Service’s regulations. We needn’t go further than the definition of “affiliation” found in the definitions section of the Act,⁴⁷ but if we were to wander through the implementing regulations of the agency, we would find that, except for the very specific definition of “affiliate” (and not, of “affiliated”) found in the multinational manager provisions,⁴⁸ the terms “affiliated” and “affiliation” are broad and inclusive.

For example, the student regulations have an interesting provision governing on-campus employment. They provide that on-campus employment may be performed at an off-campus location and still be deemed “on campus.” The Service is willing to permit this as long as the off-campus location is “educationally affiliated” with the school.⁴⁹ And what’s required to be deemed “educationally affiliated”? The off-campus entity must be “associated with the school’s established curriculum”⁵⁰ or “related” to contractually funded research projects at the post-graduate level.⁵¹ Nowhere is it even suggested that to be “affiliated” the off-campus entity must be controlled by the same board or federation as the school, or operated by the school, or have a shared owner, or be a member, branch, cooperative, or subsidiary.

⁴⁶ *Supra*, note 3 and accompanying text.

⁴⁷ See discussion *supra*, at note 44 and accompanying text.

⁴⁸ 8 C.F.R. § 214.2(l)(1)(ii)(L). *See also*, INA § 101(a)(15)(L), the multinational transferee provisions, which specifies that to qualify as a multinational petitioner, an entity must be “an affiliate” (not merely “affiliated”) or a “subsidiary,” (not just “related”) of the U.S. entity.

⁴⁹ 8 C.F.R. § 214.2(f)(9)(i).

⁵⁰ *Id.*

⁵¹ *Id.*

Similarly, the INA uses the word “affiliated” in the context of the special immigrant religious worker. Under INA § 101(a)(27)(C)(ii)(III), an immigrant may qualify as a religious worker if he seeks entry to work for “a bona fide organization which is affiliated with the religious denomination.” A bona fide organization which is affiliated with the religious denomination is defined as a nonprofit organization which is “closely associated with the religious denomination.”⁵² Here, too, there is not even a hint that the organization must be controlled by the same board or federation as the religious denomination, or be attached as a member, branch, cooperative, or subsidiary.

See also the regulations of a sister agency, the Department of State. Under its regulations, affiliate is defined this way when applied to membership in a Communist or totalitarian party:

(a) Definition of affiliate. The term affiliate, as used in INA 212(a)(3)(D), means an organization which is related to, or identified with, a proscribed association or party, including any section, subsidiary, branch, or subdivision thereof, in such close association as to evidence an adherence to or a furtherance of the purposes and objectives of such association or party, or as to indicate a working alliance to bring to fruition the purposes and objectives of the proscribed association or party. An organization which gives, loans, or promises support, money, or other thing of value for any purpose to any proscribed association or party is presumed to be an affiliate of such association or party, but nothing contained in this paragraph shall be construed as an exclusive definition of the term affiliate.⁵³

All of these definitions of affiliation—statutory and regulatory alike—have a common element. Be it “ties” and “relationships” (as affiliation is defined by the Small Business Administration), provision of support or a thing of value (INA definition), associated with the curriculum or related to research programs (on-campus employment definition), close association (religious workers and Communist party definitions), all the definitions come down to close ties between two entities. Similarly, Xxx has such close ties with several institutions of higher education, through student teaching programs and through the Texas educational system’s structure, as discussed in greater detail below.⁵⁴

Case Law Supports a Broad Definition of “Affiliation”

Case law establishes that Congress intended the definition of affiliation to be construed broadly. For example, in one case the Board of Immigration Appeals (“BIA”) held that affiliation included mere public displays of support for the Communist Party.⁵⁵ The BIA noted that “the alien here is charged with the commission of an act which Congress stated was to be considered affiliation -- *support* of a subversive organization.”⁵⁶ Nothing more

⁵² 8 C.F.R. §204.5(m)(2); Adjudicator's Field Manual § 34.5(b)(3); 9 FAM 41.58 n.12.

⁵³ 22 C.F.R. § 40.34(a).

⁵⁴ Other examples of such close ties are illustrated in the annexed sample agreements between K-12 school districts and institutions of higher education.

⁵⁵ Matter of J-, 6 I. & N. Dec. 496 (BIA 1955).

⁵⁶ *Id.* at 502 (emphasis in original) (citing INA § 101(e)(2)).

was required. In another case the BIA held that “[t]he words appearing in a statute are to be given their ordinary and commonly understood meaning. . . . In addition to the commonly understood meaning of ‘affiliate’ as an organization created by or associated with another organization, we have also the specific definition in 8 U.S.C. 1101(e)(2) that the giving or promising of support or of money for any purpose to any organization shall be presumed to constitute affiliation therewith.”⁵⁷

Both elements of “affiliation” are met here. The school district and the higher education institutions are associated with each other. And, as indicated above, the higher education institutions and the school district provide support to one another.

Even under the Fee-Related Definition, the Texas Schools Are Affiliated or Related

Although we maintain that the regulation defining “affiliated or related” for purposes of the ACWIA fee exemption does not apply to the H-1B cap exemption, as discussed above, Xxx nevertheless meets that definition. Elementary and secondary schools throughout Texas are “connected or associated with an institution of higher education, through shared ownership or control by the same board or federation”⁵⁸ within the meaning of that regulation.

Under the Texas Education Code, “the State Board of Education and the Texas Higher Education Coordinating Board...shall ensure that long-range plans and educational programs established by each board provide a comprehensive education for the students of this state under the jurisdiction of that board, extending from early childhood education through postgraduate study. In assuring that programs are coordinated, the boards shall use the P-16 Council...”⁵⁹ The P-16 Council’s duties include “examin[ing] and mak[ing] recommendations regarding the alignment of secondary and postsecondary education curricula and testing and assessment”⁶⁰ as well as “coordinat[ing] plans and programs, including curricula, instructional programs, research...[to] include:... (1) equal educational opportunity for all Texans;... (3) preparation of high school students for further study at colleges and universities... (5) teacher education, recruitment and retention...”⁶¹

Plainly, the State Board of Education, the Texas Higher Education Coordinating Board, and the P-16 Council, each of which would be a “board or federation,” connect the entire school system in the state “from early childhood education through postgraduate study”⁶² through “shared... control.”⁶³ Xxx, like all schools not operated to generate revenues for

⁵⁷ Matter of L-, 9 I. & N. Dec. 14, 19 (BIA 1960) (citing Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944)).

⁵⁸ 8 C.F.R. § 214.2(h)(19)(iii)(B).

⁵⁹ Texas Education Code § 7.005.

⁶⁰ *Id.* at § 61.076(f).

⁶¹ *Id.* at, § 61.076(e).

⁶² *Id.* at § 7.005

⁶³ *Supra*, note 56.

distribution to its owners, is a nonprofit⁶⁴ and is affiliated or related to the Texas University system through this shared control. Thus, the beneficiary, who has received an offer of employment from Xxx, is not subject to H-1B numerical limitations.

CONCLUSION

The AAO should find that Xxx is exempt from the H-1B cap. Even under the restrictive interpretation fashioned for the terms “affiliated” and “related” by legacy INS in the context of the ACWIA fee, Xxx qualifies for the exemption based on its ongoing, state supported collaborations, exchanges, relationships, and legal connections to a number of Texas institutions of higher education.

But beyond that, the AAO should find that Xxx is cap-exempt for a number of other reasons. The legislation carving out the cap exemptions stressed the importance of education. Had that emphasis been limited only to institutions of higher education, Congress could have stopped right there, and lifted the cap only for them. But Congress didn’t do that. Understanding that it could never draft a statute inclusive enough to cover all contingencies, the legislature instead used the broad and inclusive language found at INA § 214(g)(5)(A), and extended the exemption to nonprofit entities related to and affiliated with institutions of higher education. Xxx is such an entity.

When viewed in the proper context, it’s apparent that AC21 was a liberal and generous piece of legislation that sought to fix a system that had become oppressive and harmful to U.S. employers and foreign nationals alike. Its concern with education at all levels is a theme that runs throughout the legislative history. It makes no sense for the AAO to apply a restrictive rule—the ACWIA fee definition of “related” and “affiliated”—to AC21’s cap exempt provisions, thereby eliminating from cap exempt status the very entities Congress wanted to include. Were the AAO to adopt the restrictive approach, one of the most important goals of AC21 would be frustrated, a goal that the Senate expressed this way:

[T]he American education system must produce more young people interested in, and qualified to enter, key fields, and we must increase our other training efforts, so that more Americans can be prepared to keep this country at the cutting edge and competitive in global markets.⁶⁵

What better way to educate young Americans than to assure them access to the teachers that they need to fulfill that goal?

We are not urging the AAO to craft a rule that gives a blanket exemption to all entities that have some sort of connection to an institution of higher education, nor are we asking

⁶⁴ See The American Heritage Dictionary of the English Language, 4th ed. (internet edition) for the common meaning of nonprofit: “Not seeking or producing a profit or profits: *a nonprofit organization.*” See also Webster’s New Millennium Dictionary of English, Preview Edition (v 0.9.6) (internet edition) definition of not for profit: “pertaining to an organization or company established for charitable, educational, or humanitarian purposes and not for making money; also called non-profit.”

⁶⁵ S. Rep. No. 106-260, at 3 (2000).

it to state that *all* K-12 schools qualify for an exemption from the H-1B cap. Rather, we urge it to analyze facts on a case-by-case basis, and apply a “totality of the circumstances” approach, based on the “close ties” standard that permeates the view of affiliation throughout the INA. We believe that this is a reasonable approach, assuring that qualified entities will be found eligible for the cap exemption.

We also believe that Xxx qualifies under any test that the AAO would apply, and therefore, urge you to find that it is an H-1B cap exempt entity.

Respectfully submitted,

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