



March 23, 2018

PM-602-0159

Policy Memorandum

SUBJECT: *Matter of S- Inc.*, Adopted Decision 2018-02 (AAO Mar. 23, 2018)

Purpose

This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of S- Inc.* as an Adopted Decision. Accordingly, this adopted decision establishes policy guidance that applies to and shall be used to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.

Matter of S- Inc. addresses the prohibition on multiple H-1B filings by “related entities (such as a parent company, subsidiary, or affiliate).” 8 C.F.R. § 214.2(h)(2)(i)(G). For purposes of the regulatory bar, *Matter of S- Inc.* clarifies that the term “related entities” includes petitioners, whether or not related through corporate ownership and control, that file cap-subject H-1B petitions for the same beneficiary for substantially the same job. Absent a legitimate business need to file multiple cap-subject petitions for the same beneficiary, USCIS will deny or revoke the approval of all H-1B cap-subject petitions filed by “related entities” for that beneficiary.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.



ADOPTED DECISION

MATTER OF S- INC.

ADMINISTRATIVE APPEALS OFFICE
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

March 23, 2018^[1]

“Related entities” include petitioners, whether or not related through corporate ownership and control, that file cap-subject H-1B petitions for the same beneficiary for substantially the same job. Absent a legitimate business need to file multiple cap-subject petitions for the same beneficiary, U.S. Citizenship and Immigration Services will deny or revoke the approval of all H-1B cap-subject petitions filed by related entities for that beneficiary.

FOR THE PETITIONER: Samuel Alemu, Esquire, Schaumburg, Illinois

The Petitioner, a software development and consulting firm, seeks to classify the Beneficiary as an H-1B nonimmigrant to temporarily employ the Beneficiary as a “programmer analyst.” The Director of the U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center revoked the petition’s approval on notice, concluding the Petitioner and a “related entity,” C- LLC, impermissibly filed petitions for the same beneficiary. On appeal, the Petitioner submits additional evidence and asserts the Director erred in finding the entities were related. Upon *de novo* review, we will dismiss the appeal.

Employer demand often exceeds the annual, statutorily capped supply of new visas under the H-1B nonimmigrant classification.² To promote fair and orderly access to these visas, USCIS may conduct a random lottery of cap-subject petitions received by a certain date. Those petitions selected through the lottery proceed to adjudication if otherwise properly filed; USCIS rejects the remainder.

¹ On January 11, 2018, we issued this decision as a non-precedent decision. We have reopened this decision on our own motion under 8 C.F.R. § 103.5(a)(5)(i) for the purpose of making revisions in preparation for U.S. Citizenship and Immigration Services designating it as an Adopted Decision.

² This overall numerical limitation on H-1B visas is commonly known as “the cap.” See Immigration and Nationality Act (the Act) section 214(g)(1), (5)(C) of the Act, 8 U.S.C. § 1184(g)(1), (5)(c). The total number of cap-subject H-1B visas issued per fiscal year may not exceed 85,000, which includes 20,000 for those who have earned a master’s or higher degree from a United States institution of higher education. *Id.*

Petitioning employers sometimes try to improve their chances of winning the initial lottery selection by submitting multiple petitions on behalf of the same beneficiary without a legitimate business need to do so. USCIS regulations deter and penalize this tactic by requiring denial or revocation of all petitions for that common beneficiary filed by the same employer, or filed by “related” employers if any of them has not demonstrated a “legitimate business need” to file those petitions. The latter scenario gets more complicated when, as here, a petitioner demonstrates it is not “related” to the other employer through corporate ownership and control, but other factors evident from the record nonetheless demonstrate the existence of a relationship.

I. BAR ON MULTIPLE H-1B FILINGS

The regulatory bar on multiple cap-subject H-1B filings states, in pertinent part:

An employer may not file, in the same fiscal year, more than one H-1B petition on behalf of the same alien if the alien is subject to the numerical limitations of section 214(g)(1)(A) of the Act or is exempt from those limitations under section 214(g)(5)(C) of the Act. . . . If USCIS believes that *related entities (such as a parent company, subsidiary, or affiliate)* may not have a legitimate business need to file more than one H-1B petition on behalf of the same alien . . . , USCIS may issue a request for additional evidence or notice of intent to deny, or notice of intent to revoke each petition. If any of the related entities fail to demonstrate a legitimate business need to file an H-1B petition on behalf of the same alien, all petitions filed on that alien’s behalf by the related entities will be denied or revoked.

8 C.F.R. § 214.2(h)(2)(i)(G) (emphasis added).

II. BACKGROUND

In its notice of intent to revoke (NOIR) the petition, the Director found the Petitioner and C- LLC were “related entities” that filed H-1B petitions for the same Beneficiary in violation of the above rule. The Director found that the petitions were filed during the same fiscal year for the same Beneficiary to work in substantially the same job for the same end-client through the same two vendors.³ The Director also observed the similar, and at times identical, evidence submitted by the two petitioners for the Beneficiary.⁴

The Petitioner replied by denying that C- LLC and it are “related entities.” The Petitioner submitted separate articles of incorporation, corporate by-laws, stock certificates, stock transfer ledgers, operating agreements, federal employer identification number information (FEIN), federal tax returns, and leases for its company and C- LLC. The Petitioner also submitted a copy of USCIS’s notice

³ Each petition contained identical letters from the end-client and vendors.

⁴ For example, the Director noted that letters in both petitions contained similar descriptions of the proffered position, the Beneficiary’s qualifications, and the employer’s right to control the Beneficiary.

acknowledging C- LLC's withdrawal of its petition for the Beneficiary, dated after the Director's initial approval of this petition.

In its subsequent revocation notice, the Director acknowledged that the Petitioner and C- LLC have separate FEINs, operation locations, management, and ownership. The Director found that the Petitioner and C- LLC are not related to each other as a parent company, subsidiary, or affiliate. But based on the similarities between the two petitions, both filed for the Beneficiary to work in substantially the same job at the same end-client, the Director concluded that the Petitioner and C- LLC are nevertheless "related" for purposes of the multiple filing bar at 8 C.F.R. § 214.2(h)(2)(i)(G).

On appeal, the Petitioner asserts that the relevant regulatory text - "related entities (such as affiliates, subsidiaries, or a parent company)" - refers only to entities that are related through corporate ownership and control. The Petitioner disagrees with the Director's interpretation of 8 C.F.R. § 214.2(h)(2)(i)(G) to include companies that are related in other ways as well.

III. ANALYSIS

We conclude that the Director properly revoked the approval of the petition because the Petitioner is a "related" entity to C- LLC for purposes of the multiple filing bar at 8 C.F.R. § 214.2(h)(2)(i)(G). We disagree with the Petitioner's interpretation of the multiple filing bar as applying only to entities that are related through corporate ownership and control. We begin our analysis with the pertinent text of the regulation, including the parenthetical that follows the key terms: "...related entities (such as a parent company, subsidiary, or affiliate)." 8 C.F.R. § 214.2(h)(2)(i)(G). The Petitioner correctly observes that the parenthetical list informs what "related entities" may be subject to the multiple filing bar. But the parenthetical opens with the non-exhaustive phrase "such as"; it does not circumscribe a closed set of relevant relationships.⁵

The Petitioner's proposed reading of the text would frustrate the regulation's purpose of promoting fair access to limited H-1B visas. *See* 8 C.F.R. § 214.2(h)(8)(ii)(B) (addressing the H-1B lottery's "fair and orderly allocation of numbers"); *Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt from the Annual Numerical Limitation*, 73 Fed. Reg. 15389-95, 15391-93 (Mar. 24, 2008) (discussing the practice of petitioners who exploit the system by attempting to increase their chances of being selected for cap numbers).

We decline to adopt a construction that employers could so easily circumvent through corporate law stratagems. Instead, we construe "related entities" to include petitioners, whether or not related through corporate ownership and control, who submit multiple petitions for the same beneficiary for substantially the same job. Whether two jobs are "substantially the same" is an issue of fact that we

⁵ The term "such as" introduces examples of what may be considered "related entities." The common dictionary definition of the term "such as" is "used to introduce an example or series of examples." *See, e.g., Merriam-Webster Dictionary* (2018), available at <https://www.merriam-webster.com/dictionary/such%20as> (last visited Mar. 22, 2018).

determine based on the totality of the record. Some factors relevant to relatedness may include familial ties, proximity of locations, leadership structure, employment history, similar work assignments, and substantially similar supporting documentation. The Petitioner cautioned that reading the rule to include petitioners, whether or not related through corporate ownership and control, could ensnare companies that can be found “related” for any number of “unspecified reasons.” The Petitioner’s concerns are misplaced. We are not concerned with petitioning employers who have any quantum of a relationship. Two unwitting companies would not likely have the requisite similitude to trigger the bar. But the more similarities in the records, the more likely the companies were seeking to undermine the purpose of the random lottery process.

Here, the record demonstrates that the Petitioner and C- LLC are “related entities” for the issue at hand. While the entities appear to stand at arm’s length under corporate law, the Director astutely identified similarities that properly triggered the rule against multiple filings, including the Beneficiary’s assignment to the same end-client through the same mid-vendors. The Director also observed that C- LLC’s petition contained a copy of its Subcontractor Agreement with the Petitioner – executed less than one month before the instant H-1B petition was filed. The contract merely confirms what the other facts amply establish: the Petitioner and C- LLC each filed a petition intending to employ the Beneficiary in substantially the same job (i.e., performing substantially similar duties for the same end-client).

Having determined that the Petitioner and C- LLC are related entities under the rule, we next assess whether the Petitioner has demonstrated “a legitimate business need to file more than one H-1B petition on behalf of the same” beneficiary. 8 C.F.R. § 214.2(h)(2)(i)(G).⁶ In determining a petitioner’s “legitimate business need,” we examine the underlying job opportunity made by each petitioner. Each job opportunity must be bona fide, be available to the beneficiary⁷, and be materially distinct.⁸ The related petitioners cannot be offering essentially the same job opportunity to the beneficiary.

⁶ We note that a single employer may not file more than one cap-subject petition for the same beneficiary even if there is a legitimate business need. In promulgating 8 C.F.R. § 214.2(h)(2)(i)(G), USCIS recognized that, on occasion, an employer may extend the same beneficiary two or more job offers for *distinct* positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same alien. The rule, however, precluded that practice if the beneficiary is subject to the cap. USCIS recognized that allowing multiple filings by one employer on behalf of the same beneficiary could create a loophole for employers that seek to exploit the random selection process to the competitive disadvantage of other petitioners. Such employers could file multiple petitions on behalf of the same alien under the guise that the petitions are based on different job offers, when the employment positions are in fact the same or only very slightly different. Instead, USCIS explained that a petitioner could file one initial petition, and then if accepted under the cap, file an amended or new petition for concurrent employment. Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15,389-901 (Mar. 24, 2008) (emphasis added).

⁷ The H-1B program does not permit speculative employment. Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214).

⁸ See Petitions Filed on Behalf of H-1B Temporary Workers Subject to or Exempt From the Annual Numerical Limitation, 73 Fed. Reg. 15,389-901 (Mar. 24, 2008) (“USCIS recognizes that an employer and one or more related

Here, the positions are not materially distinct. As noted above, the petitions were filed in the same fiscal year for the same Beneficiary to work in the substantially same position for the same end-client through the same two vendors. In its response to the Director’s NOIR and in its appeal brief, the Petitioner only contested the Petitioner’s “relatedness” to C- LLC. The Petitioner has not explained, and therefore has not demonstrated, a “legitimate business need” to file this petition.

Finally, C- LLC’s subsequent withdrawal of its duplicate petition for the Beneficiary did not absolve the Petitioner of the multiple filing bar. That bar requires denial or revocation of “*all petitions filed* on that alien’s behalf by the related entities” in the absence of a legitimate business need. 8 C.F.R. § 214.2(h)(2)(i)(G) (emphasis added); *see also* 8 C.F.R. § 103.2(b)(15).

IV. CONCLUSION

The Petitioner and a related entity filed multiple H-1B cap-subject petitions for the Beneficiary and did not demonstrate a legitimate business need to do so. The Director properly revoked the approval of the petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(5).

ORDER: The appeal is dismissed.

Cite as *Matter of S- Inc.*, Adopted Decision 2018-02 (AAO Mar. 23, 2018)

entities (such as a parent, subsidiary or affiliate) may extend the same alien two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same alien”).