

# CURB YOUR ENTHUSIASM: AN ANALYSIS OF THE AAO'S H-1B TEXAS SCHOOL DISTRICT CASE

by Naomi Schorr

## Introduction

On September 8, 2006, the Administrative Appeals Office (AAO) of the U.S. Citizenship and Immigration Services (USCIS) approved an H-1B petition for a public school district in Texas that had claimed it was exempt from the H-1B cap because of its relationships and affiliations with institutions of higher education.<sup>1</sup> Even though the AAO approved the H-1B petition, its decision was disappointing, badly reasoned, incorrect on the facts, incorrect on the law, and devoid of any guidance for future cases.

The American Immigration Lawyers Association (AILA) submitted an amicus curiae brief to the AAO<sup>2</sup> on the question of whether the school district was exempt from the cap.<sup>3</sup> I was one of the authors of that brief,<sup>4</sup> which was written on a tight deadline, without enough time to elaborate on some of the arguments that were made. This article expands on some of the issues that were raised in the brief, and analyzes and comments on several of the statements made by the AAO in its decision.

---

<sup>1</sup> Matter of X, EAC-06-216-52028 (AAO Sept. 8, 2006), available at [www.aila.org/infonet](http://www.aila.org/infonet) (document no. 06091161 [hereinafter AAO Decision], 33 Immigr. Rep. B2-95. The attorney for the petitioner was AILA member Maria M. Cordon.

<sup>2</sup> The brief is available at <http://www.aila.org/infonet> (document no. 06082566). Although the case involved two issues—cap exemptions and whether the teacher position was a “specialty occupation”—the AILA brief dealt only with the cap issue.

<sup>3</sup> INA § 214(g)(5)(A), 8 U.S.C. § 1184(g)(5)(A) provides:

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[.]

<sup>4</sup> The other principal author of the brief was Crystal Williams of AILA, with contributions by Stephen Yale-Loehr and Geoff Forney.

## The Facts of the Case

The petitioner was a school district in Texas, educating students in grades kindergarten through twelve (“K-12”). Like a number of school districts around the country, it has an ongoing student teaching program that it conducts in conjunction with a number of local colleges and universities, all pursuant to written agreements between the school district and those institutions of higher education.

Pursuant to those agreements, the student-teachers are mentored by district teachers, their field work is supervised by the district officials, and both university and district representatives are selected and prepared for their role as mentors and supervisors by professionals who are jointly selected by the university and the district’s partnering school. As part of the arrangement, the college or university provides technical assistance and training for each of the program’s mentor teachers and student interns.

The school district made a number of arguments about why it should be exempt from the H-1B cap, chief among them the jointly operated student-teacher program it runs with institutions of higher education.<sup>5</sup>

## The Vermont Service Center’s Decision

The Vermont Service Center (VSC) recommended a denial of the H-1B petition,<sup>6</sup> finding, among other things, that the numerical limitation for the fiscal year had been reached on August 10, 2005, well before the school district’s petition was filed on May 17, 2006, and that the petitioner was not eligible for an exemption from that limitation.<sup>7</sup> The VSC claimed that

---

<sup>5</sup> The school district also argued that because the state of Texas exercised control over K-12 schools and institutions of higher education, the school district was affiliated with the institutions of higher education through shared ownership or control by the same board or federation. This argument will not be discussed in this article.

<sup>6</sup> Matter of X, EAC-06-183-53821, slip op. at 10 (July 21, 2006).

<sup>7</sup> *Id.* at 2. The announcement that the numerical cap for fiscal year 2006 had been reached was made in an Aug. 12, 2005 USCIS Press Release, *USCIS Reaches H-1B Cap*, available at [http://www.uscis.gov/graphics/publicaffairs/newsrels/H-1Bcap\\_12Aug05.pdf](http://www.uscis.gov/graphics/publicaffairs/newsrels/H-1Bcap_12Aug05.pdf). As explained in that release, USCIS

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,"<sup>8</sup> the petitioner was subject to the cap. The VSC also stated:

[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.*<sup>9</sup>

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 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 public schools and private colleges. Such agreements do not constitute affiliation or relationship as a member, branch, cooperative, or subsidiary.<sup>10</sup>

The VSC certified the case to the AAO for review.

### The AAO's Decision

In a very curious decision, the AAO said that it *agreed* with the VSC that the school district was *not* related to or affiliated with an institution of higher education:

The AAO agrees with the [VSC] director that the petitioner is not an institution of higher education or a nonprofit entity related to or

affiliated with an institution of higher education.<sup>11</sup>

If that's true, if the petitioner is *not* related to or affiliated with an institution of higher education, then how was this case approved? The cap exemption at INA § 214(g)(5)(A) benefits only those nonprofit entities related to or affiliated with an institution of higher education. The AAO found that no such relationship or affiliation existed. How, then, could it possibly have approved the case?

Let's start out with some background. Then I'll review the decision in detail.

### Background

#### 1. 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").<sup>12</sup> 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.<sup>13</sup> That training fee was added by § 414(a) of ACWIA, which provided, in pertinent part:

Sec. 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 § 415(a) of ACWIA, a provision concerned with the calculation of prevailing wages for employees of certain entities. The section provided:

Sec. 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

---

would reject any submissions subject to the fiscal year 2006 numerical cap that were received after the announced "final receipt date." The school district's petition was indeed received after the final receipt date, so that the relevant question became whether the petition was subject to the fiscal year 2006 H-1B cap.

<sup>8</sup> Matter of X, EAC-06-183-53821, slip op. at 4 (July 21, 2006).

<sup>9</sup> *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 *infra* notes 15-19 and accompanying text.

<sup>10</sup> Matter of X, EAC-06-183-53821, slip op. at 6 (July 21, 2006).

<sup>11</sup> AAO Decision, slip op. at 2, 33 Immigr. Rep. at B2-96.

<sup>12</sup> 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.

<sup>13</sup> 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.

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, those entities were not exempted from the H-1B *cap* because at that time, cap exemptions did not exist. They were introduced two years later, by the passage of the American Competitiveness in the Twenty-First Century Act (AC21).<sup>14</sup>

## 2. The INS Issues an Interim ACWIA Fee Regulation

On November 30, 1998, the legacy Immigration and Naturalization Service (INS) issued an interim regulation implementing the \$500 ACWIA fee,<sup>15</sup> which had been imposed on all H-1B petitioners, except institutions of higher education, their related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations.

The interim regulation included a definition of "related" and "affiliated" for *fee exemption* purposes. It is the same regulation found today at 8 C.F.R. §214.2(h)(19)(iii)(B). It provides:

(iii) The following exempt organizations are not required to pay the additional fee: . . .

(B) 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<sup>16]</sup> operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

## 3. 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.<sup>17</sup> In the supplementary information to the final rule, the Service stated that it had received only eight comments on the interim rule,<sup>18</sup> a rule that dealt only with the ACWIA fee. Of those, only two touched on the Service's definition of "affiliated" and "related."<sup>19</sup> That there were only eight comments may be accounted for by the fact that all that was at stake 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 received many more comments opposing its definitions.

## 4. American Competitiveness in the Twenty-First Century Act

In October 2000, two years after the passage of ACWIA, Congress enacted AC21,<sup>20</sup> which created, for the first time, exemptions from the H-1B *cap*.<sup>21</sup>

<sup>16</sup> AILA pointed 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, 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. 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 included the comma in its rendition of the definition, one can safely assume that its version is the correct one. The AAO agreed with AILA on this point. AAO Decision, slip op. at 8 n.12, 33 Immigr. Rep. at B2-101 n.12.

<sup>17</sup> 65 Fed. Reg. 10,678 (Feb. 29, 2000).

<sup>18</sup> *Id.* at 10,679 (supplementary information).

<sup>19</sup> *Id.* at 10,680 (supplementary information).

<sup>20</sup> Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

<sup>21</sup> The limitations on the number of foreign nationals who may be issued H-1B visas or otherwise accorded H-1B status

<sup>14</sup> Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

<sup>15</sup> 63 Fed. Reg. 65,657 (Nov. 30, 1998).

Codified at INA § 214(g)(5)(A) and (B), the cap exemption 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;

.....

To this day, there have been no regulations issued to define which nonprofit entities are “related” to or “affiliated” with institutions of higher education for purposes of *this* statute.

### 5. The USCIS Issues Guidance in an H-1B Cap Memorandum

On June 6, 2006, the USCIS issued a memorandum on exemptions from the H-1B cap (the June 6 Memo).<sup>22</sup> In that 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.

are set forth in INA § 214(g)(1). The number has been set at 65,000 since fiscal year 2004.

<sup>22</sup> Memorandum from Michael Aytes, Assoc. Dir. for Domestic Operations, USCIS, HQPRD 70/23.12, AD06-27, *Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on § 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (June 6, 2006), reprinted at 11 Bender's Immigr. Bull. 731 (App. D) (July 1, 2006), and available at <http://www.uscis.gov/graphics/files/pressrelease/AC21C060606.pdf> (last visited Mar. 14, 2007) and [www.aiala.org](http://www.aiala.org) (document no. 06060861) [hereinafter June 6 Memo].

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.<sup>23</sup>

To sum up so far: A statute imposing a *fee* was passed in 1998, and a legislative rule, issued pursuant to the notice and comment requirements of the Administrative Procedure Act (APA),<sup>24</sup> was also issued in 1998, defining the terms “related” and “affiliated” to institutions of higher education for purposes of that 1998 statute. Two years later, Congress passed a law exempting from the H-1B cap certain nonprofit entities that were related to or affiliated with institutions of higher education. No regulation was ever issued in connection with this statutory provision. Instead, by-passing the legislative rulemaking procedure entirely, the USCIS issued a memorandum in 2006 that simply “adopted” the definition of related and affiliated crafted for purposes of the ACWIA fee.

<sup>23</sup> *Id.* at 4 (italics added; underlining in original). It's rather interesting that the June 6 Memo, while borrowing the definition of “affiliated” found in the H-1B fee exemption regulation, did not offer any definition for those nonprofit entities “related” to institutions of higher education, even though INA § 214(g)(5)(A) permits the cap exemption both for nonprofit entities “affiliated” with institutions of higher education and for those “related” to those institutions.

<sup>24</sup> 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, e.g., *United Steelworkers of America v. Schuykill 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”).

Meanwhile, for several years before the June 6 Memo, K-12 schools and school districts had been submitting H-1B petitions to service centers claiming they were exempt from the cap because of their relationships and affiliations with institutions of higher education. With no regulation or USCIS policy in place, the outcome in a particular case was uncertain. Some cases were approved, others were denied. The June 6 Memo may have sought to bring consistency to the matter, but the issue was brought to center stage when the Texas school case was certified to the AAO.

### The AAO Decision in Detail

This article does not discuss every aspect of the AAO decision. Instead, I focus on the issues that are of particular interest to me. First, I provide a brief description of the issue, then I quote from the AAO decision bearing on that issue, and then I comment on what the AAO said.

#### I. The AAO "Generally Defers" to USCIS Statements of Policy

*The AAO claimed that it was going to "defer" to the definition of affiliated and related that was adopted by the June 6 Memo.<sup>25</sup> Did it have to?*

#### AAO Decision:

The AAO, as a component of USCIS, *generally* defers to official statements of policy issued by the agency, whether or not these statements constitute legislative rules binding on the courts pursuant to the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nevertheless, the AAO finds that USCIS reasonably interpreted AC21, which is silent as to the meaning of the phrase "related or affiliated nonprofit entity", to apply the definition of the phrase found at 8 C.F.R. §214.2(h)(19)(iii)(B).<sup>26</sup>

**Comment:** The "policy" referred to is found in the June 6 Memo, in which the USCIS *directed* adjudicators to "adopt" the same definitions of related and affiliated for cap exemption purposes as found in the ACWIA fee regulation. Regrettably, instead of issuing a legislative rule pursuant to the requirements of the APA,<sup>27</sup> providing the public with notice and an

opportunity to comment on the definitional questions, the agency decided to "regulate" through memorandum.

What does it mean when the AAO states that it "generally" defers to official agency policy statements? There's no particular reason why the AAO should have "deferred" to the policy set forth in the June 6 Memo because the AAO, according to the agency's organizational chart, does not report to the office that issued the June 6 Memo.<sup>28</sup> The June 6 Memo was issued by the USCIS Associate Director for Domestic Operations, who is with the agency's Domestic Operations Directorate. Because both the Domestic Operations Directorate and the AAO report directly to the Deputy Director of the agency, the Associate Director for Domestic Operations has no oversight authority over the AAO.<sup>29</sup>

---

Pierce, Jr., I Administrative Law Treatise § 6.6 (4th ed. 2002).

<sup>28</sup> The USCIS organizational chart, dated October 15, 2006, is available at <http://www.uscis.gov/files/testimony/1USCIS%20OrgChart%20103006.pdf> (last visited Feb. 9, 2007).

<sup>29</sup> Ever since the 2003 reorganization of the former INS, the delegations of authority have not been specified. 8 C.F.R. §103.1(a) provides:

(a) Delegations of authority. Delegations of authority to perform functions and exercise authorities under the immigration laws may be made by the Secretary of Homeland Security as provided by Sec. 2.1 of this chapter.

8 C.F.R. § 2.1, in turn, provides:

Authority of the Secretary of Homeland Security. All authorities and functions of the Department of Homeland Security to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary of Homeland Security may, in the Secretary's discretion, delegate any such authority or function to any official, officer, or employee of the Department of Homeland Security, including delegation through successive redelegation, or to any employee of the United States to the extent authorized by law. Such delegation may be made by regulation, directive, memorandum, or other means as deemed appropriate by the Secretary in the exercise of the Secretary's discretion. A delegation of authority or function may in the Secretary's discretion be published in the Federal Register, but such publication is not required.

This regulation was published as a final rule in 68 Fed. Reg. 10,922 (Mar. 6, 2003). The supplementary information stated:

[T]he final rule deletes delegations of authority at 8 CFR 103.1 that reflect the structure of the former INS and therefore no longer provide accurate

<sup>25</sup> June 6 Memo, *supra* note 22.

<sup>26</sup> AAO Decision, slip op. at 6, 33 Immigr. Rep. at B2-99 (emphasis added).

<sup>27</sup> Legislative rules have the same binding effect as statutes, and, for the most part, must be promulgated through the procedures set forth in APA § 553. *See generally* Richard J.

Furthermore, according to the USCIS website, the AAO produces appellate decisions that provide "fair" and "legally supportable resolutions" of applications and petitions for immigration benefits.<sup>30</sup> According to the website,

These decisions provide guidance to applicants, petitioners, practitioners and government officials in the correct interpretation of immigration law, regulations and policy.<sup>31</sup>

If, as the USCIS claims, the AAO's mission is to provide "legally supportable" resolutions, and if its decisions are to provide guidance to government officials, then it seems fairly apparent that the AAO did not have to defer to the agency policy on the "related and affiliated" issue, and could have fashioned a definition of its own. Moreover, the AAO has a history of not "deferring" to agency policy, policy coming out of the Examinations Office, or policies emanating from the office of the General Counsel. Take, for example, the AAO's decision on the recapture of time for H-1B or L-1 nonimmigrants.<sup>32</sup> That decision, which the agency later denominated an "adopted decision,"<sup>33</sup> completely ignored all prior INS policy on recapture and instead fashioned a new rule.

Before the AAO's recapture decision, the immigration agency followed a policy on recapture first

---

information from the regulations. These delegations are replaced with a cross-reference to the Secretary of Homeland Security's delegation authority under 8 CFR 2.1. Delegations to replace the former Sec. 103.1 will be in place on March 1, 2003, but are not required to be, and will not be promulgated as rules or codified in the Code of Federal Regulations.

*Id.* at 10,923.

<sup>30</sup> The description of the AAO's work is found at the USCIS website's page for "Adopted Decisions," at <http://www.uscis.gov>, then "Laws and Regulations," then "USCIS Adopted Decisions" (last visited Mar. 15, 2007).

<sup>31</sup> *Id.*

<sup>32</sup> Matter of X, EAC-04-047-53189, 32 Immigr. Rep. B2-91 (AAO Sept. 2, 2005), available at [http://www.uscis.gov/files/article/sep0205\\_02d2101.pdf](http://www.uscis.gov/files/article/sep0205_02d2101.pdf) (last visited Mar. 14, 2007); <http://www.aila.org/infonet> (document no. 05102760) (last visited Feb. 9, 2007).

<sup>33</sup> Adopted decisions are to be considered policy guidance binding on all USCIS personnel, *supra* note 30. See also, e.g., Matter of Buschini, No. A98 064 379 (June 30, 2006), available at <http://www.uscis.gov/files/article/Buschini063006.pdf> (last visited Mar. 14, 2007), reprinted at 11 Bender's Immigr. Bull. 958 (App. H) (Aug. 1, 2006) (with cover letter explicitly so stating).

promulgated in 1994 in a memorandum to the field.<sup>34</sup> In it, the INS provided guidance on whether the time an H or L nonimmigrant spent outside the United States during the validity period of his petition counts toward his maximum period of stay in the country in that status. The memorandum stated:

It is the opinion of this office that time spent out of the United States during the validity period of a petition must be counted toward the alien's maximum period of stay in the United States, provided that the time spent outside of the United States was not interruptive of the alien's employment in the United States. Periods of time spent outside of the United States which are considered to be a normal part of a work year, such as vacations, holidays, and weekends, do not interrupt the alien's employment in the United States since the alien is expected to be able to take time off during the work year. Likewise, short work details to other countries for the United States employer do not interrupt the alien's employment in the United States since travel is common in many industries.<sup>35</sup>

What did the AAO decision on recapture do about Service policy? It *ignored it*. In the case before the AAO, an H-1B nonimmigrant had been outside the United States for thirty days on a work assignment, and the Service Center denied the thirty-day petition extension, claiming that the thirty days were not interruptive of his employment.<sup>36</sup> In considering the issue, the AAO never even mentioned the Service policy on recapture. Instead, it gave plain meaning to the words of the statute and the regulations, and found that only days in the United States can count against the time limitations of H-1B or L-1 stay:

Section 101(a)(13)(A) of the Act states that "[t]he terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien in the United States after inspection and authorization by an immigration officer." *The*

---

<sup>34</sup> Memorandum from Lawrence J. Weinig, then-Acting Associate Commissioner, INS, Office of Examinations, to All Regions, Service Center Directors, District Directors, and Officers in Charge, CO 214h-C, CO 214L-C, *Limitations on Admission of H and L Nonimmigrants* (Mar. 9, 1994), reprinted and discussed at 71 Interp. Rel. 549, 562, 582-83 (Apr. 25, 1994). Although the suffix "C," as in CO 214h-C, generally denoted correspondence, as opposed to policy, in fact this memorandum became Service policy, and its interpretation of the law served as the basis for denying many recapture petitions.

<sup>35</sup> *Id.*

<sup>36</sup> Matter of X, slip op. at 2, 32 Immigr. Rep. at B2-92.

plain language of the statute and the regulations indicates that the six-year period accrues only during periods when the alien is lawfully admitted and physically present in the United States.<sup>37</sup>

The AAO simply walked away from prior Service policy. Based on a plain reading of the law and regulations, it held that when the beneficiary was outside the United States "he was not in any status for U.S. immigration purposes,"<sup>38</sup> and it approved the recapture petition.

Likewise, in 1998, the AAO declined to follow an opinion issued by the INS Office of the General Counsel (OGC) in connection with the EB-5 immigrant investor provisions of the Act.<sup>39</sup> In *Matter of Izummi*,<sup>40</sup> the AAO stated:

OGC memoranda ... are merely opinions. OGC is not an adjudicative body and is in the position only of being an advisor; as such, adjudicators are not bound by OGC recommendations.<sup>41</sup>

<sup>37</sup> *Id.*, slip op. at 2, 32 Immigr. Rep. at B2-92 (emphasis added).

<sup>38</sup> *Id.*, slip op. at 3, 32 Immigr. Rep. at B2-92.

<sup>39</sup> INA § 203(b)(5), 8 U.S.C. § 1153(b)(5).

<sup>40</sup> 22 I. & N. Dec. 169 (Assoc. Comm'r, Examinations 1998).

<sup>41</sup> *Id.* at 188. The AAO cited 8 C.F.R. § 103.1(b)(1), which in 1998 provided:

(b) General Counsel--(1) General. Under the direction and supervision of the Commissioner, the General Counsel is delegated the authority to carry out the duties of the chief legal officer for the Service, and is assisted by the deputy general counsel(s) and staff. The General Counsel advises the Commissioner, the Deputy Commissioner, and staff on legal matters; prepares legislative reports; and assists in litigation. The General Counsel is delegated the authority to oversee the professional activities of all Service attorneys assigned to field offices and to make recommendations to the Department of Justice on all personnel matters involving Service attorneys, including attorney discipline which requires final action or approval by the Deputy Attorney General or other designated Department of Justice official. The General Counsel is delegated authority to perform the functions conferred upon the Commissioner with respect to production or disclosure of material in Federal and state proceedings as provided in 28 CFR 16.24(a).

In that year, the INS's organization and functions were set forth at 8 C.F.R. § 100.2:

The AAO also refused to accept the opinions of Service officials that had been issued concerning the EB-5 immigrant investor provisions, claiming that those opinions "cannot remove the AAU's regulatory authority to review these cases. To say that an

---

(a) Office of the Commissioner. The Attorney General has delegated to the Commissioner, the principal officer of the Immigration and Naturalization Service, authority to administer and enforce the Immigration and Nationality Act and all other laws relating to immigration, naturalization, and nationality as prescribed and limited by 28 CFR 0.105.

(1) Office of the General Counsel. Headed by the General Counsel, the office provides legal advice to the Commissioner, the Deputy Commissioner, and staff; prepares legislative reports; assists in litigation; prepares briefs and other legal memoranda when necessary; directs the activities of the regional counsel; oversees the professional activities of all Service attorneys assigned to field offices; and, makes recommendations on all personnel matters involving Service attorneys.

...

(c) Office of the Executive Associate Commissioner for Programs—

(1) General.

(i) Headed by the Executive Associate Commissioner for Programs, the office is responsible for policy development and review as well as integration of the Service's enforcement and examinations programs. This office has primary responsibility for the planning, oversight, and advancement of programs engaged in interpretation of the immigration and nationality laws and the development of regulations to assist in activities, including:

- (A) The granting of benefits and privileges to those qualified to receive them;
- (B) Withholding of benefits from those ineligible;
- (C) Control of the borders and prevention of illegal entry into the United States;
- (D) Detection, apprehension, detention, and removal of illegal aliens; and
- (E) Enforcement of employer sanctions and other provisions of immigration-related law.

(ii) In addition to overseeing enforcement and examination policy matters, the Office of Programs is also responsible for immigration records. The Executive Associate Commissioner for Programs promulgates policy, provides direction and supervises the activities of the Offices of Enforcement and Examinations.

agency's knowledge cannot grow, and that an agency is prohibited from benefiting from its experience, is unreasonable."<sup>42</sup>

Thus, the AAO did *not* have to defer to the H-1B cap policy set out in the June 6 Memo, and had it within its power to broaden the agency's interpretation of which nonprofit entities may be deemed exempt from the H-1B cap by virtue of their affiliations and relationships with institutions of higher education. If the AAO could deviate from Service policy on the recapture issue, setting a new standard on its own, surely it had the authority to do the same with the affiliation issue. When the AAO said that "as a component of USCIS," it "generally defers to official statements of policy issued by the agency," it seems to me that what it really meant is that it can pick and choose the policies it gives deference to. That being the case, it was a great disappointment that it chose to give deference to the policy on "related" and "affiliated" announced in the June 2006 Memo.

## II. Context Is Critical

*AILA argued that ACWIA was a restrictive piece of legislation, whereas AC21 was among the most liberal pieces of H-1B legislation ever enacted. For that reason the USCIS should not have "adopted" the definition of "related" and "affiliated" found in the ACWIA legislative rule for AC21's cap exempt provision. Moreover, AILA argued that identical words in statutes can be interpreted differently, depending on the context in which the words are used.*

### AAO Decision:

Although AILA characterizes ACWIA as "restrictive" and AC21 as "remedial," the AAO observes that these laws contain both remedial and restrictive provisions. Both laws, for instance, contain provisions increasing the annual allotment of H-1B visas, though ACWIA did this only temporarily. At issue here are two similar provisions in these laws, both of which are arguably ameliorative in nature: the exemption to the H-1B fee in ACWIA and the exemption to the H-1B cap in AC21.<sup>43</sup>

**Comment:** To claim that both ACWIA and AC21 contain restrictive provisions is just plain wrong. They don't. ACWIA's provisions are almost entirely restrictive, and AC21's provisions are not restrictive at all. And to claim that both pieces of legislation contain remedial provisions (as though in equal measure) is

like saying that because Hank Aaron and Phil Rizzuto both hit home runs, they were both power hitters.<sup>44</sup>

AC21 introduced *no* restrictive provisions; both ACWIA and AC21 *temporarily* increased the annual allotment of H-1B numbers; and the only truly ameliorative provision in ACWIA was not the one exempting institutions of higher education (and their related and affiliated nonprofit entities) from the ACWIA fee, but the one that afforded them a more equitable method for calculating prevailing wages for the H-1B and permanent labor certification programs.<sup>45</sup> Let's review this more carefully.

### A. Remedial Statutes Should Be Construed Liberally

As AILA argued in its amicus brief, case law firmly establishes that remedial statutes<sup>46</sup> should be liberally construed to give effect to the remedial purposes for which they were enacted.<sup>47</sup> This, AILA urged, is particularly so in the immigration context, where doubts are to be resolved in favor of the foreign national.<sup>48</sup> That AC21 is a remedial piece of legislation goes without question. The Senate report accompanying the bill that was ultimately enacted into

<sup>44</sup> Phil Rizzuto hit 38 home runs in his major league career <http://www.baseball-reference.com/r/rizzuph01.shtml> (last visited Feb. 9, 2007). Hank Aaron hit 755. [http://en.wikipedia.org/wiki/Hank\\_Aaron](http://en.wikipedia.org/wiki/Hank_Aaron) (last visited Feb. 9, 2007).

<sup>45</sup> ACWIA also permitted to payment of honoraria in certain limited circumstances. See *infra* note 79 and accompanying text.

<sup>46</sup> A remedial statute is one designed to remedy a defect in existing laws. See, 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) (remedial statutes include those intended to correct defects).

<sup>47</sup> 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 Indep. Sch. Dist.*, 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 is a remedial statute and should be broadly applied and liberally construed).

<sup>48</sup> E.g., *Padash v. INS*, 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 is to be interpreted and applied in ameliorative fashion, particularly in immigration context).

<sup>42</sup> 22 I. & N. Dec. at 196.

<sup>43</sup> AAO Decision, slip op. at 6, 33 Immigr. Rep. at B2-99.

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.*<sup>49</sup>

In other words, a broad definition of “related” and “affiliated” was in order in the context of AC21’s ameliorative purposes. Instead, the USCIS 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 for the exemption, 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. With that in mind, let’s take a look at the two statutory provisions — AC21 and ACWIA — and compare them.

### B. AC21 Was Remedial Legislation

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

1. Section 102, which increased the annual allotment of H-1B visas;<sup>50</sup>

<sup>49</sup> S. Rep. No. 106-260, at 2 (2000) (emphasis added).

<sup>50</sup> AC21 § 102(a), Temporary Increase in Visa Allotments, provided:

Fiscal Years 2001-2003-Section 214(g)(1)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(A)) is amended—

by redesignating clause (v) as clause (vii); and by striking clause (iv) and inserting the following:

- (iv) 195,000 in fiscal year 2001;
- (v) 195,000 in fiscal year 2002;
- (vi) 195,000 in fiscal years 2003;

2. Section 103, which provided exemptions from the H-1B cap;<sup>51</sup>
3. Section 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

---

INA § 214(g)(1)(A), 8 U.S.C. § 1184(g)(1)(A) currently provides:

(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;

<sup>51</sup> AC21 § 103 amended INA § 214(g), adding paragraphs (5), (6), and (7). INA § 214(g)(5), which is relevant to our discussion, provides:

(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 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.

INA § 214(g)(5)(C) was added in December 2004 by §425(a)(1)–(4) of Pub. L. No. 108-447, 118 Stat. 2809.

petition filed for the foreign national had been approved;<sup>52</sup>

4. Section 104, which permitted unused employment-based immigrant visa numbers in a fiscal year to be reallocated;<sup>53</sup>
5. Section 105, which created several remedies for agency delays in processing H-1B visa petitions, the so-called "H-1B portability" provision;<sup>54</sup>
6. Section 106(a), 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;<sup>55</sup>

<sup>52</sup> The Immigration and Nationality Act has not been amended to incorporate the provisions of AC21 § 104(c), which provides:

One-Time Protection Under Per Country Ceiling—Notwithstanding section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)), any alien who—

- (1) is the beneficiary of a petition filed under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and
- (2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made thereon.

<sup>53</sup> Codified at INA § 202(a)(5)(B).

<sup>54</sup> Codified at INA § 214(n), 8 U.S.C. § 1184(n). This provision was designated as subsection (m) when added by §105 of AC21, and was redesignated as subsection (n) by §8(a)(3) of the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

<sup>55</sup> As originally enacted in 2000, sections 106(a) and (b) stated as follows:

**SEC. 106. SPECIAL PROVISIONS IN CASES OF LENGTHY ADJUDICATIONS.**

(a) Exemption From Limitation.--The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of that Act on whose behalf a petition under section 204(b) of that Act to accord the alien immigrant status under

section 203(b) of that Act, or an application for adjustment of status under section 245 of that Act to accord the alien status under such section 203(b), has been filed, if 365 days or more have elapsed since--

- (1) the filing of a labor certification application on the alien's behalf (if such certification is required for the alien to obtain status under such section 203(b)); or
- (2) the filing of the petition under such section 204(b).

(b) Extension of H-1B Worker Status.--The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year increments until such time as a final decision is made on the alien's lawful permanent residence.

On Nov. 2, 2002, President Bush signed into law the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758. Section 11030A states as follows:

**EXTENSION OF H-1B STATUS FOR ALIENS WITH LENGTHY ADJUDICATIONS.**

(a) EXEMPTION FROM LIMITATION.—Section 106(a) of the American Competitiveness in the Twenty-first Century Act of 2000 (8 U.S.C. 1184 note) is amended to read as follows:

“(a) EXEMPTION FROM LIMITATION.—The limitation contained in section 214(g)(4) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(4)) with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(i)(b)), if 365 days or more have elapsed since the filing of any of the following:

“(1) Any application for labor certification under section 212(a)(5)(A) of such Act (8 U.S.C. 1182(a)(5)(A)), in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act (8 U.S.C. 1153(b)).

“(2) A petition described in section 204(b) of such Act (3 U.S.C. 1154(b)) to accord the alien a status under section 203(b) of such Act.”.

(b) EXTENSION OF H-1B WORKER STATUS.—Section 106(b) of American Competitiveness in the Twenty-first Century Act of 2000 (8 U.S.C. 1184 note) is amended to read as follows:

“(b) EXTENSION OF H-1B WORKER STATUS.—The Attorney General shall extend the stay of an alien who qualifies for an exemption under subsection (a) in one-year

7. Section 106(b), the so-called "adjustment of status portability" provision,<sup>56</sup> which permits an applicant for adjustment of status to change jobs if his application has been pending for at least 180 days;
8. Section 114, which exempted all physicians receiving INA § 214(l) waivers from the H-1B cap.<sup>57</sup>

---

increments until such time as a final decision is made—

“(1) to deny the application described in subsection (a)(1), or, in a case in which such application is granted, to deny a petition described in subsection (a)(2) filed on behalf of the alien pursuant to such grant;

“(2) to deny the petition described in subsection (a)(2); or

“(3) to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.”.

<sup>56</sup> AC21 § 106(c) amended INA § 204 by adding subsection (j), which provides:

(j) Job flexibility for long delayed applicants for adjustment of status to permanent residence[.] A petition under subsection (a)(1)(D) of this section for an individual whose application for adjustment of status pursuant to section 1255 of this title has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

AC21 § 106(c) also amended INA § 212(a)(5)(A), 8 USC § 1182(a)(5)(A) by adding clause (iv):

Long delayed adjustment applicants. A certification made under clause (i) with respect to an individual whose petition is covered by section 1154(j) of this title shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

<sup>57</sup> AC21 § 114, Exclusion of Certain 'J' Nonimmigrants from Numerical Limitations Applicable to 'H-1B' Nonimmigrants, provided:

The numerical limitations contained in section 102 of this title shall not apply to any nonimmigrant alien granted a waiver that is subject to the limitation contained in paragraph (1)(B) of the first section 214(l) of the Immigration and Nationality Act (relating to restrictions on waivers).

In December 2004, Congress passed a law that sought to broaden the H-1B cap exemption to cover not just Conrad

AC21 was a bountiful piece of legislation, certainly among the most generous to come along in recent years. Clearly, in enacting this legislation, Congress liberalized H-1B law, with every component of the new law 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 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. Therefore, the USCIS should give the H-1B cap-exemption provision the broad and liberal construction that Congress intended it to have.<sup>58</sup>

### C. 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 definition by a commenter on the interim 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

---

30 physicians, but those physicians receiving *federal* interested government agency waivers. At that time, INA § 214(l)(2)(A) was amended by Pub. L. No. 108-441, Act of Dec. 3, 2004, § 1(b), 118 Stat. 2630.

Section 214(l)(2)(A) of the Immigration and Nationality Act (8 U.S.C. 1184(l)(2)(A)) is amended by adding at the end the following: "The numerical limitations contained in subsection (g)(1)(A) shall not apply to any alien whose status is changed under the preceding sentence, if the alien obtained a waiver of the 2-year foreign residence requirement upon a request by an interested Federal agency or an interested State agency.

<sup>58</sup> Congress did not itself define "affiliated" and "related" in AC21. Following the rules of statutory construction, if Congress did not define a term, that term must be given its "plain meaning." See generally Singer, *supra* note 46, at § 46.01. 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.*

narrowly define those entities exempt from paying the \$500 filing fee.<sup>59</sup>

That narrow interpretation *may* have had its place in the realm of ACWIA. With the exception of three provisions,<sup>60</sup> one of them only a temporary fix, and one helpful to only a handful of people, the tenor of that legislation was harsh and restrictive. How restrictive was ACWIA?

1. It created the concept of H-1B dependency,<sup>61</sup> imposing strict rules on those employers found to be H-1B-dependent;
2. It created rules for recruitment attestations,<sup>62</sup> dependency calculations, including the "single employer" concept,<sup>63</sup> displacement attestations,<sup>64</sup> and third-party worksite rules;<sup>65</sup>
3. It created the willful-violator provisions, and imposed on willful violators special recruitment attestations;<sup>66</sup>
4. It required employers to offer benefits to H-1B employees on the same basis as U.S. workers;<sup>67</sup>
5. It also increased and toughened enforcement provisions;<sup>68</sup>
6. It prohibited "benching";<sup>69</sup>
7. It authorized "spot" investigations by the DOL;<sup>70</sup> and
8. It imposed the additional training fee on almost all H-1B petitioners.<sup>71</sup>

<sup>59</sup> 65 Fed. Reg. at 10,680 (supplementary information) (emphasis added).

<sup>60</sup> See notes 76-79 and accompanying text.

<sup>61</sup> *Supra* note 12 at § 412(b)(1) (codified at INA § 212(n)(3)(A)). {Bluebook rule 12.2}

<sup>62</sup> *Id.* § 412(a)(1) (codified at INA § 212(n)(1)(G)).

<sup>63</sup> *Id.* § 412(d) (codified at INA § 212(n)(3)).

<sup>64</sup> *Id.* §§ 412(a)(1) and 413(c) (codified at INA §§ 212(n)(1)(F), 212(n)(4), and 212(n)(2)(E)).

<sup>65</sup> *Id.* § 412(a)(1) (codified at INA § 212(n)(1)(F)).

<sup>66</sup> *Id.* § 413(c) and (d) (codified at INA § 212(n)(2)(E)(ii) and § 212(n)(F)).

<sup>67</sup> *Id.* § 413(a) (codified at INA § 212(n)(2)(C)(viii)).

<sup>68</sup> *Id.* § 413(d) (codified at INA § 212(n)(2)(F) and (G)) (original INA § 212(n)(2)(G) sunset on Sept. 30, 2003).

<sup>69</sup> *Id.* § 413(a)(vii) (codified at INA § 212(n)(2)(C)(vii)).

<sup>70</sup> *Id.* § 413(e) (codified at INA § 212(n)(2)(G)).

<sup>71</sup> *Id.* § 414(a) (codified at INA § 214(c)(9)).

#### D. ACWIA's "Ameliorative" Provision, According to the AAO

The AAO claimed that the provision in ACWIA exempting certain entities from the ACWIA fee was an "ameliorative" provision. In my view, that's not the case. "Ameliorate" is defined, "[t]o make or become *better*; improve."<sup>72</sup> ACWIA imposed the training fee on all H-1B petitioners<sup>73</sup> except institutions of higher education and their related or affiliated nonprofit entities. We're so used to paying that fee that we may not remember that the fee did not exist before 1998. Prior to that, *no* entity paid the training fee. After ACWIA, all petitioners had to pay it, except for a few entities, *who were left in the same position they had been before ACWIA's enactment*: They didn't have to pay the fee. So, how is the legislation that exempted those entities from the fee *ameliorative*, meaning "improving" their position in some way, if it left them in the very same position they were in before the law was enacted?

#### III. The ACWIA Fee

*To bolster its claim that ACWIA contained "remedial" provisions, the AAO asserted that ACWIA exempted even more entities from paying the training fee than AC21 exempted from the H-1B cap.*

#### AAO Decision:

Indeed, the fee exemption provision to ACWIA exempts by its explicit terms more organizations from the H-1B fee — including primary and secondary schools — than AC21 does from the H-1B cap.<sup>74</sup>

**Comment:** This, the AAO infers, proves that ACWIA, like AC21, contained several "ameliorative" provisions. The AAO is plain wrong. *ACWIA* didn't exempt more organizations from the fee than are exempt from the cap. It took additional, *ameliorative* legislation some two years *after* ACWIA was enacted to fix what Congress wrought in 1998. The 1998 ACWIA provision exempted from the training fee *only* institutions of higher education, their related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations, the very same entities later exempted from the H-1B cap.

<sup>72</sup> The American Heritage Dictionary of the English Language 59 (3d ed.) (emphasis added).

<sup>73</sup> ACWIA § 414(a) (codified at INA § 214(c)(9)).

<sup>74</sup> AAO Decision, slip op. at 6, 33 Immigr. Rep. at B2-99.

But realizing that ACWIA had been *too restrictive*, several days after the passage of AC21 in 2000, Congress amended INA § 214(c)(9)<sup>75</sup> to add to the fee exemption primary and secondary education institutions and nonprofit entities engaging in established curriculum-related clinical training of students registered at institutions of higher education (or their related or affiliated nonprofit entities).

*ACWIA's True Ameliorative Provisions*

(1) Actually, with the exception of the provision that only *temporarily* increased the number of H-1B numbers, there were two provisions in ACWIA that could be considered "ameliorative." Neither is the provision cited by the AAO. One was the provision that permitted a more lenient method of calculating prevailing wages for institutions of higher education and their related or affiliated nonprofit entities.<sup>76</sup> And that provision more or less restored nonprofit entities to the position they were in before 1994.

In 1994 the Board of Alien Labor Certification Appeals (BALCA) issued a decision concerning the calculation of prevailing wages in the permanent labor certification context for those employed by nonprofit entities.<sup>77</sup> In that case, BALCA held that prevailing wages, even for nonprofit entities, were to be determined by using wage data obtained by surveying

employers across industries in the area of intended employment, not simply by comparing like entities in the area of employment.

To counter the harsh effects of this decision, the Department of Labor issued a regulation in March 1998 that provided that prevailing wage determinations for researchers (and only researchers) employed by colleges and universities, Federally Funded Research and Development Centers administered by colleges and universities, or federal research agencies would be determined by measuring similar positions at like institutions, and not through a cross-industry comparison.<sup>78</sup>

The Labor Department's March 1998 rule, which was rather narrow, was trumped just a few months later by the passage of ACWIA, which at § 415(a) changed and, in many respects, broadened the category of entities benefiting from new prevailing wage rules, and included institutions of higher and their related and affiliated nonprofit entities, and nonprofit and governmental research organizations.

(2) The other ameliorative provision of ACWIA, §431, was also aimed at institutions of higher education, their related or affiliated nonprofit entities, and nonprofit and governmental research organizations, and permitted them to pay honoraria to foreign nationals in certain circumstances.<sup>79</sup> While few individuals benefit from the provision, it is nevertheless "ameliorative."

I would argue that since the *only* remedial provisions in ACWIA were those that dealt with institutions of higher education, their related or affiliated nonprofit entities, and certain research organizations, the definitions that the INS came up with in its ACWIA fee regulation were *wrong from the start*. To give

<sup>75</sup> The provision was amended by Pub. L. No. 105-277, 114 Stat. 1247 (Oct. 17, 2000).

<sup>76</sup> Section 415(a) of ACWIA.

(a) In General.—Section 212 (8 USC 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.”

<sup>77</sup> *Matter of Hathaway Children's Services*, 91-INA-388, 1994 BALCA LEXIS 1 (BALCA Feb. 4, 1994). This decision overruled an earlier BALCA decision, *Matter of Tuskegee University*, 87-INA-561, 1988 BALCA LEXIS 374 (BALCA Feb. 23, 1988), which permitted the calculation of prevailing wages to factor in the nature of the employer's business, in this case, a United Negro College Fund school.

<sup>78</sup> 63 Fed. Reg. 13,756–67 (Mar. 20, 1998). The regulation included a definition of "federal research agency," and added a subsection on the determination of prevailing wages for certain entities.

<sup>79</sup> § 431 was codified at INA § 212(q), and provides:

Any alien admitted under section 1101(a)(15)(B) of this title may accept an honorarium payment and associated incidental expenses for a usual academic activity or activities (lasting not longer than 9 days at any single institution), as defined by the Attorney General in consultation with the Secretary of Education, if such payment is offered by an institution or organization described in subsection (p)(1) of this section and is made for services conducted for the benefit of that institution or entity and if the alien has not accepted such payment or expenses from more than 5 institutions or organizations in the previous 6-month period.

meaning to Congress' expressed concern that institutions of higher education and their affiliated nonprofit entities be treated more favorably than other entities, the INS should not have adopted its narrow definition in the ACWIA fee regulation. Moreover, that mistake certainly should not have been repeated by USCIS for AC21 purposes.<sup>80</sup>

#### IV. Statutory Language Must Be Interpreted in Context

*AILA argued that statutory language must be interpreted in context. Even though both ACWIA and AC21 have provisions for institutions of higher education and their "related or affiliated" nonprofit entities, those terms can have different meanings in the context of each enactment.*

#### AAO Decision:

AILA argues that, as observed by the Supreme Court in *Atlantic Cleaners & Dyers*, 286 U.S. 427 (1932), identical words in different parts of the same act can have different meanings to meet the purposes of the law.<sup>81</sup>

**Comment:** AILA argued that even though Congress used the identical words "related or affiliated nonprofit entity" in both the ACWIA provisions and in AC21, those words could be interpreted differently because ACWIA was restrictive whereas AC21 was remedial. Although I believe that the definition crafted for the ACWIA fee regulation was too narrow, when the full punitive text of that entire legislation is reviewed, it comes as no surprise that the INS interpreted the terms "affiliated" and "related" so restrictively in that context. But it is equally apparent that those definitions have *no place* in the context of AC21, a

<sup>80</sup> In my view, the INS's definition of "nonprofit" organization was also too narrow. See 8 C.F.R. §214.2(h)(19)(iv). Instead of limiting the definition to those entities specified in the Internal Revenue Code at §501(c)(3), (4) and (6), it should have included governmental organizations and organizations that are nonprofit under state law. In the same vein, the immigration agency's definition of "U.S. employer" for purposes of INA §203(b)(1)(B), the outstanding researcher provision, is also too narrow, perhaps by oversight. Defined at 8 C.F.R. §204.5(i)(3)(iii), the term includes a U.S. university or institution of higher learning and a department, division, or institute of a private employer. Governmental entities are not part of the definition. For a discussion of why all governmental research organizations — federal as well as state — should be exempt from the H-1B cap, see Naomi Schorr, *A Capital Idea! All Governmental Research Organizations Are Exempt From the H-1B Cap*, 10 Bender's Immigr. Bull. 951 (June 15, 2005).

<sup>81</sup> AAO Decision, slip op. at 7, 33 Immigr. Rep. at B2-100.

liberal enactment, which must be construed broadly to ensure that congressional intent is effected.<sup>82</sup>

Admittedly, there's a problem for the USCIS. The language Congress used for those entities that are exempt from the ACWIA fee is the precise language it used for those exempt from the H-1B cap, and since the INS defined those terms for ACWIA purposes, how could the USCIS come up with a different meaning for AC21 purposes?

As it turns out, 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> The narrow meaning that the

<sup>82</sup> *Pacific Far East Line v. United States*, 544 F.2d 478 (Ct. Cl. 1976) (investment credit statute must be liberally construed in keeping with its purposes); *Winnabago Industries v. Reneau*, 990 S.W.2d 292 (Tex. Ct. App. 1998) (court must look to intent of legislature in enacting liberal Lemon Law and give that intent legal effect); see also *Singer*, *supra* note 46, at § 45.09 (court must attribute to an enactment the meaning most consistent with obvious intent of the legislature).

<sup>83</sup> *Singer*, *supra* note 46, at §§ 46.05, 51.02.

<sup>84</sup> *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427 (1932) (identical words in different parts of same act can have different meanings to meet the purposes of the law); see also *Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (identical words may have different meanings where scope of legislative power exercised in one is broader than in the other); *Stowell v. HHS*, 3 F.3d 539, 542 (1st Cir. 1993) ("It is apodictic that Congress may choose to give a single phrase different meanings in different parts of the same statute"); *Vanscoter v. Sullivan*, 920 F.2d 1441, 1448 (9th Cir. 1990) (identical words, in this case "payment made," appearing more than once in same act may be construed differently if it appears they were used in different places with different intent); *Dailey v. National Hockey League*, 780 F. Supp. 262, 270 (D.N.J. 1991), *rev'd on other grounds*, 987 F.2d 172 (3d Cir. 1993) (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).

<sup>85</sup> *Sherman v. Hamilton*, 295 F.2d 516, 521 (1st Cir. 1961), *cert. denied*, 369 U.S. 820 (1962) (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.").

INS assigned to the words "affiliated" and "related" for ACWIA purposes has no place in the context of AC21's expansive and liberal purpose.

### V. Legislative Reenactment: Congress Must Voice Approval of Administrative Interpretations

*Contrary to AILA's position, the AAO ignored the "context" argument, and claimed that because the term "related or affiliated nonprofit entity" was defined by the INS in its ACWIA regulation, that definition was impliedly adopted by Congress when it enacted AC21.*

#### AAO Decision:

The AAO finds that it is more likely that Congress intended, by including the phrase "related or affiliated nonprofit entity" in the language of AC21, without providing further definition or explanation, that this phrase be interpreted consistently with the only 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). Such an interpretation by the USCIS, is reasonable, and the AAO will defer to USCIS policy in making its determination on this issue.<sup>86</sup>

**Comment:** The AAO is saying that because the phrase "related or affiliated nonprofit entity" was not defined in AC21, Congress "intended" the phrase to have the meaning the Service gave it when it wrote its ACWIA fee regulation. This is what courts sometimes call the "acquiescence-by-reenactment argument," or the "doctrine of legislative reenactment." As a *general* rule, that doctrine is said to mean that, when Congress reenacts legislation, it incorporates existing administrative and judicial interpretations of the statute into its reenactment.<sup>87</sup> According to the AAO, Congress was aware of the definition of "affiliated or related nonprofit entity" that the INS crafted for ACWIA purposes, and that when Congress used the same term in AC21, it meant to adopt that definition.

<sup>86</sup> AAO Decision, slip op. at 7, 33 Immigr. Rep. at B2-100.

<sup>87</sup> Dutton v. Wolpoff and Abramson, 5 F.3d 649, 655 (3d Cir. 1993). For a discussion of the reenactment doctrine, see Isaacs v. Bowen, 865 F.2d 468, 473-74 (2d Cir. 1989) ("[W]hen the agency charged with the implementation of a statute has purported to interpret it by promulgating regulations, and Congress — without overruling or clarifying the agency's interpretation — later amends the statutory scheme, the agency view is then deemed consistent with Congress' objectives.").

But, like most statements of *general* rules, this statement is not accurate. What the reenactment doctrine actually says is that when Congress reenacts a statute and *voices its approval* of an administrative interpretation of that statute, then, and only then, does that interpretation acquire the force of law.<sup>88</sup> Another way of saying it, and court after court says this, is that mere reenactment is not enough. Congress must also have expressed approval of the agency interpretation.<sup>89</sup> Put yet another way, to construe an agency's interpretation as Congress' will, a court must find some "manifestation of congressional approval."<sup>90</sup> In the immigration context, at least one court has held that congressional reenactment of statutory language does not "normally or automatically" indicate a legislative intent to "freeze all pre-existing agency interpretations" of language, "forever after immunizing them from change."<sup>91</sup>

There is absolutely no evidence that Congress had any idea of the INS's definition of "related and affiliated" nonprofit entity when it enacted AC21. No administrative case law ever dealt with the issue, and certainly none before October 17, 2000, the date on which AC21 was enacted. Nor has any federal judicial

<sup>88</sup> See, e.g., Demarest v. Manspeaker, 498 U.S. 184 (1991) (administrative construction on payment of witness attendance fees to criminals not entitled to deference when there is no indication Congress was aware of the construction or appellate decisions when it revised statute); Isaacs v. Bowen, 865 F.2d at 473; see also, e.g., Micron Tech. v. United States, 243 F.3d 1301, 1311 (Fed. Cir. 2001) (even if a re-enacted statute has been judicially interpreted, Congress cannot be presumed to have adopted the interpretation unless it was aware of the decision when amending the statute); Helen L. v. DiDario, 46 F.3d 325, 332 (3d Cir. 1995) (when reenacting a statute, Congress must voice approval of an administrative interpretation for courts to be bound by it).

<sup>89</sup> Hooks v. Clark County Sch. Dist., 228 F.3d 1036 (9th Cir. 2000), cert. denied, 532 U.S. 971 (2001) (in reenacting Individuals with Disabilities Education Act, Congress explicitly ratified view that states must define term "private school"); Isaacs v. Bowen, 865 F.2d at 473 (court looks for manifestation of congressional approval of an agency's interpretation); Kansas Hospital Ass'n v. Whiteman, 851 F. Supp. 401 (D. Kan. 1994) (reenactment doctrine is tool of legislative interpretation, most useful where there is some indication Congress considered the regulations in effect at time of its action).

<sup>90</sup> Isaacs, 865 F. 2d at 473.

<sup>91</sup> Molina v. INS, 981 F.2d 14 (1st Cir. 1992) (court rejected argument that word "conviction" in Immigration Reform and Control Act of 1986 should be read to adopt INS's definition of that word before Matter of Ozkok, 19 I. & N. Dec. 546 (BIA 1988)).

opinion ever been decided on the definitional issue.<sup>92</sup> Moreover, there is not a shred of evidence in the legislative history of AC21 that indicated that Congress was aware of the definition of “related or affiliated” that the INS crafted in the ACWIA regulation. It’s fairly safe to say, therefore, that this general rule of legislative reenactment does not apply to AC21.

The AAO should not have found that it was “more likely” that Congress intended the phrase “related or affiliated nonprofit entity” in the language of AC21 to be interpreted “consistently with the only 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).”<sup>93</sup> Congress was completely unaware of the interpretation the agency had given that phrase, and the AAO’s reliance on a “congressional intent” argument was misplaced.

## VI. The Definition of “Affiliation” in the Act

*AILA argued that if the USCIS were groping for a definition of “affiliation,” it need not go further than the Immigration and Nationality Act itself, which at §101(e)(2), 8 U.S.C. § 1101(e)(2), provides:*

*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.<sup>94</sup>*

### AAO Decision:

AILA argues that, as observed by the Supreme Court in *Atlantic Cleaners & Dyers*, 286 U.S.

427 (1932), identical words in different parts of the same act can have different meanings to meet the purposes of the law. But this rule of construction can be applied equally to the definition of affiliation found in section 101(e)(2) — which, by its own terms, does not contain the exclusive definition of affiliation — or to other definitions of the terms “related” or “affiliated” found in or derived from other sections of the Act.<sup>95</sup>

It should be noted that many non-profit organizations enjoy associations of some form with institutions of higher education in the United States. If USCIS applied the definition in section 101(e)(2) of the Act as counsel urges, *any* nonprofit entity could claim exemption from the H-1B cap for *all* of its employees simply by giving or promising a negligible sum to any institution of higher education. There is no indication in the language or the legislative history of AC21 that Congress intended or foresaw such a result.<sup>96</sup>

**Comment:** AILA argued that the arrangements between the petitioner and a number of institutions of higher education constituted an “affiliation” within the meaning of the INA. The school district 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. The district, 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.<sup>97</sup>

Those arrangements clearly 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 the school district. That latter organization, in turn, provides orientation, guidelines and a training environment to the student teachers to support the educational objectives of the universities.

<sup>92</sup> *Soc’y of Plastics Indus. v. ICC*, 955 F.2d 722, 729 (D.C. Cir. 1992) (doctrine of reenactment inapplicable when, before enactment of Staggers Act, no judicial or administrative decision addressed precise question at issue).

<sup>93</sup> AAO Decision, slip op. at 7, 33 *Immigr. Rep.* at B2-100.

<sup>94</sup> 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 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.

<sup>95</sup> AAO Decision, slip op. at 7, 33 *Immigr. Rep.* at B2-100.

<sup>96</sup> AAO Decision, slip op. at 7, 33 *Immigr. Rep.* at B2-100 (emphasis in original).

<sup>97</sup> *Supra* note 5 and accompanying text.

AILA also argued that under other regulations of the USCIS the term "affiliation" has a broad meaning.<sup>98</sup> For example, the F-1 student regulations 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.<sup>99</sup> And what's required to be deemed "educationally affiliated"? The off-campus entity must be "associated with the school's established curriculum"<sup>100</sup> or "related" to contractually funded research projects at the post-graduate level.<sup>101</sup> 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.

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 that is "affiliated" with the religious denomination. "Affiliated" in that context is defined as a nonprofit organization that is "closely associated with the religious denomination."<sup>102</sup> 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.

Case law also supports a broad definition of "affiliation." For example, in one case the Board of Immigration Appeals ("BIA") held that affiliation included mere public displays of *support* for the Communist Party.<sup>103</sup> 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."<sup>104</sup> Nothing more was required. In another case the BIA held that

The 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.<sup>105</sup>

The AAO brushed aside all of these arguments. Instead, it reasoned that, "[i]f USCIS applied the definition in section 101(e)(2) of the Act as counsel urges, *any* nonprofit entity could claim exemption from the H-1B cap for *all* of its employees simply by giving or promising a negligible sum to any institution of higher education."<sup>106</sup> Though not within the scope of this article, I wonder why a \$100 contribution to an Islamic charity could rise to the level of "affiliation" for terrorist purposes, whereas even an ongoing, contractually agreed-upon, years-long relationship between a K-12 school and an institution of higher education does not.<sup>107</sup> If there is a Latin legal phrase for the concept of "what's good for the goose is good for the gander," this would be the perfect time to apply it.

It seems to me that the AAO could have fashioned a test to discern whether a claimed affiliation was sufficient to sustain H-1B cap-exempt status. Indeed, the appeals unit has a history of developing tests to determine eligibility for benefits. In 1992, for example, in a nonprecedent decision that came to be called *Mississippi Phosphate*,<sup>108</sup> the AAU<sup>109</sup> created a test to assess whether someone claiming that his work was in the national interest could be approved for purposes of INA § 203(b)(2)(B).<sup>110</sup> The AAU

<sup>98</sup> The one exception is the very specific definition of "affiliate" (and not of "affiliated") found in the multinational manager provisions of the Act. 8 C.F.R. § 214.2(l)(1)(ii)(L). See also INA § 101(a)(15)(L), the multinational transferee provision, which specifies that to qualify as a multinational petitioner, an entity must be "an affiliate" (not merely "affiliated") or a "subsidiary" of (not just "related" to) the U.S. entity.

<sup>99</sup> 8 C.F.R. § 214.2(f)(9)(i).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 8 C.F.R. § 204.5(m)(2); Adjudicator's Field Manual §34.5(b)(3); 9 FAM 41.58 n.12.

<sup>103</sup> Matter of J-, 6 I. & N. Dec. 496 (BIA 1955).

<sup>104</sup> *Id.* at 502 (emphasis in original) (citing INA § 101(e)(2)).

<sup>105</sup> Matter of L-, 9 I. & N. Dec. 14, 19 (BIA 1960) (citing Addison v. Holly Hill Fruit Products, 322 U.S. 607, 618 (1944)). The author thanks Stephen Yale-Loehr for contributing this section of the article.

<sup>106</sup> AAO Decision, slip op. at 7, 33 Immigr. Rep. at B2-100 (emphasis in original).

<sup>107</sup> The INA definition of "affiliation" found at INA § 101(e) has been specifically adopted by the USA PATRIOT Act of 2001 at § 428.

<sup>108</sup> Matter of X, EAC-92-091-50126, 10 Immigr. Rep. B2-46 (AAU July 21, 1992). I was the attorney for the petitioner in that case.

<sup>109</sup> The AAO was called the Administrative Appeals Unit (AAU) until 1994, when the INS changed its name as part of an internal reorganization. 59 Fed. Reg. 60,065, 60,066 (Nov. 22, 1994). The USCIS regulations still use both names for the appeals office.

<sup>110</sup> INA § 203(b)(2)(B)(i) provides:

provided a nonexclusive list of seven factors, any one of which needed to be satisfied, to possibly sustain a national interest claim. Surely, the AAO could have done the same for H-1B-cap-exemption purposes, providing a list of factors that it would consider adequate to make a finding of "affiliation." Such factors could include the length of the relationship between the parties claiming an affiliation, the level of support provided, the amount of money (if any) that is involved, whether the agreement is memorialized in a contract, and whether the affiliation advances any of the purposes of the institution of higher education.

And let's not forget that in the June 6 Memo, the very memorandum that the AAO chose to "defer" to for its definition of "related and affiliated," the USCIS issued a policy on "third party petitioners," employing H-1B workers "at" institutions of higher education and their related or affiliated nonprofit entities.<sup>111</sup> In that part of the Memo, the immigration agency stated that if an H-1B worker, employed by a third-party petitioner, is placed "at" an institution of higher education or related nonprofit entity, he could be exempt from the cap, provided his work would "directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely higher education or nonprofit or governmental research."<sup>112</sup> A similar test could have been fashioned by the AAO to determine whether the case for affiliation had been made.

Finally, in my view, the AAO's position on the statutory meaning of "affiliation" undercuts its entire position in this decision. The AAO stated that "AILA argues that, as observed by the Supreme Court in *Atlantic Cleaners & Dyers*, 286 U.S. 427 (1932), identical words in different parts of the same act can have different meanings to meet the purposes of the law." The AAO then used that rule of statutory construction to assert that the definition of "affiliation" at INA § 101(e)(2), included in the Act when it was first enacted in 1952, was "limited to provisions making aliens associated with communist, anarchist or

totalitarian parties or organizations inadmissible or ineligible for other benefits under the Act."<sup>113</sup>

What the AAO is saying is precisely what AILA argued in its brief: That depending on the context, the legislative history, and the intent of Congress, identical words in statutes can have different meanings, even if they appear in the same overall Act. Hence, the meaning of "related and affiliated" in ACWIA and AC21 certainly could differ, the same way the AAO says the meaning of "affiliated" differs. It all depends on context.

## VII. So, How Was the Petition Approved?

*The AAO held that the school district was not related to or affiliated with the local institutions of higher education. Given that, the only thing it could have done was deny the petition. But it didn't do that. Let's review the reasoning of the AAO, which divided the definition of affiliation found in the ACWIA fee regulation into three prongs:*

### AAO Decision

First prong: The AAO considered whether there was "shared ownership or control by the same board" between the school district and any of the institutions of higher education. The AAO decided there was not.<sup>114</sup>

The AAO interprets the terms "board" and "federation" as referring specifically to educational bodies such as a board of education, board of regents, etc.<sup>115</sup>

Second prong: The AAO considered whether the petitioner established that it is operated by an institution of higher education.

As already noted, in Texas, public institutions of higher education and public primary and secondary schools, in spite of some coordinated activities, are operated separately under the control of different agencies and boards. The evidence in the record does not show that an institution of higher education operates the petitioner within the common meaning of this term.<sup>116</sup>

Third prong: The AAO considered whether the petitioner is attached to an institution of higher

#### (B) Waiver of job offer

- (i) National interest waiver[.] Subject to clause
- (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

<sup>111</sup> June 6 Memo, *supra* note 22, at 1-3 and 5-9.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> AAO Decision, slip op. at 7, 33 Immigr. Rep. at B2-100.

<sup>114</sup> *Id.*, slip op. at 8-9, 33 Immigr. Rep. at B2-101 to -102.

<sup>115</sup> *Id.*, slip op. at 9, 33 Immigr. Rep. at B2-102.

<sup>116</sup> *Id.*, slip op. at 9, 33 Immigr. Rep. at B2-102.

education as a member, branch, cooperative, or subsidiary.

It is evident from the foregoing discussion of the evidence that the petitioner, when viewed as a single entity, is not attached to an institution of higher education in a manner consistent with these terms.<sup>117</sup>

The normal rule is, three strikes and you're out. Not so here. Introduced by the word "nonetheless," whose ordinary meaning is, "in spite of everything," here's what the AAO concluded:

Nonetheless, the petitioner operates the alternative teacher certification program in collaboration with a qualifying institution of higher education. This collaboration involves a close relationship with a qualifying institution of higher education consistent with the terms of the third prong. The intent of AC21 is to exempt those employees from the H-1B cap that "directly and predominantly further the essential purposes" of institutions of higher education. The record reflects that one of the essential purposes of institutions of higher education in the State of Texas is to train primary and secondary school teachers. The record also establishes that the *Teacher Trak* alternative certification program is managed jointly by the petitioner and an institution of higher education. Thus, we find that this program is attached to an institution of higher education within the meaning of the third prong of 8 C.F.R. § 214.2(h)(19)(B).<sup>118</sup>

**Comment:** In other words, the petitioner is affiliated with an institution of higher education.

### VIII. To Whom Does the Exemption Run?

*The AAO decision limited the cap exemption to certain H-1B workers.*

#### AAO Decision:

However, such an exemption is limited to the employees of a nonprofit petitioner who are directly involved in the jointly managed program that directly and predominantly furthers the essential purposes of the institution of higher education, which in this case includes

the teachers to be employed in the *TeacherTrak* alternative certification program.<sup>119</sup>

**Comment:** By their very structure, INA §214(g)(5)(A) and (B) provide an exemption from the H-1B cap only for those employed at certain kinds of entities. Though it's true that the individuals are exempt from the cap, it's only because of their position at exempt entities. Compare INA §214(g)(5)(A), for example, with INA § 214(g)(5)(C). The latter provision allows for an exemption from the cap for up to 20,000 individuals who have earned a master's or higher degree from a U.S. institution of higher education. The exemption adheres to them no matter where they work. Or, consider the cap exemption for certain physicians. In December 2004, Congress passed a law to exempt from the H-1B cap Conrad State 30 physicians, as well as those physicians receiving federal interested government agency waivers.<sup>120</sup> The law now provides:

Notwithstanding section 248(2), the Attorney General may change the status of an alien who qualifies under this subsection and section 212(e) to that of an alien described in section 101(a)(1)(H)(i)(b). The numerical limitations contained in subsection (g)(1)(A) shall not apply to *any alien* whose status is changed under the preceding sentence, if the alien obtained a waiver of the 2-year foreign residence requirement upon a request by an interested Federal agency or an interested State agency.<sup>121</sup>

In other words, the exemption runs to the individual physician, who can be employed by any sort of entity.

But INA § 214(g)(5)(A) and (B) are notably different from these other provisions. The individual may benefit from the exemption, but it's the *entity* that's exempt. Therefore, any H-1B worker who's employed by or at the entity falls under the exemption. If a school is exempt because of its affiliation with an institution of higher education, not just the teachers benefit. The school psychologists, the guidance counselors, the administrators, and every other professional employed at the school are exempt. The AAO was just making up the law when it insisted that only those who are directly involved in the jointly managed program can benefit.

<sup>117</sup> *Id.*, slip op. at 9, 33 Immigr. Rep. at B2-103.

<sup>118</sup> *Id.*, slip op. at 9, 33 Immigr. Rep. at B2-103. (quoting June 6 Memo, *supra* note 22).

<sup>119</sup> *Id.*, slip op. at 9, 33 Immigr. Rep. at B2-103.

<sup>120</sup> INA § 214(l)(2)(A) was amended by Act of Dec. 3, 2004, Pub. L. No. 108-441, § 1(b), 118 Stat. 2630.

<sup>121</sup> INA § 214(l)(2)(A).

## IX. Legislative Versus Interpretive Rules

*AILA argued that by following the dictates of the June 6 Memo, which directed adjudicators to adopt the definition of "related or affiliated" found in ACWIA's fee regulation, instead of issuing a proposed regulation, the USCIS violated the notice and comment requirements of the APA.*

### AAO Decision:

In particular, AILA points to the "notice-and-comment" requirements found at 5 U.S.C. §552(a), which provide 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."<sup>122</sup>

**Comment:** Whether the USCIS definition of "related or affiliated" constitutes a legislative rule, an interpretive rule, or a policy statement is beyond the scope of this article, but a few things should at least be mentioned. Legislative rules have the same binding effect as statutes, and, for the most part, *must* be promulgated through the procedures set forth in APA § 553.<sup>123</sup> Interpretive rules and policy statements need not be. But unlike legislative rules, interpretive rules and policy statements are not accorded *Chevron* deference by the courts,<sup>124</sup> and do *not* constitute binding law.<sup>125</sup> If, therefore, the definition of "related or affiliated" is a legislative rule, then it should be challenged because it was not issued pursuant to the requirements of the APA. If, on the other hand, it's a policy statement or an interpretive rule, a court, or even, presumably the AAO, need not be bound by it.

### Conclusion:

You might wonder, what's my complaint? After all, the case was approved, the AAO seemed to find that

the petitioner was affiliated with an institution of higher education, and did conclude that it was exempt from the H-1B cap. All true. But this decision was too narrow in its holding, was riddled with error on both the law and the facts, and provided no guidance for future cases.

I recognize that the AAO's decision, like AILA's brief, was written quickly to accommodate the beginning of the new school year, and I can understand that in its haste, the AAO could not devote the kind of attention that a decision like this should have commanded. Perhaps the immigration agency will recognize the limitations of the AAO's decision, and will now take the opportunity to fashion a more reasonable position on H-1B cap exemptions, one that reflects the liberal and expansive intentions of AC21.

Written in invisible ink in this decision is a concern that a different approach would have opened the "floodgates" to petitioners claiming they are exempt from the cap. In my view, that's not a reasonable concern because no matter how you cut it, only a limited number of entities could ever qualify for the exemption. Instead of providing lucid guidance to practitioners on the kinds of arrangements that could qualify as "relationships" and "affiliations" for purposes of INA § 214(g)(5)(A), the AAO skirted the question. And at least as far as I'm concerned, after reading this decision many times, all I can do is scratch my head and say, "what?"

\* \* \* \*

**Naomi Schorr** (nschorr@kramerlevin.com) is Special Counsel at Kramer Levin Naftalis & Frankel LLP in New York City, where she practices in the firm's Business Immigration Group. Copyright (c) 2007 Naomi Schorr. All rights reserved. The author thanks Stephen Yale-Loehr for editing this article.

### LET US KNOW

Any reader interested in sharing information of interest to the immigration bar, including notices of upcoming seminars, newsworthy events, "war stories," copies of advisory opinions, or relevant correspondence from the DHS, DOJ, DOL, or DOS should direct this information to Daniel M. Kowalski, dan@cenizo.com, or Ellen Flynn, Practice Area Editor, Bender's Immigration Bulletin, 744 Broad St., Newark, NJ 07102, fax: (973) 820-2626, e-mail: ellen.m.flynn@lexisnexis.com.

If you are interested in writing for the BULLETIN, please contact Dan Kowalski via e-mail at dan@cenizo.com. We welcome your contributions.

<sup>122</sup> AAO decision, slip op. at 5, n.7, 33 Immigr. Rep. at B2-99 n.7.

<sup>123</sup> See generally *Pierce*, *supra* note 27, at § 6.6.

<sup>124</sup> *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Under *Chevron*, legislative rules issued to elucidate statutory provisions are given controlling weight, unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

<sup>125</sup> *Pierce*, *supra* note 27, at § 6.3; see also, e.g., *Massachusetts v. FDIC*, 102 F.3d 615, 621 (1st Cir. 1996) (agency's formal interpretation through rulemaking is accorded *Chevron* deference; less formal interpretations, including policy statements, are not). For a detailed article on the subject, see Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?* 7 Yale J. on Reg. 1 (1990).