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AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer: Cap Exemption for Nonprofit Entities Affiliated or Related to Qualifying U.S. Institutions of Higher Education

by the AILA Healthcare/Physicians Committee

This practice pointer summarizes the applicable law, case law, policy, and guidance to help practitioners establish a nonprofit petitioner's exemption from the H-1B cap based on their affiliation to or relationship with a U.S. institution of higher education.[1] Please note that this Practice Pointer supplements our 2012 Practice Pointers on Affiliation-Based Cap Exemption Cases.[2]

Background

The Immigration and Nationality Act (INA), as amended, at section 214(g) limits the number of foreign nationals who may obtain H-1B status in any given fiscal year. However, the Act exempts from the H-1B cap individuals who will be employed at an institution of higher education or a *related or affiliated nonprofit entity*.[3] Specifically, INA §214(g)(5)(A) states "the numerical limitations … shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who is employed (or has received an offer of employment) at an institution of higher education (as defined by section 101(a) of the Higher Education Act of 1965 (20 USC §1001(a))), or a related or affiliated nonprofit entity."

Though U.S. Citizenship and Immigration Services (USCIS) has yet to promulgate implementing regulations, on June 6, 2006, USCIS issued a memorandum, titled "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 (AC-21)(PL 106-313).[4]" The Aytes Memo instructs USCIS adjudicators to apply the definition of "affiliated or related nonprofit entity" found at 8 CFR §214.2(h)(19)(iii)(B) to determine whether a petitioner is an affiliated or related nonprofit entity for cap exemption purposes. 8 CFR §214.2(h)(19)(iii)(B) states:

> *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;

USCIS interprets this regulation to permit H-1B cap exemption where the petitioner satisfies any one of the four prongs in 8 CFR §214.2(h)(19)(iii)(B). In other words, the beneficiary must be employed by or at

[1] This practice pointer is limited to cap exemption based on employment by nonprofit entities affiliated or related to qualifying U.S. institutions of higher education.
[2] "Practice Pointers for Healthcare Immigration Cases," (May 2, 2012), *published on* AILA InfoNet at Doc. No. 12050246, *available at* http://www.aila.org/content/default.aspx?docid=39447.
[3] INA §214(g)(5)(A).
[4] USCIS Memorandum, M. Aytes, "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), (hereinafter referred to as "Aytes Memo") *published on* AILA InfoNet at Doc. No. 06060861, *available at* http://www.aila.org/content/default.aspx?docid=19621.

a facility that is: (1) owned by an institution of higher education; (2) controlled by the same board or federation as an institution of higher education; (3) operated by an institution of higher education; *or* (4) is attached to the institution of higher education as a member, branch, cooperative or subsidiary.

In 2010, USCIS and the Administrative Appeals Office (AAO) started to narrowly interpret the regulation as requiring shared ownership or control of the qualifying entity by an institution of higher education.[5] This resulted in many nonprofit affiliated employers having to explain why they still qualified for cap exempt status when they were not owned or controlled by the qualifying institution of higher education to which they were attached as a member, branch, cooperative, or subsidiary.[6] In fact, many nonprofit petitioners who had previously received H-1B cap exempt approvals started to receive denials even though there was no change in the affiliation-based relationship that supported the cap exemption request.

In response to the resulting outcry, USCIS issued a press release[7] on March 16, 2011 followed by an Interim Policy Memorandum[8] (PM) on April 28, 2011. The PM instructs adjudicators to accord deference to cap exemption determinations made after June 6, 2006, the publication date of the Aytes Memo, assuming there is no significant change in circumstances or clear error in the prior adjudication.

To date, USCIS has not issued further guidance on the topic and practitioners continue to experience inconsistent adjudications. In a recent meeting between AILA and Service Center Operations (SCOPS), USCIS reiterated its adherence to the 2011 PM but noted the confusion that the current lack of clear guidance causes. In response to a question raised regarding recent denials, USCIS replied:

> *SCOPS reviewed these cases and noted that there was "messiness" on both sides. They will do refresher training for adjudicators, but AILA should also reach out to its membership with practice pointers and guidance.*[9]

This Practice Pointer provides best practices for proving cap exemption based on affiliation with a U.S. institution of higher education.

Proving Cap Exemption

Nonprofit petitioners seeking exemption from the cap based on a previously approved affiliation with a U.S. institution of higher education may satisfy the points outlined in the interim PM by providing USCIS with evidence of the prior approval, such as a copy of the previously approved cap exempt petition (i.e. Form I-129 and pertinent attachments) and the I-797 approval notice issued after June 6, 2006, and any documentation that was previously submitted in support of the claimed cap exemption.

Practically speaking, however, much of the documentation used to initially establish the petitioner's cap exemption may be outdated. This may put many petitioners who are seeking "deference" based on a prior determination in the same position as those who are seeking exemption for the first time. Consequently, it

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[5] *See Matter of [Name Not Provided]*, WAC0905950704 (AAO Oct. 5, 2010), *published on* AILA InfoNet at Doc. No. 10121432, *available at* http://www.aila.org/content/default.aspx?docid=33886.
[6] *See* AILA Amicus Brief on "Affiliated or Related" for H-1B Cap Exemption Purposes, (Aug. 25, 2006), *published on* AILA InfoNet Doc. No. 06082566, *available at* http://www.aila.org/content/default.aspx?docid=20379.
[7] USCIS Update "H-1B Cap Exemptions Based on Relation or Affiliation," *published on* AILA InfoNet at Doc. No. 11031760, *available at* http://www.aila.org/content/default.aspx?docid=34880.
[8] "USCIS Interim Memo on Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation," (Apr. 28, 2011), *published on* AILA InfoNet at Doc. No. 11050130, *available at* http://www.aila.org/content/default.aspx?docid=35267.
[9] AILA Notes from SCOPS Teleconference, (Sept. 24, 2014), *published on* AILA InfoNet at Doc. No. 14100844, *available at* http://www.aila.org/content/default.aspx?docid=50332.

is prudent to craft each H-1B petition seeking affiliation-based cap exemption with comprehensive documentation.

1) Establish the Nonprofit Nature of the Petitioner.

Not all nonprofit organizations will be able to obtain cap exemption, even if they are related or affiliated with a U.S. institution of higher education. The regulations at 8 CFR §214.2(h)(19)(iv) define an eligible nonprofit petitioner to be one who is "[d]efined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4), or (c)(6), 26 USC §501(c)(3), (c)(4), or (c)(6), and…[h]as been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service." Consequently, it is critical to include documentation which clearly establishes that the qualifying entity is a nonprofit under one of the relevant Internal Revenue Code sections and has been approved as tax exempt by the Internal Revenue Service (IRS).

While previously, USCIS may have found sufficient evidence from public sources (websites, news articles, etc.) which mentioned that the petitioner was a nonprofit organization, in today's climate it is prudent to provide documentation from the IRS in the form of an Affirmation Letter granting tax exempt status. If the qualifying entity does not already have this documentation, it can be obtained from the IRS upon written request, usually in 2 to 5 business days. Employers can submit a request to the IRS via fax at (855) 204-6184.[10]

2) Establish that the Institution of Higher Education Meets The Definition at 20 USC §1001(a).

The nonprofit petitioner must share an affiliation or relationship with an institution of higher education which meets the definition found at 20 USC §1001(a):

> For purposes of this chapter, other than subchapter IV, the term "institution of higher education" means an educational institution in any State that—
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> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate, or persons who meet the requirements of section 1091 (d) of this title;
> (2) is legally authorized within such State to provide a program of education beyond secondary education;
> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary;
> (4) *is a public or other nonprofit institution; and*
> (5) *is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.*

Nonprofit petitioners sharing relationships or affiliations with non-qualifying institutions of higher education, such as for profit institutions, and/or unaccredited institutions without preaccreditation status by the Secretary of Education, are not permitted to seek cap exemption.

[10] *See* http://www.irs.gov/Charities-&-Non-Profits/Exempt-Organizations-%E2%80%93-Affirmation-Letters.

It is important to evaluate the status of an institution of higher education by reviewing its website and other public information sources to determine whether it is nonprofit. Practitioners should also review the institution's accreditation by visiting the Department of Education's website at http://ope.ed.gov/accreditation/, and provide evidence of the same in the petition.

3) Establish the Affiliation or Relationship Under the Enumerated Grounds and Highlight Any Shared Ownership, Control, Collaboration, Or Other Facts Which Tend To Show Mutual Or Shared Responsibilities and Common Goals.

A nonprofit entity must provide evidence to support its affiliation with a qualifying institution of higher education as a member, branch, cooperative, or subsidiary, or show that the entity is owned, operated or controlled by such an institution of higher education.

Establishing Joint Ownership or Control

As a practical matter, many nonprofit entities that are related to or affiliated with institutions of higher education are not, in fact, owned, operated or controlled by the institution of higher education. However, practitioners may be able to explain and provide evidence that the nonprofit entity and the qualifying institution of higher education have affiliated themselves or are related to each other to jointly furnish the goals and objectives of an affiliation agreement, contract, or memorandum of understanding In other words, while the qualifying entity *as a whole* may not be owned, operated or controlled by the institution of higher education, the institution of higher education may nonetheless have a jointly shared ownership, operational, or controlling stake in the program between the two entities that is the subject of the affiliation. For example, a nonprofit hospital and a medical school that are affiliated for the purpose of providing a graduate medical education program to clinical physicians may jointly set and control the curriculum, rules, and guidelines of the clinical training experience. The medical school and hospital may jointly appoint the faculty who will supervise the medical residents, etc.

Evidence of such a jointly managed program or endeavor may include a letter from the qualifying institution of higher education to supplement the affiliation agreement, memorandum of understanding, contract, or other document, and attesting to an ongoing and long term designed affiliation or relationship to jointly work together on the program. Joint press releases, publically available financial documents, as well as information from websites or third party agencies (such as the Accreditation Council for Graduate Medical Education in the case of medical residencies) can also support the joint nature of the affiliation or relationship between the qualifying nonprofit entity and the institution of higher education.

Attachment as a Member, Branch, Cooperative or Subsidiary

Practitioners may also argue that the qualifying entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary. In *Matter of Children's Hospital Corporation*, the Department of Labor's Board of Alien Labor Certification Appeals (BALCA) provided an instructive analysis of this point in the context of establishing an employer's eligibility for an ACWIA wage as an entity that is related to or affiliated with Harvard Medical School.[11] BALCA found that the petitioner, Children's Hospital, was attached to the university as a member. In its decision, BALCA found that a legal relationship was not required when there was evidence of consistent collaboration and that the two institutions were affiliated.

[11] *Matter of Children's Hospital*, 2011-PER-01338, (Nov. 15, 2011), *published on* AILA InfoNet at Doc. No. 1111165 *available at* http://www.aila.org/content/default.aspx?docid=37664.

The evidence included:

- A joint statement of policies with mutual duties and obligations;
- Evidence that the parties shared space, personnel and collaborated on research initiatives;
- The existence of a joint standing committee which plans and recommends initiatives for the collaboration; and
- Evidence that the hospital holds itself out as an affiliate of the medical school on its letterhead, website and even its domain name, "edu."

Critical in *Matter of Children's Hospital* was the long-time collaboration and the apparent depth of the documentation. While not all cases may be presented with such extensive evidence, *Matter of Children's Hospital* is nonetheless instructive.

Emphasize Congressional Intent

In the event of a cap exemption challenge, practitioners should remind USCIS of the congressional intent described in the Aytes Memo, "to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States *through their work on behalf of institutions of higher education and related nonprofit entities…."* (emphasis added). It may also be helpful to cite the legislative history of INA §214(g)(5)(A), which states that individuals employed by institutions of higher education and related or affiliated entities accomplish a key role in educating Americans, enabling them to take positions in specialty fields upon completion of their education. The legislative history also stresses that the statutory limitations on H-1B numbers is particularly harsh for institutions of higher education and their related/affiliated nonprofit entities because the academic calendar year does not typically match up with either normal hiring patterns or the federal fiscal year. Therefore, failure to exempt such employers from the annual H-1B cap can potentially interrupt or defeat the purpose of the program or purpose of the affiliation agreement, contract or memorandum of understanding between the nonprofit entity and the qualifying institution of higher education.[12]

4) Current Issues

Despite the interim PM, practitioners report ongoing concerns with USCIS refusing to honor prior H-1B cap exemptions. USCIS sometimes concludes that a prior H-1B petition was cap exempt not due to a finding that the petitioner was exempt but because the beneficiary was personally exempt. In such cases it is prudent to fully document the petitioner's independent basis for cap exemption as detailed above.

Conclusion

More than three years after the issuance of the 2011 interim PM, practitioners continue to see Requests for Evidence (RFEs), Notices of Intent to Deny (NOIDs), and even denials on petitions filed by nonprofit petitioners affiliated with or related to qualifying institutions of higher education. Given USCIS's inconsistent adjudications, practitioners should craft each petition with well-developed arguments and comprehensive supporting evidence until USCIS issues clarifying policy guidance on what constitutes a qualifying relationship for purposes of affiliation-based cap exemption.

[12] S. Rep. 106-260, 106th Cong., 2nd Sess., (April 11, 2000), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-106srpt260/html/CRPT-106srpt260.htm.