



July 11, 2011

Executive Summary

USCIS Stakeholder Engagement: H-1B Cap Exemptions

Overview

On May 26, 2011, the Office of Public Engagement hosted a stakeholder engagement to discuss issues related to the H-1B nonimmigrant visa. More specifically, USCIS was seeking feedback regarding the interpretation of the term “related or affiliated nonprofit entity” within the statutory framework and its effect in determining eligibility for exemption from the H-1B cap based on employment at a nonprofit entity that is related to or affiliated with an institution of higher education under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).

On March 16, 2011, as a result of stakeholder concerns on this issue, USCIS posted an Update on its website stating that the agency was reviewing its current policy on H-1B cap exemptions for nonprofit entities that are related to or affiliated with an institution of higher education. It also notified stakeholders that until further guidance is issued, USCIS will temporarily apply interim procedures to H-1B nonprofit entity petitions filed with the agency seeking an exemption from the statutory H-1B numerical cap based on an affiliation with or relation to an institution of higher education.

Principal Themes

Defining “Related or Affiliated”

Stakeholders commented that the current usage of the American Competitiveness and Workforce Improvement Act (ACWIA) regulatory definition for a nonprofit entity that is affiliated with or related to an institution of higher education for purposes of AC21 cap exemption is insufficient and does not encompass the variety of relationships and affiliations that exist.

Stakeholders added that USCIS should use more flexible and liberal standards in determining if a nonprofit has a related or affiliated relationship to an institution of higher education. Stakeholders also commented that the standard that is currently being used by USCIS is too narrow and made it particularly difficult for teaching hospitals. Stakeholders also commented that the plain meaning of the terms “related” and “affiliated” should be used and that no extra restrictions should be imposed. Stakeholders recommended using the totality of the circumstances test when interpreting whether a nonprofit entity is

sufficiently connected to an institution of higher education. It was also indicated that objective standards based in public policy should be used for the interpretation of these relationships.

Supporting Evidence

Stakeholders commented that USCIS should adopt a presumption in favor of cap exemption so long as the petitioner presents reasonable evidence of its nonprofit status and affiliation with an institution of higher education. Stakeholders indicated that USCIS should accept documentation evidencing that an organization, or a Federal, state, or local agency has previously determined that a nonprofit has been deemed to be ‘affiliated or related’ with an institution of higher education for any purpose. Stakeholders commented that USCIS should not request evidence to independently make a determination about relation or affiliation between a nonprofit and an institution of higher education. Rather, USCIS should defer to the determinations of other agencies and organizations who have previously made this determination for other purposes.

Stakeholders also commented that the Database for Higher Education should be consulted and if an institution is listed in their database, it should be accepted at face value as an institution of higher education. It was indicated that letters from institutions that recognize a teaching hospital should be given significant weight. In addition, stakeholders commented that multi-hospital systems have affiliation agreements with medical schools which could be presented as evidence.

Stakeholders commented that USCIS should accept previously issued approval notices for petitions filed with the California Service Center (CSC) after the date on which the CSC began processing all petitions filed by cap exempt employers as evidence of cap exemption so long as the approval notice is accompanied by an assertion by the petitioner that it remains exempt from the cap as a nonprofit related to or affiliated with an institution of higher education. The current guidance indicates that the approval notice would be accepted if it is accompanied by a copy of the previously approved Form I-129 along with documentation previously submitted with the petition in support of the claimed cap exemption.

Examples of Business Relationships constituting a Relation or Affiliation between Nonprofits and Institutions of Higher Education

Stakeholders provided several examples of business relationships that constitute an affiliation, including a nonprofit hospital that is affiliated with a medical school; a hospital that is owned by a religious organization that is affiliated with a State University; hospitals that engage in training and not in residency programs; and clinical training programs that are affiliated with private community colleges.

Next Steps

USCIS will review issues raised during the teleconference and determine if additional guidance should be provided to stakeholders.