

INTERIM MEMO FOR COMMENT

Posted: 05-02-2011

Comment period ends: 05-16-2011

This memo is in effect until further notice.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000



U.S. Citizenship
and Immigration
Services

April 28, 2011

PM-602-0037

Policy Memorandum

SUBJECT: Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation

Purpose

This Policy Memorandum (PM) establishes interim guidance to give deference to prior H-1B cap exemption determinations for nonprofit entities made by U.S. Citizenship and Immigration Services (USCIS) since June 6, 2006. USCIS is currently reviewing its overall policy on H-1B cap exemptions for non-profit entities that are related to or affiliated with an institution of higher education. Until further guidance is issued, USCIS is temporarily applying interim procedures described herein to H-1B non-profit 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.

Scope

Unless specifically exempted herein, this PM applies to all USCIS employees.

Authority

Section 214(g)(5)(A) of the Immigration and Nationality Act; 8 CFR 214.2(h)(19)(iii)(B).

Background

On March 16, 2011, USCIS issued an [Update](#) announcing that it is currently reviewing its policy on H-1B cap exemptions for nonprofit entities that are related to or affiliated with an institution of higher education. In the meantime, to promote consistency in adjudications until new guidance is issued, USCIS will implement an interim procedure giving deference to prior cap exempt determinations made by USCIS since June 6, 2006. On that date, USCIS issued [Interoffice Memorandum HQPRD 70/23.12](#) entitled "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)," regarding nonprofit entities related to or affiliated with institutions of higher education.

Policy

In order for USCIS to defer to a prior determination of cap exemption under the interim procedure, a petitioner must show that its organization was previously determined to be exempt from the H-1B cap as a nonprofit entity that is related to or affiliated with an institution of higher education.

Officers may expect to see some or all of the following documentation or similar types of evidence from petitioners to establish receipt of a prior determination of H-1B cap exemption based on affiliation:

- A copy of the previously approved cap-exempt petition (relevant pages of the Form I-129 and pertinent supplements) filed by the petitioner;
- A copy of the corresponding Form I-797 approval notice (issued after June 6, 2006) for the affiliation-based cap exempt petition; or
- Documentation previously submitted with a petition in support of the claimed cap exemption.

The documentation described above is not exhaustive. The petitioner may also include a statement attesting that its organization was determined by USCIS to be cap-exempt since June 6, 2006 as a nonprofit entity related to or affiliated with an institution of higher education. However, a statement alone from the petitioner, without a prior receipt number or other supporting documentation, would not be sufficient evidence of a prior cap exemption determination based on affiliation with or relation to an institution of higher education.

Where the evidence supporting a claim of prior cap exemption on these grounds is unclear, officers should try to corroborate the claim of prior determination by reviewing the Computer-Linked Application Information Management Systems (CLAIMS) for a previously approved petition if it was receipted locally and not relocated out for adjudication. While the information in CLAIMS is not necessarily dispositive to the issue of H-1B cap exemption, a review of CLAIMS may help to substantiate a prior claim of cap exemption as an affiliated or related nonprofit entity.

In cases where the prior approved petition was adjudicated at another service center, the California Service Center (CSC) and Vermont Service Center (VSC) should establish points of contact who are able to supply information from local CLAIMS to the other service center to assist in corroborating the claimed H-1B cap exemption determination. If the claimed prior cap exemption determination cannot be corroborated through CLAIMS or the evidence in the record, officers should issue a Request for Evidence (RFE) for additional documentation.

Additionally, all requests for H-1B cap exemption by the petitioner are still required to be filed with the CSC. If the petitioner fails to provide evidence of one or more post-June 6, 2006 determinations of cap exemption based on affiliation but is now seeking cap exemption, CSC should make a cap exemption determination based on the current petition and supporting

documentation. These cases would not require the review of Service Center Operations Directorate (SCOPS).

As noted in the [USCIS Update](#) dated March 16, 2011, officers should be giving deference to prior determinations made on or after June 6, 2006 that a nonprofit entity is related to or affiliated with the same institution of higher education – absent any significant change in circumstances or clear error in the prior adjudication. The main focus of officers should be on verifying that the petitioner was previously determined to be cap-exempt. Officers should not attempt to re-adjudicate the prior cap exemption determination unless evidence suggests that the prior cap exempt determination was clearly erroneous or that there has been a significant change in circumstances related to the affiliation of the petitioner to an institution of higher education.

Examples of significant changes may include, but are not limited to:

- Evidence that the nonprofit entity has reorganized to a for-profit entity;
- Evidence that the affiliation agreement with the related or affiliated institution of higher education has expired and has not been renewed automatically or otherwise; and
- Evidence that the new petition is seeking cap exemption based on affiliation or relation to a different institution of higher education.

Examples of clear error in the prior adjudication may include, but are not limited to:

- Evidence of affiliation with an organization that is NOT an institution of higher education; and
- Evidence of a prior approval that was subsequently revoked on an affiliation ground.

While these examples may not be exhaustive, an officer, who determines that there may be evidence of significant changes or clear error that render the petitioner no longer eligible for cap exemption, should discuss the facts with his or her supervisor and the Assistant Center Director (ACD). If the ACD agrees that there is evidence of significant changes or clear error rendering the petitioner ineligible for the exemption, SCOPS should be consulted before issuing a notice of intent to deny or denial based on evidence of significant changes or clear error. After review by SCOPS, if it is determined that significant change or clear error occurred in the prior determination, officers should not give deference to that prior determination; instead, officers should review the current cap exemption claim on its own merits.

Implementation

At this time, officers should continue to apply the American Competitiveness and Workforce Improvement Act fee definition for a nonprofit entity that is affiliated with or related to an institution of higher education found at 8 CFR 214.2(h)(19)(iii)(B) when adjudicating requests claiming cap exemption under section 214(g)(5)(A) of the Immigration and Nationality Act as a nonprofit entity that is related to, or affiliated with, an institution of higher education.

Until new guidance is issued, USCIS will implement this interim procedure giving deference to prior cap exempt determinations made by USCIS since June 6, 2006. This interim procedure will remain in place until further notice.

This interim guidance does not alter the Adjudicator's Field Manual (AFM). The amendment to AFM Section 31.3(g), contained in [Interoffice Memorandum HQPRD 70/23.12](#) (cited above), remains effective.

Use

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

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Service Center Operations Directorate.