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CLOSE, BUT NO CIGAR! MEANING OF AFFILIATION FOR PURPOSES OF H-1B CAP EXEMPTION

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The annual numeric limitation on the issuance of H-1B visas has been written about extensively in prior posts. It is no secret that the H-1B cap, as it is commonly referred to, has crushed the dreams of both prospective foreign employees and disappointed employers trying to secure high-skilled labor. In an attempt to relieve pressure from the cap, Congress carved out certain exemptions to the H-1B cap, including for institutions of higher education and "related or affiliated nonprofit" entities. Interestingly enough, due to a lack of clear guidance and improper rulemaking by USCIS, the meaning of the word "affiliation" still lies in murky waters.

The origin of the H-1B cap exemption regulations traces its roots to the American Competitiveness in the Twenty-First Century Act (AC21) passed in October 2000. As a result, pursuant to § 214(g)(5)(A) of the Immigration and Nationality Act, the annual numerical limitations on issuance of H-1B visas do not apply to a non-immigrant alien who "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." AC21 was meant to be and is virtually universally recognized as a "generous" or "remedial" provision. Since Congress did not specifically define the terms "related or affiliated" in the context of H-1B cap exemption for nonprofits that demonstrated affiliation with an institution of higher education, USCIS took it upon itself to hunt for a definition of these terms.

Subsequently, on June 6, 2006, Michael Aytes, the Associate Director of Domestic Operations of USCIS at the time, issued an Interoffice Memorandum

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)." In this memo, Aytes decided that the most obvious place to search for a definition of "related or affiliated" would be the H-1B regulations themselves. Although this may seem to be a logical decision, its actual implementation has backfired. This memo inexplicably instructed field offices to apply the definition of "related or affiliated" found in the American Competitiveness and Workforce Improvement Act (ACWIA).

ACWIA, in contrast to AC21 was a restrictive statute issued in November 1998 (more than two years prior to the issuance of AC21), implementing the ACWIA training fee. Following the statutory mandate of ACWIA, the regulation imposed a $500 fee on H-1B petitioners (which has since been increased through subsequent amendments), excluding institutions of higher education, their related or affiliated nonprofit entities, nonprofit research organizations, and governmental research organizations. ACWIA provided a definition of those nonprofit entities that are affiliated with or related to institutions of higher education for *fee exemption* purposes and the definition is now codified in the regulation found at 8.C.F.R. § 214.2(h)(19)(iii)(B), which provides: "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." It appears that the affiliated non-profit entity has to truly be part of the institutional of higher education, such as a teaching hospital within a university. Demonstrating affiliation in other ways, such as joint programs between a university and a non-profit entity, have otherwise been scrutinized by the USCIS and not been readily approved, although this should not discourage petitioners from creatively trying to make a claim for affiliation especially when the H-1B cap has been reached.

Interestingly enough, at the time 8 C.F.R. § 214.2(h)(19)(iii)(B) was published the AC21 had not yet been enacted and hence, there were no exemptions from the H-1B cap at that time and this regulation was clearly not meant to govern H-1B cap exemptions. To date, there has been no regulation published to define which nonprofits are "affiliated" or "related" to an institution of higher education as it relates to AC21. Moreover, the June 6, 2006 memo was issued

without going through the rulemaking process required by the Administrative Procedures Act (APA), including publication of the proposed rule in the Federal Register and accepting and considering any submitted comments prior to issuing a final rule.

AC21 was a remedial statute enacted to fix problems that plagued employers and foreign nationals alike. In enacting AC21, Congress liberalized H-1B law, easing up on prior restrictions and roadblocks by substantially increasing the numerical cap. This begs the conclusion that when Congress wrote the H-1B cap 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. Accordingly, USCIS ought to give the H-1B cap exemption provision the broad and liberal construction that Congress intended it to have. Through the June 6, 2006 Memo as well as an Interim Policy Memorandum issued on April 28, 2011 entitled, "Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation", USCIS adopted a narrow, restrictive definition of "affiliated" and "related," which runs counter to both the presumed liberal and broad definition Congress intended, as well as to the reality of the higher education system in the United States and their relationships with nonprofits.

In recent years, the American Immigration Lawyers Association (AILA) has advocated that USCIS look for definitions of "affiliation" and "affiliated" elsewhere and has suggested that instead of looking at ACWIA, which did not involve numerical limitations from the H-1B cap, USCIS could easily have found a definition of the term consistent with Congressional intent elsewhere in the Immigration and Nationality Act (INA). For instance, Congress has defined the term "affiliation" in INA § 101(e)(2), which provides: (e) 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.

AILA also referenced the fact that the term "affiliated" is broadly interpreted in other immigration regulations including those concerning student visas and permissible employment authorization as well as those governing special immigrant religious workers. For example under 8 C.F.R. § 214.2(f)(9)(i), on-campus employment may be performed at an off-campus location and still be

deemed as on-campus employment if the off-campus location is shown to be "educationally affiliated" with the school. This is demonstrated only if the off-campus entity is "associated with the school's established curriculum" or "related" to contractually funded research projects at the post-graduate level. Similarly, under INA § 1101(a)(27)(C)(ii)(III), an immigrant may qualify as a religious worker if he seeks entry to work for "a bona fide organization which is affiliated with the religious denomination." Under 8 C.F.R. §204.5(m)(2)(5), the term bona fide organization which is affiliated with the religious denomination is defined as a nonprofit organization which is "closely associated with the religious denomination." These two regulatory provisions do not even slightly suggest 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.

In an effort to address the lack of proper guidance on this issue, DHS issued a proposed rule entitled "Retention of EB-1, EB-2 and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers" which suggest that a broader interpretation of the terms "related or affiliated nonprofit entity" be used as related to INA § 214(g)(5)(A). In the preamble to the proposed rules, DHS emphatically acknowledges the lack of adequate guidance having been issued regarding the definition of "affiliated or related nonprofit entities."

> "DHS intends to improve on current policy, however, by proposing additional means by which nonprofit entities may establish a sufficient relation or affiliation with an institution of higher education....In particular, based on its experience in this area, DHS believes that the current definition for 'affiliated or related nonprofit entities' does not sufficiently account for the nature and scope of the common, bona fide affiliations between nonprofit entities and institutions of higher education. To better account for such relationships, DHS proposes to expand on the current definition by including nonprofit entities that have entered into formal written affiliation agreements with institutions of higher education and are able to meet two additional criteria. First, such entities must establish an active working relationship with the institution of higher education. Second, they must establish that one of their primary purposes is to directly contribute to the research or education mission of the institution of higher education"

The proposed fourth prong to 8.C.F.R. § 214.2(h)(19)(iii)(B) would read as follows: "A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if: "(4) The nonprofit entity has, absent shared ownership or control, entered into a written affiliation agreement with institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research and/or education, and a primary purpose of the nonprofit entity is to directly contribute to the research or education mission of the institution of the institution of higher education." This proposed change casts a wider net on the nonprofit entities that would be entitled to cap exemption, and should be readily adopted.

If the true meaning and purpose behind AC21 and the advent of cap exemption is to be realized, USCIS should look to define affiliation in broader terms as the proposed rules aim to do. Only then will nonprofits that further the mission of the institutions of higher education to which they are affiliated with, be afforded the opportunity to hire the high-skilled labor they are in desperate need of.

(This blog is for informational purposes only and should not be considered as a substitute for legal advice.)

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