



AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

MEMORANDUM

TO: Alejandro Mayorkas, Esq., Director
United States Citizenship
& Immigration Services

FROM: American Immigration Lawyers Association

RE: Definition of “Affiliated or Related Nonprofit Entity”
for H-1B Cap-Exemption Purposes Under INA
§214(g)(5)(A)

DATE: May 9, 2011

Dear Director Mayorkas:

The American Immigration Lawyers Association (AILA) welcomed the announcement on March 16, 2011, that USCIS is reviewing its policy on H-1B cap exemptions for non-profit entities related to or affiliated with institutions of higher education, and that the agency will engage the public on any forthcoming guidance.¹ We urge USCIS to conduct the engagements as early as possible in the policy-development process, so that stakeholder input is received and informs the process prior to the release of draft guidance.

We also welcome the publication on May 2, 2011, of the interim memorandum, “Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation, PM-602-0037.”²

We offer these comments in furtherance of the development of more appropriate definitions of the terms “related” and “affiliated,” rather than in response to the request for comments to the May 2, 2011, interim memo. Comments to the May 2, 2011, interim memo will be submitted separately.

AILA, through its Healthcare Committee, has looked at a number of definitions of the terms “related” and “affiliated” and offers this review, which we hope you will find helpful in crafting revised policy guidance. While these comments may reflect considerations predominantly

¹USCIS Update “H-1B Cap Exemptions Based on Relation or Affiliation,” available at [AILA InfoNet Doc. No. 11031760](#).

² The memorandum is available at [AILA InfoNet Doc. No. 11050130](#).

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”

For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 2

applicable to the healthcare sector, and we recognize that the healthcare industry is the sector of the economy that brought the issue into sharp focus at a critical juncture, the principles and concepts we outline are also applicable to other sectors. These may include, for example, primary and secondary education systems that have collaborative programs with institutions of higher education, as well as non-profit “incubators” associated with colleges and universities at which inventions originating at academic institutions are further developed for commercial application. Such entities also provide entrepreneurs with environments where concepts first developed during academic studies are nurtured and allowed to become realities. Reference to common definitions of the terms “related” and “affiliated” will provide the flexibility necessary to address needs in sectors beyond healthcare.

Background

In 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21),³ a generous piece of legislation which provided, among other ameliorative provisions, that an H-1B nonimmigrant employed at an institution of higher education, “or a related or affiliated nonprofit entity,” was exempt from the H-1B cap.⁴ Congress never defined “related” or “affiliated,” and the immigration agency has never issued regulations to explain what those terms mean in the context of the H-1B cap exemption. Instead, the USCIS imposed on the cap-exempt provision the definition of “related” and “affiliated” that it crafted to delineate which entities are exempt from the H-1B training fee.⁵ That was quite troubling, particularly since the training fee was mandated by a completely different—and most would say restrictive—statute, the American Competitiveness and Workforce Improvement Act (ACWIA).⁶

AILA suggests that the application of the definitions in the fee-exemption regulation to the cap-exemption provision of AC21 runs counter to the intent of AC21. Though legacy INS stated in 1998, when it issued ACWIA’s interim fee rule, that it had drawn on generally accepted definitions of the terms “related or affiliated,”⁷ the definition that it

³ Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

⁴ AC21 added INA § 214(g)(5)(A), which 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;

⁵ The definition was imposed through an agency memorandum. 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) [hereinafter 2006 Aytes Memo].

⁶ Pub. L. No. 105-277, 112 Stat. 2681.

⁷ 63 Fed. Reg. 65657, 65658 (Nov. 30, 1998). Left for another day is a discussion of whether legacy INS actually even considered the definition of “related” apart from the definition of “affiliated.” It would seem that the two terms were treated as though they were synonymous.

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”

For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 3

formulated was quite narrow⁸ and anything but the “generally accepted” meanings of those words. Moreover, the fee exemption rule drew only 11 comments,⁹ hardly the number that would be expected if the cap, rather than the fee, were at stake. In other words, borrowing from a rule drafted to exempt certain entities from paying a \$500 training fee, a rule that drew fewer than a dozen comments, USCIS imposed the definitions in that rule on the cap exempt provision. It did not craft a new rule, it did not seek public comment, it did not engage the public in discussion; it simply imposed the rule through the 2006 Aytes Memo.

In fact, Congress recognized that the fee rule was too restrictive, and enacted additional legislation¹⁰ to extend the fee exemption to primary and secondary schools, and to nonprofit institutions that afford clinical training of students registered at institutions of higher education. The cap exemption was not on the table because contemporaneous legislation, AC21,¹¹ temporarily increased the cap to up to 195,000, relieving any pressure to more closely address that issue.¹²

Alternate Ways to Define “Affiliated” and “Related”

Rather than the narrow definition of “related” and “affiliated” that was crafted for the fee rule, USCIS should borrow from other definitions of “related” and “affiliated” that more accurately reflect the generally accepted meanings of those terms.

The INA defines “affiliation” as “the giving, loaning or promising of support or of money or any other things of value for any purpose to any organization.”¹³ In its F-1 student regulations, USCIS authorizes employment at an “educationally affiliated” off-campus location, and defines “educationally affiliated” as “associated with the school’s established curriculum” or “related to contractually funded research projects at the post-graduate level.”¹⁴ In the realm of religious workers, USCIS regulations define a *bona*

⁸ See, e.g., 65 Fed. Reg. 10678, 10680 (Feb. 29, 2000) (supplementary information) (the Service interprets ACWIA to “narrowly define” entities exempt from the fee).

⁹ 65 Fed. Reg. at 10679. Note that the Service states in one place that “[t]he Service received eight comments from individuals and organizations in response to the interim rule,” and in another place “[t]he Service received 11 specific comments regarding the definitions of exempt organizations contained in the interim rule.” At least one commenter urged legacy INS to adopt a more expansive definition of “affiliated” that would embrace teaching hospitals that do not have shared ownership and control, but rather, have “documentational understanding[s]” with institutions of higher education. *Id.* at 10680.

¹⁰ Pub. L. No. 105-277, 114 Stat. 1247 (Oct. 17, 2000).

¹¹ Pub. L. No. 106-313 (Oct. 17, 2000).

¹² Though the cap was reduced from 195,000 in FY2003 to 65,000 in FY2004, Pub. L. No. 108-447, 118 Stat. 2809 (Dec. 8, 2004), exempted the first 20,000 U.S. advanced degree holders from the cap, further relieving pressure.

¹³ INA §101(e)(2).

¹⁴ 8 C.F.R. §214.2(f)(9)(i).

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”
For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 4

fide organization “affiliated with” a religious denomination as an organization that is “closely associated” with the religious denomination.¹⁵

Common and legal dictionary definitions of the terms “affiliated” and “related” offer additional insights.¹⁶ Webster’s on-line dictionary defines “related” to mean “connected by reason of an established or discoverable relation.”¹⁷ “Affiliated” is defined as “closely associated with another typically in a dependent or subordinate position,”¹⁸ or “attach[ed] to or connect[ed] with an organization.”¹⁹ Black’s Law Dictionary defines the verb “affiliate” as signifying “a condition of being united; being in close connection, allied, associated, or attached as a member or branch.”²⁰ The on-line resource Dictionary.com cites to the Random House Dictionary definition of the term “affiliate” as “to bring into close association or connection: *The research center is affiliated with the university.*”²¹ Similarly, Black’s Law Dictionary defines “related” as “standing in relation; connected; allied; akin.”²²

In the healthcare context, Mosby’s Medical Dictionary defines an “affiliated hospital” as one “that is associated to some degree with a medical school, a health profession, a health program, or another health care institution.”²³ Similarly, the Merriam-Webster Medical Dictionary defines a “teaching hospital” as “a hospital that is affiliated with a medical school and provides the means for medical education to students, interns, residents, and sometimes postgraduates.”²⁴

Not one of these definitions of “affiliated” or “related” requires common control or ownership. Instead, the definitions contemplate entities that are in close contact, that are connected and/or that have allied interests. Moreover, these definitions are more consistent with the purpose of AC21. While the primary purpose of ACWIA was to place restrictions on the H-1B category, the purpose of AC21 was just the opposite. The legislative history confirms that AC21 was enacted to correct prior legislation that placed an artificially low annual limit on the number of H-1B petitions available each fiscal year:

¹⁵ 8 C.F.R. §204.5(m)(5) and 8 C.F.R. §214.2(r)(3).

¹⁶ USCIS will frequently rely on dictionary definitions. See, e.g., Donald Neufeld, Acting Associate Director, Domestic Operations, “Revisions to Adjudicator’s Field Manual (AFM). Chapter 22.22(b) General Form I-140 Issues (AFM Update AD07-26), September 14, 2009; available at [AILA InfoNet Doc. No. 09110465](#). See also *Matter of [name not provided]*, EAC 06 038 50651 (AAO, September 6, 2007).

¹⁷ Available at <http://www.merriam-webster.com/dictionary/related>, last accessed April 27, 2011.

¹⁸ Available at <http://www.merriam-webster.com/dictionary/affiliated>, last accessed April 27, 2011.

¹⁹ The New Shorter Oxford English Dictionary at 35 (1993).

²⁰ Black’s Law Dictionary 58 (6th ed. 1990).

²¹ Available at <http://dictionary.reference.com/browse/affiliate>, last accessed April 27, 2011 (emphasis added).

²² Black’s Law Dictionary 1288 (6th ed. 1990).

²³ <http://medical-dictionary.thefreedictionary.com/affiliated+hospital> (citing *Mosby’s Medical Dictionary* 2009), last accessed April 27, 2011.

²⁴ Available at <http://dictionary.reference.com/browse/teachinghospital> (citing *Merriam-Webster’s Medical Dictionary* 2007), last accessed April 27, 2011.

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”
For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 5

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.*²⁵

The legislative history further expands upon the rationale:

Additionally, U.S. universities are on a different hiring cycle than from other employers. The H-1B cap has hit them hard because they often do not hire until the numbers have been used up; and because of the academic calendar, they cannot wait until October 1, the new fiscal year, to start a class.²⁶

By insisting on elements of ownership and control as a prerequisite for cap exemption, USCIS is restricting the types of non-profit institutions eligible for cap exemption, thwarting Congress’ intent to provide institutions of higher education and affiliated or related nonprofit entities with greater access to the H-1B pool of workers.

Definitions of “Related or Affiliated” in Other Federal Laws and Regulations

Based on our survey of federal laws and regulations, we identified several definitions of “affiliated” or “related” that could provide the needed flexibility and more closely reflect congressional intent to exempt non-profit institutions associated with institutions of higher education from the H-1B cap. Here are two definitions that seem particularly relevant to the health care field:

- The U.S. Department of Health & Human Services (Medicare reimbursement). Nonprofit hospitals that sponsor Graduate Medical Education (GME) programs are not required to have a formal relationship with a medical school in order to obtain accreditation, although most do.²⁷ And, so long as they are accredited, the residency/fellowship programs receive Medicare funding for their GME slots from HHS.²⁸
- The U.S. Department of Health & Human Services (National Cancer Institute) defines an “affiliated teaching hospital” for purposes of cancer research funding as “a hospital which, although not owned by such school, has a written agreement with a school of medicine, osteopathy, dentistry, or public health eligible for

²⁵ S. Rep. No. 106-260, at 2 (2000) (emphasis added).

²⁶ *Id.*

²⁷ Graduate Medical Education Directory (American Med. Ass’n, 2010-2011)

²⁸ 42 C.F.R. §413.75(b).

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”
For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 6

assistance under this part, providing for effective control by the school of the teaching in the hospital.”²⁹

These and other definitions are set forth in the following chart:

AGENCY SOURCE	CITATION	DEFINITION	CONTEXT
Department of Homeland Security	INA §101(e)(2)	Defines “ affiliation ” as “[t]he giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization...”	Definitional section of the Immigration & Nationality Act
Department of Homeland Security	8 C.F.R. §204.5(m)(5) and 8 C.F.R. §214.2(r)(3)	Defines “ bona fide organization which is affiliated with the religious denomination ” as “an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 . . .”	Establishing eligibility for classification as a special immigrant religious worker or a nonimmigrant religious worker
Department of Homeland Security	8 C.F.R. §214.2(f)(9)(i)	Defines “ educationally affiliated ” as “associated with the school’s established curriculum” or “related to contractually funded research projects at the post-graduate level.”	Authorizing foreign student employment at certain “educationally affiliated” off-campus locations
Environmental Protection Agency	40 C.F.R. §262.200	<p>“Eligible academic entity means a college or university, or a non-profit research institute that is owned by or has a formal written affiliation agreement with a college or university, or a teaching hospital that is owned by or has a formal written affiliation agreement with a college or university.”</p> <p>Formal written affiliation agreement for a non-profit research institute means a written document that establishes a relationship between institutions for the purposes of research and/or education. . . . A formal written affiliation agreement for a teaching hospital means a master affiliation agreement and program letter of agreement, as defined by the Accreditation Council for Graduate Medical Education, with an accredited medical program or medical school.”</p>	Hazardous waste disposal standard for academic institutions and their affiliates
Department of Health & Human Services	42 C.F.R. §411.355(e)(i)(A)	“(A ‘ component ’ of an academic medical center means an affiliated medical school, faculty practice plan, hospital, teaching facility, institution of higher education, departmental professional corporation, or nonprofit support organization whose primary purpose is supporting the teaching mission of the academic medical center.)”	Defining a “component” of an academic medical center in delineating exceptions to the rule against physician referrals of Medicare and Medicaid patients to entities with which the physician has a financial relationship.
U.S. Patent & Trademark Office	35 U.S.C. §287(c)(2)(C)-(D)	<p>(C) “[T]he term ‘related health care entity’ shall mean an entity with which a medical practitioner has a professional affiliation under which the medical practitioner performs the medical activity, including but not limited to a nursing home, hospital, university, medical school, health maintenance organization, group medical practice, or a medical clinic.”</p> <p>(D) “[T]he term ‘professional affiliation’ shall mean staff privileges, medical staff membership, employment or contractual relationship, partnership or ownership interest, academic appointment, or other affiliation under which a medical practitioner provides the medical activity on behalf of, or in association with, the health care entity.”</p>	Limitations on patent infringement liability for physicians and related health care entities
Department of Veterans Affairs	38 U.S.C. §7423(d)(1)	“The term ‘ affiliated institution ’ means a medical school or other institution of higher learning with which the Secretary has a contract or agreement as referred to in section 7313 of this title for	Providing for deferment of service for VA physicians participating in residency/fellowship training with

²⁹ 42 C.F.R. §52d.2(e).

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”
For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 7

AGENCY SOURCE	CITATION	DEFINITION	CONTEXT
		the training or education of health personnel.”	an “affiliated institution”
Department of Health & Human Services	5 C.F.R §5501.109(b)(4)	Defines educational activity provider to include “a health care Provider” that presents Grand Rounds, and defines Grand Rounds at 5501.109(b)(6) as “regularly scheduled, interactive presentation “conducted in an accredited medical school or an affiliated teaching hospital setting that provides practicing physicians, faculty, fellows, resident physician trainees, medical students, graduate students, and post-doctoral fellows, as well as allied and associated health professionals. . .an opportunity to evaluate outcomes.”	Defining outside activities prohibited to employees of the National Institutes of Health
Internal Revenue Service	26 C.F.R §1.170-2(b)(4)(ii)(c)	In order for a medical research organization to act “in conjunction with a hospital” “it must be physically connected, or closely associated, with a hospital. In any case, there must be a joint effort on the part of the research organization and the hospital pursuant to an understanding that the two organizations shall maintain continuing close cooperation in the active conduct of medical research.”	Defining circumstances under which contributions made to medical research organizations may be classified as charitable deductions for tax purposes
U.S. Food & Drug Administration	21 C.F.R. §203.3(t) – (u)	(t) Defining “ nonprofit affiliate ” as “any not-for-profit organization that is either associated with or a subsidiary of a charitable organization as defined in section 501(c)(3) of the Internal Revenue Code of 1954.” (u) Defining “ ongoing relationship ” as “an association that exists when a manufacturer and a distributor enter into a written agreement under which the distributor is authorized to distribute the manufacturer’s products for a period of time or for a number of shipments.”	Definitional section of regulations implementing the Prescription Drug Marketing Act of 1987, setting forth procedures for the re-importation and wholesale distribution of prescription drugs
U.S. Department of the Treasury	12 C.F.R. §1.130(b)(2)	“An obligation that finances the construction or improvement of facilities used by a hospital may be eligible as a Type II security, if the hospital is a department or a division of a university, or otherwise provides a nexus with university purposes , such as an affiliation agreement between the university and the hospital, faculty positions of the hospital staff, and training of medical students, interns, residents, and nurses (e.g., a teaching hospital).”	Defining circumstances in which a hospital may be sufficiently associated with a university to qualify for issuance of “Type II” securities issued for university purposes

Drawing upon these and other definitions, USCIS should fashion a test to determine which nonprofit entities are exempt from the H-1B cap by virtue of their relationships to or affiliation with an institution of higher education. That test should recognize as cap-exempt an entity that:

- Has been accredited by a federal, state or local educational accrediting agency for an educational purpose based on its affiliation or relationship with an institution of higher education. For example, any nonprofit entity that sponsors a Graduate Medical Education program accredited by the Accreditation Council for Graduate Medical Education (ACGME) should qualify for cap exemption;³⁰ *or*
- Has been recognized or approved as related to or affiliated with an institution of higher education by another federal or state agency for *any* purpose. For example, any nonprofit entity sponsoring an “approved medical residency

³⁰ A list of ACGME-accredited programs is available at <http://www.acgme.org/adspublic/>.

Director Alejandro Mayorkas

RE: Definition of “Affiliated or Related Nonprofit Entity”
For H-1B Cap-Exemption Purposes Under INA §214(g)(5)(A)

Page 8

program” for purposes of Medicare reimbursement under 42 C.F.R. §413.75(b) should qualify for cap exemption; *or*

- Has entered into a currently valid affiliation agreement with an institution of higher education that defines the respective rights and responsibilities of cooperating entities; *or*
- Is otherwise related to or affiliated with an institution of higher education based on the totality of facts presented by the petitioner and consistent with the plain meaning of the terms “related” or “affiliated.”

Conclusion

The AC21 cap exemption provisions were enacted by Congress to facilitate and expand the possibilities for H-1B employment within institutions of higher education and “affiliated or related” nonprofit entities. We understand and appreciate USCIS’s sensitivity to the cap exemption issue, and hope this memorandum is useful to the agency as it crafts a revised approach that relies on commonly understood meanings of the terms “related” or “affiliated.” We look forward to continuing to work with you to address this extremely important issue.