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Office of Public Engagement
U.S. Citizenship and Immigration Services
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Via e-mail: opefeedback@uscis.dhs.gov

**Re: AILA Comments on USCIS Interim Memorandum:
Additional Guidance to the Field on Giving Deference to
Prior Determinations of H-1B Cap Exemption Based on
Affiliation (PM-602-0037)**

The American Immigration Lawyer's Association (AILA) submits the following comments in response to the interim policy memorandum, "Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation."

Introduction

AILA applauds U.S. Citizenship and Immigration Services (USCIS) for announcing on March 16, 2011 that it is revising its current policy on adjudicating cap exempt H-1B petitions based on a nonprofit entity's affiliation or relationship with an institution of higher education. In addition to the comments provided on the interim guidance herein, AILA has separately provided USCIS with a detailed research and policy memorandum containing constructive suggestions for reshaping the current cap exemption standard. In the meantime, we welcome USCIS's stated intention to defer to prior determinations on H-1B cap exemption until the revised policy is promulgated, and offer the following suggestions for refining and clarifying the interim memorandum.

Heightened Level of Internal Review

The interim memo provides that both the Assistant Center Director (ACD) and Service Center Operations (SCOPS) must be consulted prior to the issuance of a Notice of Intent to Deny (NOID) or denial in a case where the adjudications officer feels that deference to a prior determination of cap exemption is inappropriate. However, no such internal supervisory review is required before issuance of a Request for Evidence (RFE). Moreover, in cases where the petitioner does not provide evidence of cap exemption approval subsequent to June 6,

2006, adjudications officers are apparently free to issue an RFE, NOID, or denial without supervisory review, or at least without SCOPS review. We agree with USCIS that enhanced supervisory review is warranted in cap exemption cases but feel that the level of review proposed in the interim memo should be expanded to include RFEs, NOIDs, and/or denials in *any* case where the petitioner is claiming cap exemption based on a relationship with an institution of higher education.

AILA members report that some petitioners have received “boilerplate” RFEs requesting evidence of shared ownership and control between the petitioner and an institution of higher education, despite having provided evidence of cap exemption approval in accordance with the March 16, 2011 USCIS announcement. The issuance of such RFEs, and the time it takes to respond is a waste of resources for both the Service and the petitioner and needlessly delays the commencement of H-1B employment. We believe that increased internal review prior to issuance of an RFE, NOID, or denial will serve to limit adjudication errors and increase efficiency and consistency.

Similarly, AILA recommends that both the ACD and SCOPS be consulted prior to the issuance of an RFE, NOID, or denial for *any* affiliation-based cap exempt petition, regardless of whether the petitioner is requesting deference to a prior cap exempt determination, or has never before requested cap exemption. USCIS’s decision to review its existing cap exemption policy and to defer to prior determinations in the interim arose precisely from the fact that the current standard for cap exemption is impractical, difficult to apply, and results in inappropriate and inconsistent determinations. Examiners who are now asked to apply that standard to cases where there is no prior approval to guide them are in even *greater* need of supervisory oversight than are examiners reviewing petitions with an adjudications history that supports cap exemption. For this reason, we urge USCIS to require ACD and SCOPS review before issuance of an RFE, NOID or denial in *any* affiliation-based cap exemption case.

Increasing the “Look Back” Period for Deference

The interim memo requires officers to defer to prior determinations of affiliation-based cap exemption made since June 6, 2006, the date that USCIS published its memorandum establishing the current adjudications standard.¹ However, the statute providing for affiliation-based cap exemption, the American Competitiveness in the Twenty-First Century Act (AC21), was passed on October 17, 2000.² AILA suggests that USCIS defer to any prior determination of affiliation-based cap exemption granted since the date of AC21’s enactment, October 17, 2000.

¹ 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).

² Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000).

Clarification on Applicability of Deferential Standard

Finally, AILA urges USCIS to clarify that there are some situations where examiners will need to defer to a prior cap exemption decision even where the petitioner itself may not have been the recipient of the prior cap exemption. For example, an amended H-1B petition is not required where an H-1B petitioner is involved in a corporate restructuring in which the new corporate entity succeeds to the interests and obligations of the original employer and where the terms and conditions of employment remain the same except for the petitioner's identity.³ In situations where the new corporate entity is a nonprofit entity that has succeeded to the cap-exempt qualifying relationship of the initial employer, USCIS should defer to the prior employer's cap exemption determination.

Similarly, beneficiaries who will be employed *by* a non-qualifying entity to work *at* a facility previously determined to be cap exempt should be granted a cap exemption in deference to a USCIS prior determination that the worksite is cap exempt. This is in keeping with the 2006 Aytes memo's acknowledgement that AC21 permits third party petitions filed on behalf of H-1B beneficiaries who will be "employed at" a qualifying institution to claim a cap exemption.

Conclusion

AILA appreciates the opportunity to comment on this interim memo and looks forward to continued dialogue with USCIS on the critical issue of H-1B cap exemption.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

³ INA §214(c)(10).