



U.S. Citizenship
and Immigration
Services

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Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS

From: Michael Aytes /s/
Associate Director for Domestic Operations
United States Citizenship and Immigration Services
Department of Homeland Security

Date: June 06, 2006

Re: 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)

Revisions to *Adjudicator's Field Manual (AFM)* Chapter 31.3
(*AFM* Update AD06-27)

Purpose

This memorandum provides field offices with guidance on determining eligibility for exemptions to the H-1B cap based on employment or an offer of employment at an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization as provided by section 103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. 106-313 (as codified in section 214(g)(5)(A) and (B) of the Immigration and Nationality Act (INA or Act).

Background

A number of questions have arisen regarding the statutory provisions exempting certain entities and/or foreign nationals from the H-1B cap under section 214(g)(5)(A) and (B) of the Act. These sections provide, in part:

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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))¹, or a related or affiliated nonprofit entity;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization.

This memorandum clarifies how USCIS will interpret the clauses below when adjudicating H-1B petitions requesting exemptions to the H-1B cap:

- I) “employed (or has received an offer of employment) at”
- II) “an institution of higher education or a related or affiliated nonprofit entity”
- III) “a nonprofit research organization or a governmental research organization.”

I. “Employed (or has received an offer of employment) at”

Sections 214(g)(5)(A) and (B) of the Act (Section 103 of AC21) exempt an alien from the H-1B cap if the alien is “employed (or has received an offer of employment) at” an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization (hereinafter a “qualifying

¹Section 101(a) of the Higher Education Act of 1965, (Pub. Law 89-329), 20 U.S.C. section 1001(a), defines institution of higher education as:

(a) Institution of higher education

For purposes of this chapter, other than subchapter IV, the term “institution of higher education” means an educational institution in any State that—

- (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
- (2) is legally authorized within such State to provide a program of education beyond secondary education;
- (3) provides an educational program for which the institution awards a bachelor’s degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
- (4) is a public or other nonprofit institution; and
- (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

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institution”). Commonly, qualifying institutions petition on behalf of current or prospective H-1B employees and claim this exemption. In certain instances, petitioners that are not themselves a qualifying institution also claim this exemption because the alien beneficiary will perform all or a portion of the job duties “at” a qualifying institution. For purposes of this memorandum, such petitioners are referred to as “third party petitioners.” A third party petitioner is one who petitions on behalf of an H-1B worker who will work “at” a qualifying institution, but where the alien is or will be employed by the third party petitioner, not the qualifying institution. These types of cases should be adjudicated based on the guidance provided below.

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain aliens who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.²

USCIS will, therefore, allow third party petitioners to claim exemption on behalf of a beneficiary under either section 214(g)(5)(A) or (B), if the alien beneficiary will perform job duties at a qualifying institution that directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research. Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution.

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the

² See S. Rep. No. 106-260 (April 11, 2000) [re. S. 2045, the bill that was enacted into AC21] providing that individuals should be considered cap exempt “... by virtue of what they are doing” and not simply by reference to the identity of the petitioning employer.

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particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap. However, qualifying third-party employment can occur in a variety of other ways. USCIS therefore is providing a non-exhaustive list of examples in the AFM to assist adjudicators in determining cap exemption eligibility.

II. Institution of Higher Education or Related or Affiliated Nonprofit Entity

The H-1B regulations, in the context of qualifying for the H-1B fee exemption, directly adopt the definition of institution of Higher Education set forth in section 101(a) of the Higher Education Act of 1965. Adjudicators should adopt the same definition for an institution of Higher Education for purposes of exemptions to the H-1B cap.

In addition, the H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entities for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(B), the following definition applies:

An affiliated or related nonprofit entity. 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.

III. Nonprofit Research Organization or a Governmental Research Organization

This phrase has been defined specifically within the H-1B regulations in the context of qualifying for the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as a nonprofit research organization or governmental research organization for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(C), the following definitions apply:

A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and

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investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

* * * * *

Questions regarding this memorandum may be directed through appropriate channels to Kristina Carty-Pratt in Service Center Operations.

Accordingly, the *AFM* is revised as follows:

- ☞ 1. Section 31.3(g) in Chapter 31 of the Adjudicator’s Field Manual is amended to include the following new paragraph at AFM 31.3(g)(13) to read as follows:

31.3 H-1B Classification and Documentary Requirements

(g) Adjudicative Issues

(13) H-1B Cap Exemptions Pursuant to 214(g)(5) of the Act. USCIS officers should comply with the following guidance to determine whether an alien is exempt from the H-1B cap under the provisions of 214(g)(5) of the Act, which reads as follows “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;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization.”

A. “Employed (or has received an offer of employment) at”

1. General Discussion

Sections 214(g)(5)(A) and (B) of the Act (Section 103 of AC21) exempt an alien from the H-1B cap if the alien is “employed (or has received an offer

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of employment) at” an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization (hereinafter a “qualifying institution”). Commonly, qualifying institutions petition on behalf of current or prospective H-1B employees and claim this exemption. In certain instances, petitioners that are not themselves a qualifying institution also claim this exemption because the alien beneficiary will perform all or a portion of the job duties “at” a qualifying institution. For purposes of this paragraph, such petitioners are referred to as “third party petitioners”. A third party petitioner is one who petitions on behalf of an H-1B worker who will work “at” a qualifying institution, but where the alien is or will be employed by the third party petitioner, not the qualifying institution. These types of cases should be adjudicated based on the guidance provided below.

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying institution. This broader category may allow certain aliens who are not employed directly by a qualifying institution to be treated as cap exempt when needed to further the essential purposes of the qualifying institution.

Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work predominately performed by the beneficiary and the normal mission of the qualifying entity. Petitioners must therefore demonstrate how the beneficiary’s duties are directly and predominately related to, and in furtherance of, the normal, primary or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research.

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of

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professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap.

2. Examples

As qualifying third-party employment can occur in a variety of other ways, below is a non-exhaustive list of examples to assist adjudicators in determining cap exemption eligibility:

Example 1: Company A, a for-profit consultant firm that would not otherwise be a qualifying institution, files an H-1B petition on behalf of an employee working directly for the firm. The H-1B petition describes the alien beneficiary's job duties, which will be performed on-site at a qualifying governmental research organization pursuant to a joint-agreement between the two entities. Company A submits evidence in support of its H-1B petition demonstrating that the alien beneficiary will be working on a research project performing duties similar to those performed by actual employees of the governmental research organization in furtherance of the qualifying entity's mission. If the alien beneficiary was sponsored directly by the government research organization, he or she would clearly qualify for the H-1B cap exemption.

Q: Would the alien beneficiary qualify for the H-1B exemption?

A: Yes. In this case, the alien beneficiary would be exempt from the H-1B cap because the alien beneficiary will perform research duties that would or could otherwise be performed by employees of the qualifying institution, in furtherance of the qualifying institution's primary mission.

Example 2: Company B, a for-profit hospital and research center that would not otherwise be a qualifying institution, files an H-1B petition on behalf of a renowned Oncologist who will be a direct employee of the hospital and whose duties will consist of clinical treatment of cancer patients and laboratory research on a new medication to treat liver cancer. Company B maintains a relationship with a qualifying non-profit research organization dedicated to finding a cure for liver cancer, whereby Company B occasionally provides resources and data in exchange for access to the non-profit's national database on protocols for treating liver cancer. Company B's new Oncologist will spend 55% (i.e., a majority) of her time working on-site at the non-profit research organization conducting

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research and laboratory experiments on the new medication to treat liver cancer and accessing the national database. The Oncologist will be performing sophisticated research and laboratory experiments that are not normally conducted by employees of the non-profit research organization but that nonetheless directly and predominantly further the normal, primary, or essential purpose, mission, objectives or function of the non-profit organization. Company B and the non-profit entity will collaborate on a joint paper publishing the research.

Q: Would the Oncologist qualify for an H-1B cap exemption based on this employment?

A: Yes. In this case, the Oncologist's work clearly furthers the overall mission of the qualifying non-profit research organization and benefits the United States. The fact that Company B and the qualifying non-profit entity share a cooperative relationship helps establish a sufficient nexus between the Oncologist's work and the normal, primary, or essential purpose, mission, objectives or function of the non-profit organization. Further, the Oncologist will spend more than half of her time working physically on-site "at" the qualifying entity.

Example 3: A medical fellow in pediatrics has been employed at a qualifying non-profit university medical center for two years in H-1B status. At the end of the fellowship, the doctor will become a member of Company C, a private pediatrics practice group which has its primary offices within the university medical center and predominantly trains medical students and treats patients in the medical center. The doctor will be doing exactly the same work that he did during his fellowship, including remaining on the university medical center's faculty, but for reasons related to hospital billing practices and medial malpractice insurance requirements, his technical, and therefore petitioning, employer will be the private pediatrics practice group.

Q: Would the doctor qualify for an H-1B cap exemption based on this employment?

A: Yes. In this case, the doctor would be exempt from the H-1B cap because the conditions of employment demonstrate that the doctor will be performing the same work that he performed while employed directly by the qualifying university medical center. Thus, the H-1B employment directly furthers the primary mission of the hospital because the doctor will remain on the university medical center's

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faculty, and will continue to educate and train its medical students and treat patients at the medical center.

Example 4: Company D, a for-profit market research firm that would not otherwise be a qualifying institution, files an H-1B petition on behalf of a direct employee. The H-1B petition states that the alien beneficiary will be conducting a specific kind of market research on-site at a qualifying University. In addition, the petition states that the University has a specialized research tool that can only be accessed from its facilities and that the alien beneficiary's research will be conducted for the benefit of the petitioner's clients and business, and not for the University.

Q: Would the alien beneficiary qualify for the H-1B exemption based on this employment?

A: No. In this case, the alien would not qualify for a cap exemption as he or she is only physically located "at" the qualifying institution and no nexus has been demonstrated between the work performed by the beneficiary and the normal purpose of the qualifying entity. The alien beneficiary will not perform work for the benefit of the qualifying institution, but rather for the for-profit firm.

(B) Institution of Higher Education or Related or Affiliated Nonprofit Entity

The H-1B regulations, in the context of qualifying for the H-1B fee exemption, directly adopt the definition of institution of Higher Education set forth in section 101(a) of the Higher Education Act of 1965. Adjudicators should adopt the same definition for an institution of Higher Education for purposes of exemptions from the H-1B cap.

In addition, the H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemptions. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entity for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(B), the following definition applies:

An affiliated or related nonprofit entity. 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

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attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(C) Definitions of Nonprofit Research Organization or a Governmental Research Organization

This phrase has been defined specifically within the H-1B regulations in the context of qualifying for the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as a nonprofit research organization or governmental research organization for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(C), the following definitions apply:

A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

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2. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD06-27
[INSERT
SIGNATURE
DATE OF THIS
MEMO]

Chapter 31.3(g)(13)

This memorandum revises Chapter 31.3(g) of the *Adjudicator's Field Manual (AFM)* to include section 13 regarding H-1B cap exemptions pursuant to 214(g)(5) of the Act.

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cc: USCIS Headquarters Directors
Bureau of Immigration and Customs Enforcement
Bureau of Customs and Border Protection