Practice Pointers for Healthcare Immigration Cases

by the AILA Healthcare Professionals/Physicians Committee

Preparing and filing immigration petitions on behalf of physicians can pose unique strategic and logistical challenges. The AILA Healthcare Professionals/Physicians Committee has compiled the following practice pointers aimed at assisting AILA members in successfully navigating this complex area of immigration law.

For more general information, we recommend two AILA publications: *Immigration Options for Physicians* and *Immigration Options for Nurses and Allied Healthcare Professionals*. There are also a variety of audio/web seminars from the past few years on specialized topics relating to physician immigration. All of these resources are available for purchase through AILA InfoNet.

J-1 Waiver Applications for Doctors under INA §214(l)

Physicians who complete graduate medical education in the United States in J-1 nonimmigrant status are automatically subject to the two-year home residency requirement pursuant to INA §212(e). Most physicians who obtain a §212(e) waiver do so by agreeing to work for at least three years in a medically underserved area (MUA) of the United States, or at a facility operated by the Department of Veteran's Affairs.[1] The waiver process requires a request from an "interested government agency" (IGA), or state Department of Health and the recommendation of the U.S. Department of State (DOS) before final approval of the waiver by U.S. Citizenship and Immigration Services (USCIS). The actual three year J-1 waiver commitment must be completed in H-1B status. We offer the following tips and reminders for processing these types of cases:

- ***Variability in J-1 Waiver Processing***. The J-1 waiver process involves three different agencies and processing times can vary dramatically. Depending upon the state or federal agency involved, it may take several weeks or many months to obtain an initial favorable decision from the IGA. The DOS recommendation then takes an additional 4 to 6 weeks, followed by USCIS approval, which can take another 4 to 6 weeks. The H-1B petition can be filed with the DOS recommendation letter, with the final USCIS J-1 approval typically processed concurrently with the H-1B petition, but there may be other credentialing steps required by the state or the facility where the physician will work that could take weeks to complete even after the H-1B petition is approved.

  Attorneys should investigate how long the process is likely to take and begin the waiver process early enough to secure the desired H-1B start date. The most common delay is obtaining a license. When processing delays do occur, attorneys should be prepared to pursue all avenues in tracking and monitoring the status of the application through the various agencies, and through AILA's liaison inquiry process for J-1 waiver cases at the DOS Waiver Review Division that fall outside the normal processing time.[2]

[1] *See* INA §214(l).
[2] For more information on liaison assistance, see AILA InfoNet Doc. No. 05081962 (*posted* Jan. 23, 2012).

AILA InfoNet Doc. No. 12050246. (Posted 05/02/12)

- ***Extending J-1 Status for Board Examinations***. Because there are so many moving parts to the J-1 waiver process, it is advisable for the physician to apply for an extension of J-1 status for the purpose of studying for a board examination. Such extensions are generally granted by the sponsoring exchange visitor program, known as the Educational Commission for Foreign Medical Graduates (ECFMG),[3] where the board exam will be offered within 6 months of completion of the J-1 program *so long as the waiver application has not yet been approved*. Also, bear in mind that there is a 30-day grace period following the end date on the DS-2019. Thus, if the physician secures a J-1 extension through October 30 to study for board exams, that really gives until November 30 to complete the J-1 waiver process and file an H-1B change of status petition.

- ***The 90-Day Rule***. INA §214(l)(1)(C)(i) requires the physician to "agree to begin employment" with the J-1 waiver employer within 90 days of the date the waiver is approved by USCIS. It is often impossible to arrange the timing of final J-1 waiver approval so that employment commences within 90 days of the approval. For example, due to early waiver application deadlines in many states, the J-1 waiver may be approved more than 90 days before completion of the J-1's graduate medical education, preventing commencement of employment within the 90-day window; or the H-1B petition cannot be approved within 90 days of the J-1 waiver approval; or, the H-1B petition is approved but the facility at which the physician will be employed cannot complete the medical credentialing process within 90 days of the J-1 waiver approval. In these circumstances, the physician must delay the commencement of employment until it is legally possible to do so, even if this means beginning the J-1 waiver commitment more than 90 days after the approval of the J-1 waiver. It is important to note that the law requires only an *agreement* by the physician to commence employment within 90 days of the grant of the waiver; it does not mandate that employment actually begin within 90 days.

- ***J-1 Waiver Attorney's Fees and Costs***. The federal statute and regulations do not place any restrictions on who must bear the legal fees and costs associated with the J-1 waiver process. In the past, J-1 waiver applicants have often covered these costs themselves, since the J-1 waiver application is personal to the applicant and his or her family members. However, recently, the Department of Labor (DOL) has argued in federal court that J-1 waiver legal and filing fees are part of the "business expenses" related to an H-1B petition and must be paid by the H-1B sponsoring employer. A federal district court for the Eastern District of Tennessee agreed with DOL, holding in an August 2011 decision that imposing J-1 waiver costs on the employer represented a "reasonable interpretation of the statute."[4]

  That decision has been appealed to the U.S. Court of Appeals for the Sixth Circuit but, for now at least, it remains binding in the Eastern District of Tennessee and, if upheld by the Sixth Circuit, would become binding throughout that jurisdiction. AILA filed an amicus

[3] *See* http://www.ecfmg.org/.
[4] *See Kutty v. DOL*, No. 3:05-CV-510 (E.D. Tenn., 8/19/11), *published on* AILA InfoNet at Doc. No. 11082560 (*posted* 8/25/11).

brief in the case, summarizing the legal, factual and policy errors of the lower court's decision.[5]

H-1B Petitions Based on a Physician's J-1 Waiver Commitment

- ***H-1B Cap Exemption***. Since most J-1 graduate medical education programs end on June 30, the majority of J-1 waiver physicians seek to commence their J-1 waiver commitments in H-1B status on July 1. Fortunately, physicians who obtain a J-1 waiver pursuant to INA §214(l) are exempt from the H-1B cap, so the lack of new H-1B numbers during the summer months is not a concern.[6] Unlike other bases for cap exemption, which are tied to the nature of the sponsoring employer, this H-1B cap exemption is personal to the physician *beneficiary* and can continue to be used by him/her when moving to subsequent employment with another H-1B petitioner regardless of whether that employer is independently cap exempt.[7]

  Also, keep in mind that where the sole basis for cap exemption is the physician's J-1 waiver commitment (i.e., the petitioner is not independently cap exempt on another ground), the H-1B petition need not be filed with the California Service Center (CSC) (which has exclusive jurisdiction over all other cap-exempt cases). Rather, the petition is filed with either the Vermont Service Center (VSC) or the CSC, depending on which Service Center has jurisdiction over the place of intended employment.

- ***H-1B Petition Filed with DOS Recommendation Letter***. USCIS will accept the H-1B petition for processing as soon as DOS recommends the J-1 waiver; it is not necessary to wait for the final J-1 waiver approval notice from USCIS before filing the H-1B petition. The VSC has exclusive jurisdiction over J-1 waiver applications. Thus, if the H-1B petition is filed in Vermont, the same Service Center processes both the H-1B and J-1 waiver approval. Where the H-1B petition is filed in California, USCIS policy is to coordinate approval of the J-1 waiver application with Vermont so that the final J-1 waiver approval notice and H-1B petition can be processed simultaneously.[8] However, the H-1B petition cannot be approved before the final J-1 waiver. This can lead to delays, for example, in premium processing cases where the Service Center may be otherwise ready to approve the H-1B petition within the 15 day premium processing window, but must wait for final J-1 waiver approval from Vermont.

- ***File J-1 Waiver Documentation with the H-1B Petition***. While the H-1B petition for a J-1 waiver physician may be filed upon receipt of the DOS recommendation letter, that letter may not always accurately reflect all information relevant to the adjudication of the H-1B petition. AILA's liaison efforts with the DOS Waiver Review Division (WRD) have revealed that space limitations within the fields of the form recommendation letter sometimes prevent

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[5] *AILA Amicus Says H-1B Fee Regulation Should Not Extend to J-1 Waivers, published on* AILA InfoNet at Doc. No. 11121235 (*posted* 12/12/11).
[6] INA §214(l)(2)(A).
[7] *Id*.
[8] *See AILA/CSC Liaison Practice Pointer: CSC-VSC Coordination of J-1 Waiver Approvals, published on* AILA InfoNet Doc. No. 10120849 (*posted* 12/8/10).

the inclusion of full and accurate data.[9] For example, the DOS letter may state that the physician must complete the waiver commitment at facility X without indicating that the actual employer is Health System Y. This can cause concerns when USCIS receives an H-1B petition from Health System Y but that name does not appear on the DOS recommendation letter as being part of the J-1 waiver commitment employment. To prevent such issues from delaying adjudication of the H-1B petition, attorneys should include whatever supplemental information might be needed to clarify the sponsoring employer and worksite locations (e.g., copy of the employment contract for the J-1 waiver commitment, the J-1 waiver recommendation letter from the State Department of Health) when filing the H-1B petition with USCIS.

J-2 Change of Status to H-1B Following J-1 Waiver Approval

A J-1 waiver granted to an international medical graduate under INA §214(l) also applies to the J-2 dependent. This is clearly stated on the I-797 Notice of Approval for the J-1 waiver. In the past, prospective H-1B employers seeking to hire the J-2 dependents of J-1 physicians have successfully filed change of status petitions for the J-2, along with a copy of the I-797 waiver approval notice for the J-1 principal. In some cases, the J-2 first changed status to H-4 and later requested a change of status to H-1B upon obtaining an employment offer. In the past, such requests for changes of status were routinely granted.

However, recently the CSC has begun denying the change of status request in such cases, claiming that the J-2 is ineligible to change to any status other than H-4 until completion of the J-1's three-year medical service requirement under INA §214(l). The denials cite to INA §214(l)(2) and to 8 CFR §212.7(c)(9), although neither provision prevents the requested status change. These provisions do *permit* a change of status from J-2 to H-4 for dependents of J-1 physicians who have obtained a waiver. But just because the statute expressly *permits* a change of status to H-4 does not mean that it *precludes* a change of status to something else.

INA §248(a)(1)-(4) spells out the exceptions to the normal rule that one who is maintaining valid status in the U.S. may change to another status within the U.S. While INA §248(a)(2) bars a J-1 physician from changing status (except to H-1B under INA §214(l)), nothing in INA §248 prohibits the J-2 from changing status. Notably, INA §248(a)(3) provides that an alien subject to §212(e) may not change status unless he or she has first obtained a waiver. Since the J-1's waiver also attaches to the J-2 derivative, a J-2 should be permitted to change status to H-1B directly from J-2 once the J-1 waiver is approved.

AILA is working with USCIS to address this issue. However, during a February 2012 meeting with USCIS Service Center Operations, USCIS supported the CSC change in policy. Unless and until stakeholders are able to argue successfully for a reinstatement of prior adjudications policy, J-2 spouses who seek H-1B employment in the U.S. based on the J-1 spouse's INA §214(l) waiver must be prepared for possible denial of a change of status request, thus necessitating consular processing for an H-1B visa before commencing H-1B employment, or using a "bridge" of H-4 status.

[9] *See AILA/DOS Liaison Q&As on WRD (10/18/2011)*, Question 16, *published on* AILA InfoNet at Doc. No. 11102423 (*posted* 10/24/11).

Documenting Equivalence of Foreign Medical Degree

An "advanced degree" is any U.S. academic or professional degree or a foreign equivalent degree above that of a baccalaureate.[10] In recent Administrative Appeals Office (AAO) decisions[11] and agency memoranda,[12] USCIS recognized that many countries do not follow U.S. education patterns for training medical doctors. The USCIS *Adjudicator's Field Manual* (AFM), as revised by the Neufeld Memo of June 17, 2009, provides:[13]

> The United States is one of the few countries where medical school applicants are required to obtain a bachelor's degree as a requirement for admission to medical school. As a result, a United States MD degree is considered to be an advanced degree. *In many other countries a person may be admitted to medical school directly out of high school. In these instances, the program of study for the foreign medical degree is longer in length (generally 5-7 years in duration) than is required for a less specialized foreign bachelor's degree (generally 3-4 years in duration*). In some countries the name of the degree is "Bachelor of Medicine, Bachelor of Surgery," and the program of study may involve ONLY medicine, to include some limited basic sciences. (Emphasis added).

In light of these differing international norms for medical education, the AFM provides that a foreign medical degree is the equivalent of a U.S. medical degree (and thus an advanced degree) if the international physician:

- Has been awarded a foreign medical degree from a medical school that requires applicants to obtain a bachelor's degree equivalent to a U.S. bachelor's degree as a requirement for admission; or,

- Has been awarded a foreign medical degree and a foreign education credential evaluation is provided ... that credibly describes how the foreign medical degree is equivalent to a medical degree obtained from an accredited medical school in the United States; or,

- Has been awarded a foreign medical degree and has passed the National Board of Medical Examiners Examination (NBMEE) or an equivalent examination, such as the U.S. Medical Licensing Examination (USMLE), Steps 1, 2 & 3.

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[10] INA §203(b)(2); 8 CFR §204.5(k)(2).

[11] See *Matter of [Name Not Provided], SRC-08-198-51124*, (AAO Jan. 9, 2009) ("an MBBS from India 'represents the attainment of a level of education comparable to a first professional degree in medicine in the United States'"), *published on* AILA InfoNet at Doc. No. 09011320 (*posted* 1/13/09); and *Matter of [Name Not Provided], SRC-08-219-53365*, (AAO Jan. 29, 2009) ("the level of education required for issuance of an MBBS from Pakistan should be deemed to be the equivalent of that required for a United States M.D., and an MBBS degree from Pakistan should be deemed to be the equivalent of ... a United States M.D."), *published on* AILA InfoNet at Doc. No. 09021835 (*posted* 2/18/09).

[12] *See* USCIS Memorandum, D. Neufeld, "Revisions to Adjudicator's Manual (AFM) Regarding Certain Alien Physicians, Chapter 22.2(b) General Form I-140 Issues (AFM Update AD09-10)" (June 17, 2009), *published on* AILA InfoNet at Doc. No. 09062260 (*posted* 6/22/09) (hereinafter "Neufeld Memo").

[13] AFM 22.2(j)(1).

In addition, the international physician must show that he or she is either fully licensed to practice medicine in the state of intended employment, or that the foreign medical degree meets the state medical board's requirements for an unrestricted medical license.

USCIS often challenges I-140 petitions that do not include formal credentials evaluations of foreign medical degrees but, as the AFM makes clear, a formal evaluation statement is not required where the beneficiary holds a foreign degree, evidence of passage of USMLE Steps 1, 2 and 3, and an unrestricted medical license in the state of intended employment.

Medical Licensure Issues

A physician must have a medical license prior to filing an H-1B petition, and in some states, must have a license prior to J-1 waiver approval. However, in some states, a physician cannot obtain the license until the H-1B is approved. Both the states and USCIS have policies to accommodate licensure problems.

State Medical License Boards

Some states, including, Tennessee, Arizona and Nevada, will not issue a medical license to an international medical graduate until the physician is authorized to work in the state. For many physicians completing training or moving between states, obtaining work authorization in the state is not possible before the license issues. Because the physicians need the license to file an H-1B petition, many employers and physicians believe they are out of luck in these jurisdictions.

To address this "chicken-and-egg" licensure problem, the states have created a "but for" letter that may be presented with the H-1B petition in lieu of the license. The "but for" letter essentially states that the physician has completed all of the requirements for licensure but for work authorization in the state. In Tennessee, the state medical licensure board will issue the "but for" letter at the physician's request. Often, it will provide it directly to the immigration attorney's office.

Some states also put a deadline on the physician's need to provide work authorization. So, using Tennessee again as an example, the state licensure board will tell the physician to provide proof of work authorization within 90 days of completing the license application. Meeting the 90-day deadline sometimes is not possible. In those cases, physicians usually are successful in getting the deadline extended.

It appears that some states are starting to view medical licensure as a way to control how, when, or where international medical graduates can practice medicine. For example, Texas recently passed a law that requires all international medical graduates (except U.S. citizens and lawful permanent residents) to commit to serving three years in an underserved area of the state just to be eligible for a medical license.[14] AILA has been monitoring the creation of implementing regulations for this law that will take effect September 1, 2012. Although immigration lawyers might not be experts in medical licensure, AILA members should endeavor

[14] *See* Texas SB-189, modifying Chapter 163 of the Texas Medical Board Rules.

to keep up with developments in this area of the law in order to better advocate for and advise physicians and their employers about the ability to hire international medical graduates.

USCIS

A May 2009 USCIS memo sets forth agency guidelines for handling health professional license issues.[15] The memo states that where a beneficiary is not in possession of a license from the state where he or she will be working, the Service will accept documentation confirming that the state will not issue a license in the absence of work authorization approval (e.g., copy of state statute or regulation, or the previously mentioned "but for" letter from the state licensure board). On the basis of this documentation (and proof that the petition is otherwise approvable), USCIS will approve the H-1B petition for a period of one year. After the beneficiary obtains licensure, the employer may file an H-1B extension as usual.

The May 2009 memo also confirms that, where the beneficiary is in possession of an unrestricted medical license in the state of intended employment, USCIS should approve the petition for the full validity requested even if the unrestricted medical license is due to expire before the end date listed on the petition. This was welcome guidance as, prior to its issuance, USCIS frequently refused to approve H-1B status for physicians beyond the expiration date on the beneficiary's current license.

Note that some states do not require a license for training programs (internship or residency). New Jersey is one example where registration of the trainee physicians by the teaching hospital with the state licensing board is sufficient. An excellent resource for information on state licensure requirements is the Federation of State Medical Boards.[16]

Physician National Interest Waivers

To qualify for a national interest waiver (NIW) pursuant to INA §203(b)(2)(B)(ii), a physician must commit to working for a total of five years as a full-time clinical physician either at a facility operated by the Veteran's Administration or in an HHS-designated Medically Underserved Area (MUA)/Health Professional Shortage Area (HPSA).[17] The following are some tips and information on NIW adjudications.

- ***Requirement for a Five Year Employment Contract***. In a 2007 policy memorandum, USCIS confirmed that the NIW petition may be filed at any time before, after or during the five year commitment period and that the five year commitment need not be completed within any specific period of time.[18] However, the regulations still require the submission of

[15] USCIS Memorandum, B. Velarde, "Requirements for H-1B Beneficiaries Seeking to Practice in a Health Care Occupation," (May 20, 2009) *published on* AILA InfoNet at Doc. No. 09052766 (*posted* 5/27/09).
[16] http://www.fsmb.org/usmle_eliinitial.html.
[17] To see whether a worksite is in an MUA or HPSA, see http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx.
[18] USCIS memorandum, M. Aytes, "Interim Guidance for adjudicating national interest waiver (NIW) petitions and related adjustment applications for physicians serving in medically underserved areas in light of *Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006)," (Jan. 23, 2007), published on AILA InfoNet at Doc. No. 07021262 (posted 2/12/07).

a five year employment contract with the NIW petition filing.[19] This can present challenges for physicians who may have completed some or all of the qualifying five years of employment before filing the NIW petition. Common sense would indicate that the length of the employment contract need only be five years if the physician had not already completed part of the commitment prior to filing the petition. The literal language of the regulation requires "a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility."[20] In the event that the physician had completed all five years of service before filing the petition, the remaining "required period of clinical service" would be zero and the physician should be able to provide evidence of service completion at the time of filing the I-140 petition instead of an employment contract. In the event that the physician had completed a portion of the service requirement before filing the I-140, the physician should be able to present evidence of the completed portion, together with a signed employment agreement for a term covering the balance of the five years.

Instead, USCIS continues to insist upon an agreement dated within 6 months of filing the NIW petition that either runs for a full five year term, or acknowledges whatever time has already been worked toward the commitment with prior employers. For the physician who is currently working for the same employer with whom he or she began her service commitment, the contract can be amended to extend the term for however long is required to reach a maximum of five years. The contract addendum should have been executed within 6 months prior to the filing of the NIW petition, and should acknowledge the amount of time the physician has already worked for the employer and the fact that the term of the contract is being extended to cover a total of five years of employment.

Physicians who have already completed the full five year term, or who are no longer employed by the employer with whom they began the service commitment should execute an addendum to their current employment contract within 6 months prior to filing the NIW petition in which both parties acknowledge the time the physician previously worked toward completion of the five year commitment. In the alternative, such physicians could file the NIW petition with a new five year contract with an underserved area employer notwithstanding that some or all of the qualifying five years of employment was completed before filing the NIW petition. This would not mean that these physicians would have to wait an additional five years to be approved for adjustment of status; USCIS *will* agree to consider the prior employment evidence in the context of the adjustment of status application. Upon submission of tax returns, pay stubs and a letter from the prior employer, USCIS will credit the previous time worked toward the five year medical service period required for approval of the I-485. Be sure to document that each location is underserved, or was underserved at the time the physician began practice there. However, at the present time, USCIS will not accept this same evidence in support of the I-140 petition because it does not take the form of a five year contract dated within six months prior to filing the NIW I-140 petition.

[19] 8 CFR§204.12(c)(1).
[20] *Id.*

- ***What Time Counts Toward the Five Year NIW Commitment Period?*** Physicians who are subject to the three year J-1 waiver commitment pursuant to INA §214(l) may count that three years of employment toward completion of a five year NIW commitment. In addition, during an August 2011 National Stakeholder Teleconference on I-140s, USCIS confirmed that physicians who completed U.S. residency or fellowship training in a status other than J-1 may also count that training time toward completion of the five year commitment so long as the training occurred at a location that otherwise qualifies under the statute.

- ***When May the Physician Stop Working at a Qualifying Facility?*** During the August 2011 National Stakeholder Teleconference on I-140s, USCIS confirmed that a physician who has completed the five year qualifying service commitment need not remain employed at a qualifying site until the I-485 is ultimately approved. This is particularly relevant for physicians from India and China who, because of backlogs in immigrant visa availability, may complete their five years of service long before their adjustment of status applications are ultimately approved.

- ***May Specialist Physicians Submit NIW Petitions?*** The physician NIW program was initially limited to primary care physicians (internal medicine, family practice, OB/GYN, pediatrics and psychiatry) unless the physician was to be employed at a Veteran's Administration facility. In 2007, USCIS issued a policy memorandum confirming that specialist physicians working at non-VA facilities are also eligible for a physician NIW, so long as the facility is located in a Physician Scarcity Area (PSA), Health Professional Shortage Area (HPSA) or Medically Underserved Area (MUA).[21]

  While there was some prior confusion among adjudicators as to whether non-VA specialist physicians must work in a PSA in order to qualify for the NIW, the AFM confirms that any physician, including a medical specialist, may count employment in *any* federally designated underserved area (i.e., HPSA, MUA, MUP, or PSA) toward satisfaction of the five year employment period.[22]

- ***What Types of Medical Practitioners Qualify for the NIW Petition?*** An NIW petition under INA §203(b)(2)(B)(ii) may only be filed on behalf of clinical physicians. Dentists, chiropractors, podiatrists, and optometrists do not qualify, although they may meet the evidentiary criteria for a standard NIW petition filed under INA §203(b)(2)(B)(i).

Affiliation-Based Cap Exemption Cases

Under INA §214(g)(5)(A), nonprofit entities that are affiliated with or related to institutions of higher education are exempt from the H-1B numerical cap. USCIS policy with regard to this cap exemption has fluctuated greatly over the last few years. It is essential that AILA attorneys be aware of current trends in order to navigate this area of immigration practice successfully.

[21] *See supra* note 18.
[22] AFM Chapter 22.6(j)(6)(C).

Prior to June 6, 2006

Prior to June 6, 2006, the affiliation exemption presented few issues for practitioners. Without defining the technical elements of the term "affiliation,"[23] USCIS mainly looked to formal affiliation agreements as proof of affiliation, and largely deferred to their contents. Any additional evidence showing affiliation was also considered, with USCIS weighing the totality of the circumstances to determine whether a sufficient affiliation existed for cap exemption.

From June 6, 2006 until March 18, 2011

On June 6, 2006, USCIS published a memorandum instructing adjudicators to apply the affiliation definition found in the H-1B *fee* exemption regulation when determining whether a sufficient affiliation existed for purposes of H-1B *cap* exemption.[24] This provision defines an "affiliated or related nonprofit entity" as follows:

> 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.[25]

With this memorandum, USCIS relayed its intention to apply a significantly more restrictive definition, meeting one of three prongs, namely "shared ownership or control by the same board or federation;" the petitioner being "operated by an institution of higher education," or attachment to an institution of higher education "as a member, branch, cooperative, or subsidiary." Ignoring the reality of how affiliations with institutions of higher education are in fact organized, the new definition clearly excludes numerous organizations that have previously received such exemptions.[26]

Despite the memorandum, requests for evidence and denials based on the new affiliation definition were few and sporadic until late 2010. At that time, USCIS began applying the Aytes Memorandum more rigidly, resulting in numerous RFEs and denials for a lack of affiliation.

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[23] To date, Congress has never specifically defined "affiliated" or "related" with regard to H-1B cap exemption and USCIS has not promulgated regulations defining those terms in the context of cap exemption.

[24] USCIS Memorandum, M. Atyes, "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), *published on* AILA InfoNet at Doc. No. 06060861 (*posted* 6/8/06) (hereinafter "Aytes Memorandum").

[25] 8 CFR §214.2(h)(19)(iii)(B).

[26] The application of the fee exemption definition to the cap exemption provision can be challenged on a number of grounds. *See* "AILA Comments on USCIS Interim Memorandum: Additional Guidance to the Field Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation (PM-602-0037)," published on AILA InfoNet at Doc. No. 11051731 (posted 5/17/11); "Definition of 'Affiliated or Related Nonprofit Entity' for H-1B Cap-Exemption Purposes Under INA §214(g)5(A)," AILA InfoNet Doc. No. 11051067 (*posted* 5/10/11); and AILA amicus curiae brief filed with the AAO on "Affiliated or Related" for H-1B Cap Exemption Purposes, AILA InfoNet Doc. No. 06082566 (*posted* 8/25/06).

Post March 18, 2011

Largely due to pressure from AILA and other organizations, USCIS announced on March 18, 2011 that it was reviewing its policy pertaining to cap exemptions based on affiliation.[27] On April 28, 2011, USCIS released an interim memorandum providing revised guidance on the adjudication of H-1B cap exemption requests based on relation or affiliation.[28] Until the policy review is complete, USCIS will temporarily give deference to prior affiliation determinations made after June 6, 2006, unless there was clear error[29] or a significant change of circumstances[30] has occurred since the prior determination. Organizations that do not qualify for deference will have their affiliation exemptions adjudicated under the Aytes Memorandum definition.[31]

Deference Claims for Affiliation

To qualify for deference, the petitioner is required to show the following:[32]

- *A previously approved Form I-129* – include the H-1B Data Collection and Fee Exemption Supplement that indicates the petition was filed under the affiliation cap exemption.

- *An I-797 approval notice for the petitioner* – ensure that the petition was approved after June 6, 2006. The interim memorandum also instructs adjudicators to try to corroborate prior approvals for deference claims by reviewing the Computer-Linked Application Information Management Systems (CLAIMS).

- *Documentation establishing affiliation* – ensure that this documentation was included in the previously approved petition on which deference is based. If the affiliation agreement that was the basis for the initial determination has now expired, provide a copy of the extended affiliation agreement.

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[27] *See* "H-1B Cap Exemptions Based on Relation or Affiliation," *published on* AILA InfoNet at Doc. No. 11031760 (*posted* 5/24/11).

[28] "Additional Guidance to the Field on Giving Deference to Prior Determinations of H-1B Cap Exemption Based on Affiliation," PM-602-0037 (Apr. 28, 2011), *published on* AILA InfoNet at Doc. No. 11050130 (*posted* 5/1/11).

[29] Per the interim memorandum, clear error includes cases where the organization with which the petitioner is affiliated is not an institution of higher education or where the prior determination of affiliation had been subsequently revoked. A petitioner with at least one approval and one denial (or multiple approvals and denials), would appear to qualify for the cap exemption, if the most recent determination is an approval.

[30] Per the interim memorandum, examples of significant changes include if the organization becomes a for-profit entity, the affiliation agreement has expired, or the petitioner is seeking an exemption based on a different affiliated organization.

[31] Nevertheless, there are still some open questions relating to when deference applies. For example, if a beneficiary is employed *by* a non-qualifying organization *at* an organization qualifying for deference (e.g. an organization determined to be affiliated with an institution of higher education), would the petitioner qualify for deference, since it has no prior determination of its affiliation? Similarly, in a corporate restructure that does not require an H-1B amendment, would USCIS defer to the cap exempt determination of the initial company, if the successor company does not qualify for deference?

[32] Practitioners have, nevertheless, reported RFEs for this documentation, even when such evidence has been submitted. *See* report from CSC Stakeholder Engagement Meeting, Aug. 10, 2011, *published on* AILA InfoNet Doc. No. 11093037 (*posted* 9/30/11).

- *Evidence of the petitioner's continued nonprofit status*.

The above list is not exhaustive. Any additional probative documentation, including a statement from the petitioner should be included, although the petitioner's statement alone would not be enough to qualify for deference.

Non-Deference Claims for Affiliation

Even prior to the deference memorandum, USCIS applied the Aytes Memorandum definition inconsistently. This is reflected in two important AAO decisions. In the first case, known as the "Texas School District" case,[33] the AAO held that a petitioner could still qualify for a cap exemption based on affiliation, even if it did not directly satisfy one of the three prongs outlined in the Aytes definition. The AAO held that the third prong may still be met,[34] if the following requirements were present:

- The petitioner operates a program in collaboration with an institution of higher education;

- The collaboration involves a close relationship with the institution of higher education in accordance with the intent of the third prong (i.e. to "directly and predominantly further the essential purposes of institutions of higher education");

- The beneficiary of the petition is "directly involved in the jointly managed program that directly and predominantly furthers the essential purposes of the institution of higher education"

In the second more recent case,[35] the AAO denied an H-1B petition without applying or even mentioning the more liberal affiliation test established in the Texas School District case. Moreover, it opined that the examination of a "jointly administered program" is only relevant for cases where the beneficiary is employed "at" a cap exempt organization by a third party petitioner. Since this pronouncement is contrary to the third criterion outlined above in the Texas School District test, it is unclear if the intention of the AAO was to dispense solely with this criterion, or with the entire Texas School District test, or whether it even understood the issue presented before the agency.

It is with this inconsistency and confusion that USCIS is currently adjudicating non-deference claims under the Aytes Memorandum since March 18, 2011. Many practitioners have reported denials based on USCIS's literal interpretation of the three prongs, comporting with the 2010 AAO decision. Other practitioners have reported exemption approvals (usually after extensive RFEs) in cases where none of the three prongs had been satisfied literally. In virtually

[33] Matter of *[Name Not Provided], EAC-06-216-52028*, AAO (Sept. 8, 2006), *published on* AILA InfoNet at Doc. No. 06091161 (*posted* 9/11/06).
[34] i.e. attachment to an institution of higher education, but not as a "member, branch, cooperative, or subsidiary" as the Aytes Memorandum definition requires.
[35] Matter of *[Name Not Provided]*, WAC-09-059-50704, AAO Oct. 5, 2010, *published on* AILA InfoNet at Doc. No. 10121432 (*posted* 12/14/10).

all of these cases, evidence of some shared control, joint operations, or significant joint collaboration of programs had been submitted in the "spirit" of the Aytes Memorandum as outlined in the Texas School District case.

If the petitioner meets the narrow requirements of the Aytes Memorandum definition, it should provide corporate documentation evidencing such qualification, including organizing documents. In all cases, the petitioner should provide cogent evidence of its close collaboration with an institution of higher education. Some examples include the institution of higher education having a vote or other important roles in administration of a joint program; common members of the board or shared directors; numerous shared personnel appointments, including faculty appointments; shared funding; joint strategy planning; joint research and education projects; and any additional evidence of a significant close relationship with the institution of higher education. These may be supported by a detailed affiliation agreement. Nevertheless, an affiliation agreement that does not address any shared ownership, control or significant collaboration may not qualify the petitioner for cap exemption as permitted prior to the enforcement of the Aytes Memorandum. Based on the AAO decisions, affiliations based solely on training medical residents, providing forums for student teaching, or providing advanced placement at colleges for high school students are typically regarded as too tenuous for cap exemption purposes based on affiliation.[36]

[36] USCIS also considers an affiliation of two state organizations, both ultimately controlled by the state, as a tenuous, non-qualifying affiliation.