ABCs OF H-1Bs (THIS IS PART VI OF AN VIII PART SERIES): THE H-1B CAP WAS REACHED; DO I STILL HAVE A CHANCE OF GETTING AN H-1B VISA?

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In the first week of April during the last several years the U.S. Citizenship and Immigration Services ("USCIS") announced that it has received a sufficient number of H-1B petitions to reach the statutory cap, both regular and master's. Because of the surge of petitions filed, USCIS conducts a lottery (technically referred as "random selection process"), to determine which petitions received in the five-day submission period, the minimum time USCIS can accept petitions, will actually be considered. USCIS then begins sending receipt notices for the petitions selected in the random selection process.

The H-1B lottery is a very stressful time for thousands of potential H-1B candidates. Until the prospective H-1B employers (or their legal representatives) start receiving receipt notices, and the dark clouds of uncertainty over prospective H-1B visa holders move past, the question worth asking and exploring is: *"Do I still have a chance of getting an H-1B visa even if my H-1B petition does not make it to the H-1B cap?"*

Unfortunately, the regular (bachelor's) H-1B cap remains at 58,200 and the master's cap cannot accommodate more than 20,000 specialty occupation workers. However, there are certain categories of cap-exempt H-1B visas that candidates can look to. One such category is for beneficiaries of employment offers *at*: (1) institutions of higher education or related or affiliated nonprofit entities; or (2) nonprofit research organizations or governmental research organizations. To get a cap- exempt H-1B visa using these categories the fundamental question to ask is: whether the offer of employment is from an institution of higher education, or related or affiliated nonprofit entities, or from nonprofit research organization or governmental research organization.

For the purposes of H-1B cap exemption, the H-1B regulations have adopted the definition of institution of higher education as the definition has been set forth in section 101(a) of the Higher Education Act of 1965. As detailed in our previous article, to be classified as an institution of higher education, the educational institution must satisfy five (5) requirements. First, the educational institute must be a *public or other nonprofit* institution. Second, the master's degree issuing institution must be accredited by a nationally recognized accrediting agency or association. Additionally, the educational institution must satisfy each of the following three requirements: (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; and (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. The previous article in this series discussed in detail which educational institutions may or may not qualify as an institution of higher education. Further guidance was recently provided in a set of regulations that became effective on January 17th, 2017.

Assuming that an academic institution will qualify as an institution of higher education, the next two questions that have perplexed immigration practitioners (and potential H-1B employers are): (1) what is the difference between employed "by" and employed "at"; and (2) how does one

determine if the nonprofit institution is "related to or affiliated with" an institution of higher education.

The 2006 Aytes memo clarified the difference between employed "at" and employed "by", and the purpose behind it. This memo explained that 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 prospective H- 1B beneficiary will perform all or a portion of the job duties "at" a qualifying institution. Such petitioners are referred to as "third party petitioners".

Thus, USCIS allows an exemption in situations where the employee is employed by a "third party petitioner" but the prospective H-1B employee will perform job duties at a qualifying institution that directly and predominately furthers the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education, or nonprofit research organization, or governmental research organization. Thus, if the 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 this context, the issue that has been source of frequent litigation is: "How to determine whether the nonprofit institution is "related to or affiliated with" the institution of higher education?" The Administrative Appeals Office ("AAO"), a component of USCIS, has always deferred to the USCIS approach as to whether the nonprofit institution is related to or affiliated with the institution of higher education. According to USCIS policy, the definition of related or affiliated nonprofit entity that should be applied can be found at 8 C.F.R. § 214.2(h)(19)(iii)(B). In particular, USCIS takes into consideration the following definition: "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."

Per new 2017 guidance, The term "related or affiliated nonprofit entity" is defined, both for ACWIA fee (**8 CFR §214.2(h)(19)(iii)(B**) and cap exemption purposes, to include nonprofit entities that satisfy any one of the following conditions: (1) the non-profit is connected or associated with an institution of higher education through shared ownership or control by the same board or federation; (2) the non-profit is operated by an institution of higher education; (3) the non-profit is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or (4) the non-profit has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship with the institution of higher education for the purposes of research or education; and a fundamental activity of the non-profit is to directly contribute to the research or education mission of the institution of higher education.

The AAO has further interpreted the terms “board” and “federation” as referring specifically to educational bodies such as a board of education, board of regents, etc. Arguing that all public universities and public primary and secondary schools are all nonprofit entities ultimately owned by the State government will not help to fetch the exemption.

However, consider a situation where the primary or secondary school runs a teacher’s certification program in collaboration with a qualifying institution of higher education, and one of the essential purposes of the institution of higher education is to train primary and secondary school teachers. This collaboration could be used to satisfy the third prong that the petitioner is *attached* to an institution of higher education as a member, branch, cooperative, or subsidiary. Thus, individuals involved in such a program could be treated as being H-1B cap exempt. However, such an exemption is limited to the employees of a nonprofit petitioner who are directly involved in the jointly managed program that directly and predominantly furthers the essential purposes of the institution of higher education.

Switching gears from the most hotly contested issue to that of the least contested issue is a focus upon which institution may qualify as a nonprofit research organization or governmental research organization. USCIS always follows the definition as stated in the regulation at 8 C.F.R. 214.2(h)(19)(iii)(C). Specifically, 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. The research, be it basic or applied, includes sciences, social sciences, or the humanities.

In conclusion, to claim H-1B cap exemption under this category, the institution should qualify either as an institution of higher education or as a nonprofit research organization or as a governmental research organization. Even if the petitioner is not an institution of higher education, it may qualify for the exemption if it is “related to or affiliated with” the institution of higher education. In order to be “related to or affiliated with” an institution of higher education, one or more of the following must be satisfied: (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation; (2) The petitioner is operated by an institution of higher education; or (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

Last but not the least; the regulations do not demand that the prospective H-1B employee should be employed “by” an institution of higher education (or related or affiliated nonprofit entities), or nonprofit research organization, or governmental research organization. Even if the H-1B employee is employed by a third-party but s/he performs majority of work “at” (upon) a qualifying institution and that work directly and predominately furthers a primary or essential purpose of the qualifying institution, such an employee will be treated as cap-exempt. Of course, it is likely that we will receive further and additional guidance on these issues in the future.

For more information about the H-1B nonimmigrant work visa process or to consider H-1B nonimmigrant work visa options, the immigration and nationality lawyers and attorneys at the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. invite you to visit them on the web at www.visaserve.com or to email them at info@visaserve.com or to call the firm at 201.670.0006 (x107).