New Regulations Clarify Which Employers Are Exempt From Yearly H-1B Quota

Insights
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On November 18, 2016, the Department of Homeland Security ("DHS") issued its long-awaited rule seeking to improve certain aspects of the employment-based immigration system. The new rule, which becomes effective on January 17, 2017, clarifies several agency policies and procedures that affect U.S. employers who sponsor high-skilled nonimmigrant workers. The rule is intended to increase consistency among agency adjudicators and provide greater stability and job flexibility for certain foreign workers.

One issue that drastically needed clarification is how a nonprofit employer can show that they are "related to or affiliated with" an institution of higher education to qualify for an exemption to the yearly H-1B quota (or "cap"). Under existing law, H-1B nonimmigrant workers are exempt from being counted against the yearly H-1B quota if they are employed with institutions of higher education, a governmental or nonprofit research organization, or a nonprofit entity related to or affiliated with such an institution.

The U.S. Citizenship and Immigration Services ("USCIS") had not provided guidance to nonprofit employers on this topic since its last policy memorandum issued on April 28, 2011. In its 2011 memorandum, USCIS stated that an affiliated or related nonprofit entity must be connected to 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.

As a result, many nonprofit employers that had been considered affiliated with an institution of higher education in the past, but were not owned, operated or controlled by the institution of higher education, found that they no longer qualified for an H-1B exemption. Rather, petitioners seeking an exemption through a claimed affiliation began receiving onerous requests for additional evidence and denials from USCIS Service Center adjudicators based on inconsistent adjudication standards.

The new rule seeks to address these inconsistencies by providing clarity into how "affiliation" can be shown by a formal written agreement between the employer and the institution of higher education. Under the new rule, a nonprofit employer will be considered related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

1. The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;
2. The nonprofit entity is operated by an institution of higher education;
3. The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or
4. The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

By clarifying that a nonprofit employer can qualify for the H-1B cap exemption through a formal written agreement, the new rule gives needed hope to nonprofit employers who failed to qualify under the old 2011 memorandum. Employers no longer must show shared ownership or control by the same board operated by an institution of higher education, or show that they are a member, branch, cooperative, or subsidiary of the institution, to qualify as "related to or affiliated with" an institution of higher education.

To qualify under the new rule, the written affiliation agreement must confirm both of the following:

1. An active working relationship between the nonprofit entity and the institution for the purposes of research or education; and
2. That one of the nonprofit entity's fundamental activities may directly contribute to the research or education mission of the institution.

In enacting the new rule, the agency pointed out that Congress intended to exempt those foreign national workers who would directly contribute to the research or education missions of those institutions. The change makes it clear that nonprofit employers may qualify for the H-1B exemption even if they are engaged in more than one fundamental activity, any one of which may directly contribute to the research or education mission of a qualifying college or university.