




U.S. Citizenship
and Immigration
Services

HQPRD70/23.12
AD06-24

MAY 02 2006

Interoffice Memorandum

To: REGIONAL DIRECTORS
SERVICE CENTER DIRECTORS
NATIONAL BENEFIT CENTER

FROM: Michael Aytes 
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SUBJECT: AFM Update: Chapter 31: H-1B Cap Exemption for Aliens Holding a Master's or Higher Degree from a U.S. Institution. (AD06-24).

This memorandum revises Chapter 31.3 of the *Adjudicator's Field Manual (AFM)*. Chapter 31 pertains to the adjudication of H-1B petitions. This update will be included in the next INSERTS release. 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)(9) to read as follows:

31.3 H-1B Classification and Documentary Requirements

(g) Adjudicative Issues.

(10) H-1B Cap Exemption for Allens Holding A U.S. Master's or Higher Degree.

On December 8, 2004, the President signed the Omnibus Appropriations Act (OAA) for Fiscal Year 2005, Public Law 108-447, 118 Stat. 2809. Among the provisions of OAA is the H-1B Visa Reform Act of 2004. The H-1B Visa Reform Act of 2004 amends section 214(g)(5) of the INA by adding an additional exemption to the H-1B cap. New section 214(g)(5)(C) provides that aliens who have earned a masters' or higher degree from a

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United States institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) are exempt from the H-1B visa cap (up to a maximum of 20,000 per year). Once the 20,000 cap is reached, any employer seeking an alien who possesses a masters' or higher degree will be subject to the 65,000 annual limit for H-1B nonimmigrants unless the alien is eligible for another statutory or regulatory exemption..

When reviewing a petition involving a potential 20,000 cap case, adjudicators should first determine if there is another basis to exempt the alien beneficiary from the 65,000 H-1B cap. For example, if the alien is being petitioned for by an entity described in section 214(g)(5)(A) or (B) of the INA, he or she may be exempt from the annual 65,000 cap, as these provisions do not contain a numerical limit. Similarly, if the employer is simply amending the H-1B petition, seeking an alien for concurrent employment, or is changing employment for an alien who is already in H-1B status, the petition may be approved as a cap-exempt case. Adjudicators should always apply all exemptions that do not contain numerical limitations first before applying the "masters or higher" 20,000 exemption.

(1) U.S. Masters Degree.

In determining whether a U.S. issued degree is a master's degree, adjudicators should consider more than the simple nomenclature of a degree. The fact that a degree is or is not titled as a masters degree is not by itself dispositive. A degree may be titled as "Doctor of ___" but in fact not be a graduate degree at all. For example, in the field of Chiropractic, the entry-level degree is "Doctor of Chiropractic" and a bachelors degree in any field is not required prior to obtaining that degree. On the other hand, attorneys typically hold a "juris doctor" degree, and medical doctors hold a similar "doctor of medicine" degree. Prior to earning either the J.D. or M.D. degree, the holder must first earn at least a bachelors degree in some field. Accordingly, while neither degree is likely equivalent to a Ph.D., a J.D. or M.D. degree would be considered to be equivalent to, if not higher than, a masters degree.

Thus, adjudicators should consider the place that the claimed "masters" degree holds on the academic hierarchy of degrees. Specifically, in order to qualify as a masters degree so as to meet the cap exemption requirement, the degree must be one for which a bachelors degree in any field is required in order to obtain the "masters" degree. This ensures that the "masters" degree is a degree that is at least one level higher than a bachelor's degree, which is the essential component of a "masters or higher" degree.

(2) Qualifying Institution

In addition to meeting the above standard, the claimed masters degree must be issued

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from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965. That section provides as follows:

For purposes of this chapter, other than subchapter IV and part C of subchapter I of chapter 34 of Title 42, 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 pre-accreditation status by such an agency or association that has been recognized by the Secretary for the granting of pre-accreditation 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.

In order to obtain the H-1B cap exemption for a U.S. Masters' degree or higher, both # 1 (qualifying "masters" degree) and # 2 (qualifying U.S. institution) must be met.

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

AD XX-XX Chapter 31.3
[INSERT
SIGNATURE
DATE]

Adds guidance relating to the H-1B cap exemption for aliens holding master's or higher degrees from a U.S. institution of higher learning.