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# DHS Codifies and Clarifies the Parameters of Cap-Exempt H-1B Employment

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In a final regulation published on November 18, 2016 which takes effect on January 17, 2017, DHS has clarified the requirements and parameters associated with cap-exempt employment of H-1B workers by nonprofit entities that are affiliated with or related to an institution of higher education or other cap-exempt institutions. This final regulation also clarifies that governmental research organizations, also exempt from the H-1B cap, include federal, state and local organizations whose primary mission is the performance or promotion of basic or applied research.

**Proving Affiliation with Cap-exempt Institution in Order to Claim an Exemption from the H-1B Quota**

Until publication of this new regulation, there were three different ways that a nonprofit entity could demonstrate affiliation with an institution of higher education or other cap-exempt institutions such as a non-profit research institution or government research institution in order to seek exemption from the cap: (1) by showing it is connected to the educational institution through shared ownership or control by the same board or federation; (2) by showing it is operated by an institution of higher education; or (3) by showing it is attached to an institution of higher education as a member, branch, cooperative or subsidiary.

This new regulation introduces and formalizes a fourth option to claim the exemption. A non-profit can claim the exemption from the H-1B quota by demonstrating that it 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 for the purposes of research or education, and that a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

The language above represents a change and a liberalization of the rule as originally proposed, which would have required the nonprofit entity to show that a “primary purpose” of the entity is to directly contribute to the educational or research mission of the institution of higher education. By removing “primary purpose” and substituting “a fundamental activity”, DHS expects more nonprofit entities to be able to take advantage of the exemption. In the commentary preceding the regulation, DHS has clarified that a nonprofit can take advantage of the exemption if it is engaged in more than one fundamental activity, so long as at least one of these fundamental activities is to directly contribute to the research or education mission of a qualifying college or university.

**Clarification of How Much Time the H-1B Worker Must Spend at the Qualifying Institution**

The regulation clarifies that an H-1B worker who is not directly employed by a qualifying institution or organization qualifies for exemption from the H-1B quota if he or she will spend the majority of his or her work time performing job duties at a qualifying organization and if those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution or organization. The regulation further states that the burden is on the H-1B petitioner to establish that there is a nexus between the duties to be performed by the H-1B beneficiary and the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity.

**Clarification Regarding Concurrent H-1B Employment**

The regulation codifies the existing practice and policy that authorizes concurrent H-1B employment in a cap-subject position of an individual who is the beneficiary of an approved cap-exempt H-1B petition. The regulation confirms that a cap-subject employer seeking to take advantage of the H-1B quota exemption must demonstrate to USCIS that the H-1B beneficiary is employed in valid H-1B status with a cap-exempt employer and that the employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and that the H-1B beneficiary can reasonably and concurrently perform

the work described in each employer's visa petition.

**What Happens If Cap-exempt Employment Ceases?**

The regulation clarifies that if cap-exempt employment ceases, and the H-1B worker is not the beneficiary of a new cap-exempt petition, then the person becomes subject to the cap if he/she was not previously counted within the 6-year period of authorized admission to which the cap-exempt employment applied. DHS further clarifies that if cap-exempt employment converts to cap-subject employment, USCIS may revoke the petition. In this regulation, DHS did not say that the cap-subject H-1B petition approval automatically becomes void if an H-1B beneficiary ceases employment with the cap-exempt employer. Instead, DHS said that if the cap-exempt employment ceases, USCIS "may revoke" the cap-subject petition. Until such a revocation occurs, the cap-subject employment that benefitted from the exemption continues to be authorized. Under these circumstances it is prudent for the cap-subject employer to file an H-1B visa petition under the quota for the H-1B beneficiary.

**Definition of "Governmental Research Organization"**

In this final rule, DHS clarifies that a governmental research organization which can claim exemption from the H-1B quota includes not only federal research organizations but also state and local organizations whose primary mission is the performance or promotion of basic and/or applied research.

**Claiming Exemption from the ACWIA H-1B Filing Fee**

The final regulation clarifies that an employer claiming to be exempt from the ACWIA H-1B filing fee on the basis that it is a non-profit research organization must submit evidence that it has tax exempt status under IRS Code of 1986 section 501(c)(3) or (c)(4). All other employers claiming to be exempt must simply submit a statement describing why the organization is exempt.

## Authors

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