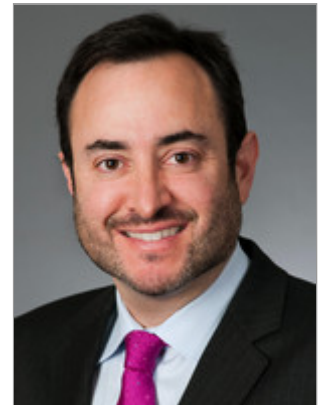


# An Expansion Of H-1B Quota Exemptions For Nonprofits

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Law360, New York (January 18, 2017, 2:01 PM EST) -- A new immigration regulation went into effect on Jan. 17, 2017, expanding the types of U.S. nonprofits that are exempt from the annual H-1B visa quota and making this coveted U.S. work permit more accessible year round.[1]

The H-1B visa program permits U.S. employers to hire foreign professionals in the United States for up to six years and sometimes longer. The program is an invaluable means for employers seeking to complement their U.S. workforces with key foreign talent. Unfortunately, the program is inaccessible to many employers because the demand for visas far exceeds the annual quota of approximately 85,000. In 2000, Congress passed the American Competitiveness in the Twenty-first Century Act (AC21),[2] which, among other things, exempts most U.S. institutions of higher education[3] (hereinafter referred to as "universities") and certain other nonprofits from the annual quota in order to ensure these employers have reliable access to international specialists when filling professional positions.



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AC21 generally exempts two types of U.S. nonprofit[4] organizations from the annual H-1B quota: research nonprofits[5] and nonprofits related to or affiliated with a U.S. university.[6] The statute does not define what types of university relationships nonprofits must have to qualify for the quota exemption. U.S. Citizenship and Immigration Services published policy guidance in 2006 clarifying that the agency interprets "affiliated" and "related" the same way it defines these terms in its regulations exempting nonprofits from certain government filing fees.[7]

The 2006 guidance provides that a nonprofit is considered related to or affiliated with a university if the nonprofit "is 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." [8]

This narrow definition has precluded many independently governed and operating nonprofits from qualifying for the H-1B quota exemption. It has also made the H-1B petition process less predictable for nonprofits seeking to show they have the requisite "attachment" to a university. Over the past 15 years, our clients have experienced inconsistent adjudications from USCIS on cap-exempt H-1B petitions for nonprofit organizations. In some cases this has forced such organizations to jettison top candidates in favor of individuals with inferior expertise but who do not require H-1B sponsorship. This not only prevents the nonprofit from obtaining the best employees, but it also diminishes the value the nonprofit can provide to the affiliated university(ies) it seeks to support.

In promulgating its new regulation, USCIS explicitly recognized this challenge and the need to expand the kinds of university affiliations nonprofits can show to obtain an exemption from the H-1B quota. In discussing the changes made by the new regulation, USCIS provided, "This proposed

path to eligibility for the [H-1B] cap ... which is not available under current policy, was intended to expand eligibility to nonprofit entities that maintain common, bona fide affiliations with institutions of higher education.”[9]

Under the new regulation, a nonprofit will be deemed to have the requisite relationship or affiliation with a university, and will be exempt from the annual H-1B visa quota, if it meets any one of the following four 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.[10]

The first three of the above criteria are consistent with USCIS’s prior guidance. It is with the fourth criterion that USCIS has meaningfully expanded the pool of university-affiliated nonprofits that are eligible to apply for an exemption from the H-1B quota. There are two key components to the new criterion:

- **Written affiliation agreement:** USCIS requires that there be a formal, written understanding between the nonprofit and the university, allowing USCIS to ensure the institutions are adequately affiliated in a meaningful way and that the nonprofit will directly further the educational or research mission of the university.[11] These written agreements would thus provide USCIS with evidence that the nonprofit entities “maintain common, bona fide affiliations with institutions of higher education.”[12]
- **A fundamental activity of the nonprofit:** USCIS discussed this key element during the rulemaking process. Initially, USCIS proposed that “a primary purpose” of the nonprofit must be to contribute directly to the educational or research mission of the university. After receiving comments that the “a primary purpose” requirement would make the rule too restrictive, the final rule requires only that “a fundamental activity”[13] of the nonprofit be to support the research or educational mission of the university. In doing so the agency sought to clarify that “nonprofit entities may qualify for the cap ... exemptions even if they are engaged in more than one fundamental activity, any one of which may contribute to the research or educational mission of a qualifying college or university.”[14] This change in language from the proposed rule to the final rule should greatly expand the number of nonprofits eligible for H-1B cap exemption since USCIS is explicitly recognizing that the nonprofit’s relationship with a university need not be a “purpose” of the nonprofit at all, let alone a “primary” purpose. A nonprofit need only show that among its important or essential[15] activities is the affiliation(s) it has with universities in supporting their research or educational mission(s).

It is important to note that many nonprofits engaged in basic or applied research are already exempt from the H-1B quota, regardless of their affiliation with universities.[16] Where the new regulation, and the more expansive definition of “related to or affiliated with,” is most likely to have an impact is on nonprofits that partner with universities to provide educational opportunities to students. Many college curriculums provide, if not require, opportunities for students to gain practical experience related to their academic majors. Nonprofit organizations are often key sources of college internships and practicums. As a result, many universities have entered into

affiliation agreements with nonprofits capable of providing the kind of practical experience these institutions seek for their students. Under the new regulation, these educationally supportive nonprofits may qualify for an exemption from the H-1B quota if they are able to demonstrate that university relationships are an ongoing and important activity of the nonprofit.

Finally, the new regulation clarifies that there may be instances where a petition on behalf of an H-1B worker is exempt from the annual quota even where the individual will not be employed directly by a qualifying cap-exempt entity.[17] Specifically, even where the employer filing the petition is cap-subject — including private, for-profit employers — if the petitioning employer can demonstrate the H-1B worker will spend the majority of his or her time at the cap-exempt employer and will perform duties that “directly and predominantly further the essential purpose, mission, objectives or functions” of the cap-exempt employer, then an exemption from the H-1B quota may be available.[18]

For example, a nonprofit nursing home qualifies as cap-exempt because of agreements with a local nursing college to provide ongoing practical training opportunities to its nursing students. The nursing home contracts with a for-profit physicians’ group to supply the nursing home with a qualified physician — a foreign national — who will supervise the nursing staff. If the physicians’ group is able to demonstrate that the physician will spend the majority of his time at the nursing home furthering the educational activities provided by the nursing home, then the physicians’ group may seek an exemption from the annual quota when filing its H-1B petition on behalf of the foreign physician.

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[1] 81 Fed. Reg. 82398 (Nov. 18, 2016).

[2] American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106-313, 114 Stat. 1251 (Oct. 17, 2000).

[3] Institution of higher education has the same definition as described in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)). See 8 CFR 214.2(h)(8)(ii)(F)(1).

[4] AC21 defines nonprofit to mean entities organized under section 501(c)(3),(4), or (5) of the U.S. Internal Revenue Code and approved as tax exempt for research or educational purposes. See 8 CFR 214.2(h)(8)(ii)(F)(3), referring to 8 CFR 214.2(h)(19)(iv).

[5] A research nonprofit, along with a governmental research organization (which is also exempt from the annual quota), is defined as “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. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes or services. It may include research and investigation in the sciences, social sciences or humanities.” See 8 CFR 214.2(h)(19)(iii)(C).

[6] INA §214(g)(5)(A).

[7] USCIS Interoffice Memorandum HQPRD 70/23.12 entitled "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, Michael Aytes, Associate Director for Domestic Operations. See also former 8 CFR 214.2(h)(19)(iii)(B).

[8] Id.

[9] 81 Fed. Reg. 82398, 82445.

[10] 8 CFR §214.2(h)(8)(ii)(F)(2).

[11] 81 Fed. Reg. at 82444.

[12] Id. at 82445.

[13] Id. See also 8 CFR 214.2(h)(8)(ii)(F)(2)(iv) and (h)(19)(iii)(B)(4).

[14] Id. at 82444.

[15] <http://www.dictionary.com/browse/fundamental?s=t>

[16] 8 CFR 214.2(h)(8)(ii)(F)(3).

[17] 8 CFR 214.2(h)(8)(ii)(F)(4).

[18] Id.