



New DHS Rule Extends H-1B Cap Exemptions

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One of the biggest drawbacks for employers trying to utilize the H-1B visa program is the numerical cap. The current law limits the number of H-1B visas available to 65,000 annually with an additional 20,000 available to those with a U.S. Master's Degree. USCIS regularly receives more than triple the cap number in H-1B petitions each year, resulting in the implementation of a random lottery system to determine who receives a visa. Despite the odds, the H-1B continues to be the visa classification of choice for many employers due to the advantages it provides for foreign national employees working in professional positions. A new Department of Homeland Security ("DHS") As of January 17, 2017, a regulation has gone into effect that will extend cap exemptions to additional entities that are affiliated with or related to institutions of higher education, removing one of the biggest hurdles of the H-1B process for certain employers.

H-1B cap-exempt employers include institutions of higher education and nonprofit entities, nonprofit research organizations, and governmental research organizations related to or affiliated with an institution of higher education. In the past, to qualify as a cap-exempt entity affiliated or related to an institution of higher education, the organization had to demonstrate either (1) shared ownership or control with the institution of higher education, (2) operation by the institution of higher education, or (3) a qualifying corporate relationship between the institution of higher education and the affiliated entity (such as a parent-subsidiary or branch relationship). The common ownership/operation requirement often proved too onerous, limiting the cap exemption's utility.

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Under the new rule, an entity can take advantage of cap exemption by entering 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 purpose of research or education, if a fundamental activity of the affiliate is to directly contribute to the research or educational mission of the higher education institution. Institutions of higher education are typically party to dozens of various types of affiliation agreements, and the new cap exemption option could help a large number of affiliates avoid the H-1B cap. Those affected by the new rule might include school districts and private non-profit schools, which have traditionally been subject to the H-1B cap. One typical arrangement that might qualify an affiliate for cap exempt status is an agreement by an institution of higher education to accept coursework completed at an affiliate high school for college credit.

Cap-exempt status provides a number of practical advantages. Initially, it guarantees qualifying entities adjudication of their H-1B petition (versus rejection due to cap issues), which allows employers to more easily evaluate future labor needs and limit legal expenses associated with preparing multiple immigration petitions. Beneficiaries of an approved cap-exempt H-1B petition are also permitted to begin work immediately upon approval, while cap-subject beneficiaries cannot begin work until October 1 when the new H-1B fiscal year begins. Cap-exempt employers can also file their petitions at any time throughout the year. Cap exemption may also provide protection from any further limitation of the H-1B classification by the incoming Trump administration.

For questions on the new H-1B cap exemption rule or for advice on other immigration matters, please contact the authors of this alert, Melissa L. Azallion and Jonathan C. Eggert, from McNair's immigration team at (843) 785-2171.