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**H-1B cap exception: “employment by” a cap-exempt institution, or “employment at” a cap exempt organization**

H-1B visa petitions are filed by U.S. employers seeking to hire foreign nationals in specialty occupations involving the theoretical and practical application of a body of “specialized knowledge” (such as the sciences, medicine and health care, education, biotechnology). The minimum requirement for the foreign national is a bachelor’s degree or the equivalent work experience (or a combination of education and work experience). Employers must pay at least the fair prevailing wage for the job.

Under the immigration laws, visas for professional specialty workers are capped at 65,000 per fiscal year. Another 20,000 visas are available to workers with advanced degrees (master’s or higher) obtained at U.S. institutions of higher education. Of the total 85,000 H-1B visas available, some 6,800 “H-1B1” visas are set aside each year for nationals of Chile and Singapore (a maximum of 1,400 for Chile and 5,400 for Singapore).

U.S. employers are allowed to file H-1B petitions which are subject to the annual cap six months in advance of the start of the fiscal year. The fiscal year commences on October 1, and so six months in advance is April 1. For the past several fiscal years, US Citizenship and Immigration Services (USCIS) has received far more than 85,000 H-1B petitions on April 1, causing USCIS to shut off the accepting of additional petitions the first week of April and then conducting a lottery for the lucky 85,000 winners. In April 2014, USCIS received 172,500 petitions during the week of April 1-5, and in April 2015 USCIS received 233,000 petitions during the week of April 1-5, thus creating only a 37% chance of winning the H-1B lottery.

While the vast majority of H-1B applicants are subject to the cap, some H-1B petitions can always be filed because they are exempt from the numerical cap. These include petitions for physicians with certain J waivers, as well as petitions filed by institutions of higher education or related or affiliated nonprofit entities, by nonprofit research organizations, or by governmental research organizations—collectively known as “cap-exempt organizations”. Also, petitions filed on behalf of current H-1B workers who have previously been counted against the cap are not counted again. This means H-1B petitions for extension of status, change of employers, or concurrent H-1B employment may be submitted at any time if the foreign national beneficiary has already been counted against an annual H-1B cap.

**There are two ways that all U.S. employers are allowed to file for a cap-exempt H-1B even if there are no H-1Bs available under the cap:**

1. **“Employed by” a cap-exempt organization.** USCIS regulations state that if an individual already is employed under a cap-exempt H-1B by a cap-exempt organization, then any other employer may immediately petition for its own cap-exempt H-1B to be concurrent with the cap-exempt organization’s H-1B. For example, Employer A wants to hire a software engineer from India (“Employee”) but the Employee has never before been counted against the H-1B cap, the H-1B cap has been reached, and there are no H-1Bs available. The employer cannot wait until the following October 1 for the Employee to start. If Employer A or the Employee can find a cap-exempt organization (a university, a non-profit affiliated with a university, a non-profit research organization, or a government research organization) to sponsor the Employee for a part-time H-1B for as little as 5-10 hours, then as soon as this cap-exempt H-1B is approved and the Employee is inside the U.S. in H-1B status, then Employer A may piggy-back on top of this cap-exempt H-1B petition and file its own cap-exempt H-1B petition for the Employee to immediately work full time for Employer A (concurrently with the part-time H-1B held by the cap-exempt organization). This is permitted by law even though otherwise Employer A would have had to wait for the next April 1 to file, hope it wins the H-1B lottery, and then wait until October 1 for the Employee to start. It is interesting to note that USCIS has stated that once the two concurrent H-1B petitions have been approved, should the foreign national cease to be employed by the cap-exempt organization, the private company who received the approved H-1B by virtue of piggy-backing on the cap-exempt H-1B may continue to keep its cap-exempt H-1B in place until the expiration date. USCIS reminds these employers that the employee still has not been counted against a cap, and thus the danger of no longer working for the original cap-exempt organization is that an extension of the second H-1B is not possible (unless the foreign national employee is in fact counted against annual cap in the next two H-1B lotteries).
2. **“Employed at” a cap-exempt organization**. USCIS recognizes that Congress chose to exempt from the numerical limitations of the H-1B cap certain foreign nationals who are employed “at” a qualifying institution, which is a broader category than foreign nationals employed “by” a qualifying institution. USCIS interprets the statutory language as reflective of Congressional intent that certain foreign nationals who are not employed directly by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominately furthers the essential purposes of the qualifying institution.

Thus, USCIS allows all U.S. employers to directly file a cap-exempt H-1B petition if the foreign national worker is physically placed at a cap-exempt institution, and if the work being done by the foreign national H-1B worker will **directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research.** The U.S. employer directly filing a cap-exempt H-1B petition because the employee will be “employed at” a qualifying institution must be able to prove a logical nexus between the work performed predominately by the beneficiary and the normal, primary, or essential work performed by the qualifying institution. In many instances, these employers seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency, but this is not required.

For example, Employer A is a start-up company who is willing to place a prospective H-1B employee at a university’s innovation center for entrepreneurs. This is welcomed by the university because part of its mission and/or objectives is to create an entrepreneurial environment where students can combine critical thinking with practical experience to create their own start-up businesses, and the university sees a nice fit between the start-up’s presence on campus and the university’s mission and/or objectives. Thus Employer A is permitted to directly file a cap-exempt H-1B petition for the employee, and the employee will be employed by Employer A and will be employed at the university.

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