

# FAQ: H-1B and Cap Exempt Organizations

## Can you Benefit from the H-1B Cap-Exemption?

The H-1B cap is one of the current greatest concerns and challenges for employers seeking to hire professional foreign nationals. Employers are challenged by the limited (capped) number of H-1B visas available and the oversubscribed demand for these visas (the cap is typically reached within the first five days of filing).

However, many employers and foreign nationals do not know that there are important H-1B cap-exempt options for certain employers. The cap-exemption status allows employers to save money in filing fees, by-pass the cap and file an H-1B at any time of the year.

This article provides an outline of these cap-exempt options to help employers increase their chances of hiring talented H-1B candidates.

## There are two main types of H-1B cap-exemptions:

- 1) Cap-exempt candidates such as those that were counted by the cap already when they obtained a prior H-1B petition; and
- 2) Cap-exempt employers.

This article will focus on the latter.

## Who are the cap-exempt qualifying employers?

- Institutions of Higher Ed (IHE)
- Nonprofit entities related to or affiliated with an IHE
- Nonprofit research organizations and
- Governmental research organizations

Certain for-profit third-party entities which are typically non-qualifying employers can also benefit from the cap-exemption if the H-1B employee will be working “at” a qualifying institution. These employers are also exempted from the ACWIA fee which is \$1,500 or \$750, depending on the size of the employers’ workforce. I provide more information on this option below.

## Who Qualifies as Institutions of Higher Education (IHE)?

Institutions of Higher Education (IHE) are those that:

- Admit students who have completed secondary education.
- Are licensed to provide education beyond secondary school.
- Provide educational programs for which they award bachelors' degrees or provide programs of not less than 2 years that are acceptable for full credit toward bachelors' degrees.
- Are a public or nonprofit institution.
- Are accredited or been granted pre-accreditation status by a recognized accrediting agency.

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Each of these qualifications must be satisfied and supported with evidence. Public secondary schools do not qualify as cap-exempt for H1B unless they have a formal affiliation with a college or University.

### **Who Qualifies as Nonprofit Entities related to or affiliated with an IHE?**

They are those that are connected to an IHE through:

- 1) Shared ownership or control;
- 2) Operation by the same board or foundation; or
- 3) Attached as a member, branch or subsidiary.

This exemption also applies to certain H-1B workers employed by a third party for-profit entity who are working at a cap-exempt location. Their work must serve the core mission of the exempt institution. For example, a physicians' practice group affiliated with and located at a university teaching hospital could qualify for this exemption.

### **Who Qualifies as a Nonprofit Research Organization?**

They are those that are primarily engaged in basic and/or applied research. *Primarily engaged* is interpreted as the entity's main purpose for operating is research.

**“Basic research”** is general research to gain knowledge of a subject without specific applications in mind or immediate commercial objectives. **“Applied research”** is research to gain knowledge or understanding of how a specific need may be met. It includes investigations to discover new scientific knowledge with specific commercial objectives relating to products, processes or services. Both basic and applied research may include research in the sciences, social sciences, or humanities.

### **How do you establish that a Nonprofit Entity is affiliated with an IHE?**

The supporting documentation should include evidence of the following:

- The nonprofit status of the nonprofit employer such as the IRS letter granting tax exempt status;
- The IHE accreditation as a college or university;
- The nonprofit's affiliation with the IHE such as the affiliation agreement, contract or MOU.

For example, a nonprofit hospital affiliated with a medical school should submit letters from the IHE confirming the affiliation, faculty appointments of physicians working for the nonprofit, evidence of joint collaboration on projects to support the medical training, appointment of the nonprofit physicians to joint standing committees, and other collaborative activities.

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### **How do you establish that third party for-profit entity is cap-exempt because the H-1B worker is “employed at” an exempt entity?**

Third party for-profit employers can gain the benefit of cap-exemption when the H-1B employee will work “at” a qualifying institution.

The supporting documentation must include evidence that the H-1B employee will perform duties at the qualifying institution that “directly and predominantly further the normal, primary or essential purpose of the qualifying institution.” This should include evidence that the H-1B employee’s duties will include teaching medical students, evaluating students’ work and developing the qualifying entity’s programs.

If you believe that you may qualify for H-1B cap-exempt status, please contact the Marks Gray Immigration team via email so that we may conduct a full analysis to ensure your time, resources and chances of success are maximized.

The Marks Gray Immigration Team led by **Giselle Carson** looks forward to assisting you.

To Schedule an analysis, please email [ImmigrationGroup@marksgray.com](mailto:ImmigrationGroup@marksgray.com).