

August 16, 2023

Submitted via public.engagement@uscis.dhs.gov

Ur Mendoza Jaddou
Director, U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security
Washington, DC 20529

Re: H-1B cap exemptions under current law and regulation, to facilitate collaboration between nonprofit, academic, and industry partners

Dear Director Jaddou,

The Global Entrepreneur-in-Residence (GEIR) National Peer Network includes initiatives and communities looking to build networks of immigrant founders, entrepreneurs, and STEM professionals working in the collaboration spaces between entities subject and not subject to H-1B numerical limits. Such collaboration can be key to developing welcoming communities across the country. Active long-time members of the GEIR National Peer Network include groups in Cincinnati, Cleveland, Detroit, Grand Rapids, and Washington, DC along with programs at three universities, Babson, Michigan Tech, and UMass-Boston, advocates working on related activities, and legal advisors, many of whom are the signatories to this letter.

We have been meeting regularly over the last year, and informally in various groupings over the last decade, and are writing you with some inquiries related to your agency's activities that touch on our priority: policies that can attract and retain immigrant startup entrepreneurs and STEM experts. Our impetus for writing today is simple and three-fold:

First, the H-1B lottery results in March 2023 significantly raised the profile of efforts to [game the system to increase odds of being selected](#), and correspondingly, we expect, to find new ways to use H-1B cap exemptions. Compliant organizations and activities focused on the applicable, albeit narrow, exemptions Congress established should not be crowded out or negatively impacted by new actors that either intentionally or inadvertently do not follow or understand restrictions on H-1B cap exemptions.

Second, universities are engaging their communities more often and returning to their roots as [engines of regional economic growth](#), especially in the context of increasing deployment of federal funds in support of regional economic development efforts and boosting innovation across the United States. For example, the Build Back Better Regional Challenge, NSF Engines, and Commerce's Regional Innovation Hubs each present such opportunities for universities. The State of California's July 2023 announcement of a [state-funded "UC Global Entrepreneurs"](#) program and the State of Michigan's July 2022 announcement of a program to [support international entrepreneurs across Michigan cities through a state-funded grant](#) (p. 148) to a nonprofit show that H-1B cap exemptions will be increasingly relevant to facilitating

coordination between higher education institutions and nonprofits, companies, and international STEM talent.

Third, the Biden Administration has made clear its commitment to implementing current law in ways to [attract global talent to strengthen our economy and technological competitiveness, and benefit working people and communities all across the country](#). Use of the H-1B cap exemptions identified by Congress to facilitate collaboration is key to such efforts.

For these three reasons, we request answers to the following questions below that will, we hope, confirm the guard rails on how H-1B cap exemptions are used in compliance with existing law and regulation:

1. Operational roles. To date, entrepreneurs employed by a university have had job descriptions in approved H-1B cap-exempt petitions with job duties focused on expanding access to entrepreneurial education or training other university community members as entrepreneurs. Can the agency confirm that an operational role that supports one of the fundamental activities of a university also can be an approved use of the cap-exemption, such as a Chief Financial Officer for a unit of a university, presuming the role was a qualifying specialty occupation?
2. Managing an innovation district. When a 501(c)(3) nonprofit entity runs an innovation district with university leadership serving on the board of the innovation district, can the agency confirm there is no requirement for additional operational collaboration between the university and innovation district beyond managing and directing the entity in order to qualify for H-1B cap exemption? Can USCIS also verify that the university need not be geographically located within the innovation district?
3. Type of IRS-designated nonprofit. With regard to running an innovation district that includes a university leadership role, the nonprofit entity could also be structured as a business league or through a chamber of commerce under 501(c)(6). Can USCIS confirm that adjudicators are aware that such business, trade, or commerce nonprofits may be involved in cap-exempt affiliations and that, as stated in the agency's regulations, there is no distinction among the types of nonprofit designation granted by the IRS, when the agency is considering an H-1B cap exemption?
4. Creation of collaborative relationships. Can USCIS verify that no particular period of months of prior collaboration is necessary to confirm the validity of a relationship between a university and an affiliated nonprofit as appropriate for enabling use of the cap-exempt H-1B pathway?
5. State and local government role. As universities are increasingly being leveraged as key drivers of talent and research commercialization within regional economic development frameworks, can the agency confirm it is proper for city and state

governments to file H-1B cap-exempt petitions when they work to attract and retain immigrant entrepreneurs by partnering either with a university or an affiliated research nonprofit to drive American job creation? Relatedly, can USCIS confirm that to claim cap-exempt status as a state or local government research entity, the state or local government need only explain and document the existence of a research component as opposed to a separate entity with a separate FEIN?

6. State and local government economic development affiliations with institutions of higher education. We understand that USCIS's current interpretation of regulations is often best reflected in the preamble explanation of the relevant regulation governing an issue. When a state or local governmental agency is tasked with driving job creation and economic development and affiliates with a university to do so, can USCIS confirm that a state or local government agency can itself be a qualifying affiliate with a local higher education institution, qualifying as an affiliated cap-exempt entity under the agency's [preamble explanation of the current affiliation final rule](#) (published November 18, 2016)? Likewise, can the agency verify that it does not matter if the economic development agency is itself a public-private partnership instead of a purely public entity?
7. For-profit companies. If a for-profit corporation is involved in the governance of either a university-controlled entity, such as a collaborative entrepreneurship center or a research collaboration, or plays a role in funding or managing a research nonprofit, and is in compliance with IRS rules concerning contributions to, relationships with, or management of nonprofits, can USCIS confirm that the fact of involvement of a for-profit company does not itself impact the eligibility of the research nonprofit or university-controlled entity for H-1B cap exemption?
8. For-profits and research translation as connected to other activities. If a for-profit corporation sets up and controls the board and management of a nonprofit for the purpose of advancing the research, development, and commercialization of promising technology and entrepreneurs in partnership with several universities, can USCIS confirm that the role of the for-profit entity does not impinge on the eligible affiliation between the nonprofit and the universities for H-1B cap exempt petitions? Likewise, if the nonprofit accepts philanthropic contributions to fund grants that support low-income American-born entrepreneurs launching new entrepreneurial ventures tied to promising technologies, can USCIS verify that the role of the for-profit in managing the nonprofit does not impact the eligibility for H-1B cap exemption?
9. Nonprofit organizations that have outsourced some payroll and management functions. Increasingly, nonprofits are turning to arrangements such as the use of Professional Employer Organizations (PEOs) that specialize in management, whereby, for example, payroll and human resource functions are handled by the PEO. As such, the paychecks and tax documents may have the taxpayer ID number

of the PEO or other entity. Can the agency clarify that contracting for payroll, management or human resources functions does not affect the ability of a nonprofit to qualify as a cap-exempt employer, presuming all other regulatory requirements are met (either for engaging in research or as an affiliated entity)?

10. Qualifying employment and source of nonprofit funding. Nonprofits receive funding from many sources, including those nonprofits that may engage in research and be cap-exempt or those that affiliate with either universities or nonprofit research enterprises and therefore may request H-1B cap exemption. Can USCIS confirm that under the agency's regulations there is no qualifying employment relationship with the employer filing an H-1B petition, including nonprofits that regularly accept donations, if the H-1B beneficiary makes financial contributions to the employer or otherwise covers the wages or employer costs of the H-1B employment?

We understand that some of these questions may implicate issues that the agency cannot answer outside of the notice and comment rulemaking process to set policy. We are uncertain on how to define the line between policy-making and policy-explaining, but we hope that at least parts of each of these inquiries provide an opportunity for USCIS to provide more clarity about an area of increased relevance in 2023 with regard to current law and regulations.

Respectfully submitted,

Jim Baker, Associate Vice President for Research, Michigan Technological University
Dan Berger, immigration attorney
Cincinnati Compass
Federal City Council
Global Cleveland
Global Detroit
Fiona McEntee, immigration attorney
Open Avenues Foundation
Tahmina Watson, immigration attorney
Stephen Yale-Loehr, Professor of Immigration Law Practice, Cornell Law School

Cc: Douglas B. Rand, Senior Advisor to the Director
Leah L. Rogal, Senior Advisor to the Chief, Office of Policy & Strategy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Camp Springs, MD 20588-0009



U.S. Citizenship
and Immigration
Services

October 18, 2023

Jim Baker
Associate Vice President for Research,
Michigan Technological University
jrbaker@mtu.edu

Dear Mr. Baker:

Thank you for your August 16, 2023 letter regarding H-1B cap exemptions under current law and regulation, to facilitate collaboration between nonprofit, academic, and industry partners. Please see the answers to your questions enclosed with this letter.

Thank you again for your letter and interest in this important issue. Please share this response with the other organizations that cosigned your letter. Should you require any additional assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Ur M. Jaddou". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ur M. Jaddou
Director

H-1B cap exemptions under current law and regulation

1. Operational roles. To date, entrepreneurs employed by a university have had job descriptions in approved H-1B cap-exempt petitions with job duties focused on expanding access to entrepreneurial education or training other university community members as entrepreneurs. Can the agency confirm that an operational role that supports one of the fundamental activities of a university also can be an approved use of the cap-exemption, such as a Chief Financial Officer for a unit of a university, presuming the role was a qualifying specialty occupation?

USCIS Answer: If the beneficiary will be directly employed by a qualifying institution of higher education, then the beneficiary's position and duties are not relevant to the cap-exempt determination (however, the position must still qualify as a specialty occupation).

Per 8 CFR 214.2(h)(8)(iii)(F)(4), an H-1B beneficiary who is *not* directly employed by a qualifying institution, organization, or entity would only qualify for a cap exemption if they will spend the majority of their work time performing job duties at a qualifying institution, organization, or entity and those job duties *directly and predominately* further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research. 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. Accordingly, USCIS would review each petition based on the record by the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular position will qualify for cap-exemption.

2. Managing an innovation district. When a 501(c)(3) nonprofit entity runs an innovation district with university leadership serving on the board of the innovation district, can the agency confirm there is no requirement for additional operational collaboration between the university and innovation district beyond managing and directing the entity in order to qualify for H-1B cap exemption? Can USCIS also verify that the university need not be geographically located within the innovation district?

USCIS Answer: If the nonprofit's relationship with the institution of higher education (IHE) meets one of the criteria at 8 CFR 214.2(h)(8)(iii)(F)(2)(i)-(iv), then there is no further requirement for additional operational collaboration. Further, there is no requirement for the university to be geographically located within the innovation district.

3. Type of IRS-designated nonprofit. With regard to running an innovation district that includes a university leadership role, the nonprofit entity could also be structured as a business league or through a chamber of commerce under 501(c)(6). Can USCIS confirm that adjudicators are aware that such business, trade, or commerce nonprofits may be involved in cap-exempt affiliations and that, as stated in the agency's regulations, there is no distinction among the types of nonprofit designation granted by the IRS, when the agency is considering an H-1B cap exemption?

USCIS Answer: Per 8 CFR 214.2(h)(19)(iv)(A), the nonprofit must be defined as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6). It must also demonstrate that it has been “approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.” If the 501(c)(6) nonprofit can demonstrate that it was approved as a tax-exempt organization for research or educational purposes by the IRS and that it meets the definition of a “nonprofit research organization,” then there is no further distinction among the three qualifying types of nonprofit designation granted by the IRS. Moreover, USCIS acknowledges that the phrase “approved as a tax exempt organization for research or educational purposes by the IRS” does not necessarily require a purpose-specific approval letter by the IRS, but rather that such purpose is established by the facts in the record.

4. Creation of collaborative relationships. Can USCIS verify that no particular period of months of prior collaboration is necessary to confirm the validity of a relationship between a university and an affiliated nonprofit as appropriate for enabling use of the cap-exempt H-1B pathway?

USCIS Answer: There is no statutory or regulatory requirement for a particular period of months of prior collaboration. USCIS officers will consider all relevant factors in confirming the validity of a qualifying relationship between the university and nonprofit.

5. State and local government role. As universities are increasingly being leveraged as key drivers of talent and research commercialization within regional economic development frameworks, can the agency confirm it is proper for city and state governments to file H-1B cap-exempt petitions when they work to attract and retain immigrant entrepreneurs by partnering either with a university or an affiliated research nonprofit to drive American job creation? Relatedly, can USCIS confirm that to claim cap-exempt status as a state or local government research entity, the state or local government need only explain and document the existence of a research component as opposed to a separate entity with a separate FEIN?

USCIS Answer: City and state governments may qualify for cap exemption if they are a governmental research organization whose primary mission is the performance or promotion of basic and/or applied research. To meet this cap exemption, the state or local government research entity must demonstrate that their primary mission is the performance or promotion of basic research and/or applied research. Alternatively, a state or local government research entity may qualify for cap exemption if they employ a beneficiary who will spend most of their work time performing job duties at a qualifying institution, organization, or entity and those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity. USCIS reviews the totality of the evidence for each petition using the preponderance of the evidence standard and cannot make a generalized assessment as to whether a particular organization or affiliation will qualify for cap-exempt status.

6. State and local government economic development affiliations with institutions of higher education. We understand that USCIS's current interpretation of regulations is often best reflected in the preamble explanation of the relevant regulation governing an issue. When a state or local governmental agency is tasked with driving job creation and economic development and affiliates with a university to do so, can USCIS confirm that a state or local government agency can itself be a qualifying affiliate with a local higher education institution, qualifying as an affiliated cap-exempt entity under the agency's preamble explanation of the current affiliation final rule (published November 18, 2016)? Likewise, can the agency verify that it does not matter if the economic development agency is itself a public-private partnership instead of a purely public entity?

USCIS Answer: Under current regulations, an entity related to or affiliated with an institution of higher education must be a non-profit defined as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6) and demonstrate that it has been approved as a tax-exempt organization for research or educational purposes by the IRS. The non-profit must also meet at least one of the criteria at 8 CFR 214.2(h)(8)(iii)(F)(2)(i)-(iv). As explained in the final rule, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, published on November 18, 2016, USCIS will continue to consider exemption requests from government entities that are also organized as nonprofit entities. Consistent with current practice, USCIS will assess on a case-by-case basis whether a governmental organization has established that it is a nonprofit entity related to or affiliated with an institution of higher education for purpose of the ACWIA fee and H-1B numerical limitations. To the extent that a public-private partnership meets these requirements, such entity may meet the definition of an entity related to or affiliated with an institution of higher education.

7. For-profit companies. If a for-profit corporation is involved in the governance of either a university-controlled entity, such as a collaborative entrepreneurship center or a research collaboration, or plays a role in funding or managing a research nonprofit, and is in compliance with IRS rules concerning contributions to, relationships with, or management of nonprofits, can USCIS confirm that the fact of involvement of a for-profit company does not itself impact the eligibility of the research nonprofit or university-controlled entity for H-1B cap exemption?

USCIS Answer: Institutes of higher education may be exempt from the cap if they meet the definition at section 101(a) of the Higher Education Act of 1965. A non-profit organization may also be exempt if it is primarily engaged in basic research and/or applied research. Additionally, an entity affiliated with an institution of higher education must meet the definition of a non-profit under 8 CFR 214.2(h)(19)(iv)(A) and demonstrate that it has been approved as a tax-exempt organization for research or educational purposes by the IRS to qualify for cap exemption under 8 CFR 214.2(h)(8)(iii)(F)(2). A for-profit's involvement that does not change the entity's approval as a tax-exempt organization for research or educational purposes by the IRS would not necessarily impact its eligibility for H-1B cap exemption. USCIS, however, cannot make a generalized assessment as to whether a particular organization or entity will qualify for cap-exempt status.

8. For-profits and research translation as connected to other activities. If a for-profit corporation sets up and controls the board and management of a nonprofit for the purpose of advancing the research, development, and commercialization of promising technology and entrepreneurs in partnership with several universities, can USCIS confirm that the role of the for-profit entity does not impinge on the eligible affiliation between the nonprofit and the universities for H-1B cap exempt petitions? Likewise, if the nonprofit accepts philanthropic contributions to fund grants that support low-income American-born entrepreneurs launching new entrepreneurial ventures tied to promising technologies, can USCIS verify that the role of the for-profit in managing the nonprofit does not impact the eligibility for H-1B cap exemption?

USCIS Answer: As long as the for-profit entity's activities do not cause the non-profit entity to no longer meet the definition of a non-profit under 8 CFR 214.2(h)(19)(iv)(A) or affect its status as a tax-exempt organization for research or educational purposes by the IRS, then the non-profit may still qualify as a cap exempt affiliate if it meets one of the criteria at 8 CFR 214.2(h)(8)(iii)(F)(2)(i)-(iv). USCIS, however, cannot make a generalized assessment as to whether a particular organization or entity will qualify for cap-exempt status.

9. Nonprofit organizations that have outsourced some payroll and management functions. Increasingly, nonprofits are turning to arrangements such as the use of Professional Employer Organizations (PEOs) that specialize in management, whereby, for example, payroll and human resource functions are handled by the PEO. As such, the paychecks and tax documents may have the taxpayer ID number of the PEO or other entity. Can the agency clarify that contracting for payroll, management or human resources functions does not affect the ability of a nonprofit to qualify as a cap-exempt employer, presuming all other regulatory requirements are met (either for engaging in research or as an affiliated entity)?

USCIS Answer: Use of a PEO will not, standing alone, negate an employer's cap-exempt qualification. USCIS will, however, take into consideration all relevant factors in assessing whether the nonprofit meets the definition of a United States employer, including whether that nonprofit has demonstrated that it may hire, pay, fire, supervise, or otherwise control the work of the beneficiary. In order to qualify for cap-exemption, the nonprofit must meet the definition of a non-profit under 8 CFR 214.2(h)(19)(iv)(A) and must be defined as a tax-exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), per 8 CFR 214.2(h)(19)(iv)(A). It must also demonstrate that it has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service. USCIS will consider all relevant factors and review the totality of the evidence for each petition using the preponderance of the evidence standard to determine cap-exempt status.

10. Qualifying employment and source of nonprofit funding. Nonprofits receive funding from many sources, including those nonprofits that may engage in research and be cap-exempt or those that affiliate with either universities or nonprofit research enterprises and therefore may request H-1B cap exemption. Can USCIS confirm that under the agency's regulations there is no qualifying employment relationship with the employer filing an H-1B petition, including nonprofits that regularly accept donations, if the H-1B beneficiary makes financial contributions to the employer or otherwise covers the wages or employer costs of the H-1B employment?

USCIS Answer: Per INA 212(n)(1), the employer must file a Labor Condition Application (LCA) stating it will offer to pay the beneficiary at least the local prevailing wage or the employer's actual wage, whichever is higher, for the occupation. The arrangement described in the question does not appear to be legitimate, as it likely would not comply with Department of Labor regulations related to the employer paying the employee's wage under 20 CFR 655. The employer must also demonstrate that the employee remains employed in the capacity specified in the petition and the statement of facts contained in the LCA are true and correct.