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# Practice Pointer

## **Recent H-1B Cap Exemption Developments for Non-Profit Research Organizations**

*By AILA's USCIS HQ (Benefits Policy) Committee<sup>1</sup>*

INA section 214(g)(5)(B), added as part of the American Competitiveness in the 21st Century Act (AC21) in 2000, exempted nonprofit research organizations from the H-1B statutory cap. 8 CFR §214.2(h)(19)(iii)(C) states that a nonprofit research organization must be “primarily” engaged in “basic research” and/or “applied research.” While many nonprofits conduct research to support their mission, the question then became whether research is the primary activity. The regulation further reads:

*(C) A nonprofit research organization or governmental research organization. A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a federal, state, or local 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;*

Until recently, USCIS recognized a petitioner as a cap exempt nonprofit research organization with only the IRS letter confirming tax exempt status, a basic description of research activities, and a few examples of research output (including, if helpful, the organization's Annual Report). Indeed, a search of AAO decisions found very few cases challenging the nonprofit research organization designation. One case concerned a healthcare information technology nonprofit claiming cap exemption as a nonprofit research organization.<sup>2</sup> The AAO dismissed the appeal, pointing out that the federal tax returns do not “mention research as a component of its operations.” Additionally,

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<sup>1</sup> Special thanks to AILA USCIS HQ (Benefits Policy) Liaison Committee members Nicole Simon, Dan Berger, and Suzanne Seltzer for their contributions to this practice pointer.

<sup>2</sup> *Matter of O-, Inc.*, ID# 13837 (AAO Apr. 3, 2017).

the AAO stated that because only 27 out of 300 employees were “research staff,” the nonprofit was not “primarily engaged” in research.

However, as with many things, the tides appear to be turning. Starting in 2018, members have reported an increase in scrutiny of a petitioner’s nonprofit research organization cap exemption. Given that USCIS no longer accords deference to prior adjudications,<sup>3</sup> both initial filings and extensions of stay with the same petitioner are receiving RFEs and denials based on failure to establish eligibility for the cap exemption. Based on a review of recent Requests for Evidence, denials, and the aforementioned AAO case, the following are recommendations for initially assessing a petitioner’s cap exemption eligibility:

- the nonprofit’s most recently filed federal 990 tax return to see if the word “research” is listed as part of the organization’s mission on page 2,
- the articles of incorporation to be sure research is discussed as an activity, and
- the website and/or annual report for discussion of research activities.

If research is not mentioned in those documents, the petitioner may wish to update the documents to accurately reflect the organization’s primary research activity. In addition, such documentation is important evidence to include with the I-129 petition, both with the initial filing and with any subsequent petition for extension of stay. Practitioners may also want to include other documentation of research activities, such as published research articles, research grants, or, for applied research, discussion or reference to internal reports.

We also note that for corporate or employment reasons, some nonprofits research organizations are part of a larger nonprofit, and do not have a separate federal employer identification number (FEIN). These types of arrangements are increasingly common, where the research arm will have a separate payroll, human resource function, tax filings, and sometimes operate in a different state. USCIS has challenged the cap exemption of the research arm based on the FEIN. However, it may be that given the corporate relationship, the research arm will not qualify for the exemption.<sup>4</sup>

The majority of RFEs questioning eligibility for the nonprofit research organization exemption will include the following non-exhaustive list of documents:

- Documentation from the IRS that demonstrates that the petitioner has been approved as a tax-exempt organization for research or educational purposes by the Internal Revenue Service.

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<sup>3</sup> See <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf>

<sup>4</sup> These RFEs are relatively new, and we do not yet know what type of evidence might work to establish the subsidiary as a cap exempt employer. Where there are no alternative cap exemption options, some practitioners now are consulting with experts in nonprofit law to provide a legal argument that the two organizations are distinct despite sharing a tax ID number. The Committee will update this Practice Advisory as we see the results of these cases.

- Copies of the most recent IRS determination letters regarding the petitioner's tax-exempt status.
- Copies of the petitioner's Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, or Form I 024, Application for Recognition of Exemption Under Section 501(a), or similar applications and supporting documents that the petitioner had submitted to the IRS.
- Copies of the petitioner's organizational documents including but not limited to charters, articles of incorporation, articles of organization, bylaws, or similar documentation that was submitted to the IRS to obtain tax exempt status.
- Complete copies of the petitioner's most recent Form 990, Return of Organization Exempt from Income Tax, including all required schedules and statements that identify the primary exempt purpose.
- Copies of annual reports or similar documentation that describe the petitioner's activities, incomes, expenses, number of workers, and types of workers.
- The petitioner's most recent financial statements to include breakdown of incomes and expenses.
- Documentation that establishes the petitioner's research activities, such as books, articles, brochures, research papers, and other literature describing the purpose and nature of the petitioner's research activities.
- Work products from research projects, such as published research papers in journals, magazines, newspapers, and websites.
- Evidence that the petitioner received research grants from governmental, educational, or other for-profit or nonprofit grantors.
- Photographs of research.
- Written testimonials attesting to the research that the petitioner conducted. The testimonials should include the writer's name, address, and qualifications.
- Any evidence that shows that the organization is a tax exempt organization under IRC section 501(c)(3), (c)(4), or (c)(6); approved as a tax exempt organization for research or educational purposes by the IRS; and primarily engages in basic and/or applied research.

Although not explicitly referenced in the above list of suggested documents, the USCIS is now referencing the IRS National Taxonomy of Exempt Entities (NTEE) Code as a simplistic yet erroneous criteria of determining whether an organization's primary purpose is research. The NTEE is used by the IRS and the National Center for Charitable Statistics (NCCS) to classify nonprofit organizations. The NTEE Code is a three- or four-character code that attempts to characterize the organization in terms of its primary exempt activity. The IRS began issuing new exempt organizations an NTEE code as part of the determination process in 1995. According to the IRS, the determination specialist assigns an NTEE code to each organization exempt under IRC §501(a) as part of the process of closing a case when the organization is recognized as tax-exempt. The many variables involved in applying the codes, including the fact that organizations

often have numerous activities, can provide challenges when attempting to precisely capture an organization's primary exempt activity.<sup>5</sup>

This policy of relying on the NTEE code is not mentioned in the USCIS Policy Manual<sup>6</sup> (see annotated version obtained by AILA through a FOIA request provided on AILA InfoNet at Doc No. 19091601), and runs counter to IRS guidance.<sup>7</sup> The NTEE Code has no specific use for tax purposes, IRS guidance indicates that the organizations purpose will be explained more fully on the annual 990 tax filing, and that organizations can have multiple purposes. Organizations with NTEE codes that do not indicate research as the primary purpose may receive an RFE on this issue. The IRS guidance itself should be submitted in response, as well as ample documentation based on the bulleted list above. This is an evolving issue and, as we receive more examples of RFEs and outcomes, this practice pointer will be updated.

The USCIS HQ (Benefits Policy) Committee will continue to track related developments. AILA members can submit reports on this issue to AILA by emailing [reports@aila.org](mailto:reports@aila.org) with subject line "Non Profit Research Organizations."

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<sup>5</sup> See Letter from Manager, Exempt Organizations Guidance, Internal Revenue Service, dated January 14, 2013, available at <https://www.irs.gov/pub/irs-wd/13-0005.pdf>.

<sup>6</sup> USCIS Policy Manual, Volume 2: Nonimmigrants, pp. 94-95, published on AILA InfoNet at Doc No. 19091601 (posted on 9/17/2019).

<sup>7</sup> See *supra* at note 4.