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BETSY ARIAS

NEGOTIATING THE IMMIGRATION MAZE

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H-1B Visa

J-1 Waiver

National Interest Waiver

Labor Certification

Permanent Resident Status

O-1 Visa

F-1 Visa

International Nurses

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October 2017 Edition

Table of Contents

1. The Immigration Brochure for the Foreign Medical School Graduate………..3-5

2. Executive Order Pertaining To Travel Bans…………………………….....5-7

3. The H-1B Visa / The H-1B Cap...7-9

4. The H-1B Option for Physicians: Post Graduate Training and Attending Positions……………………………………………….……..…...9

5. Automatic Revalidation of Visas/Travel Without A Visa……………………...10

6. H-1B Cap and Cap Exemption…...10-11

7. H-1B Filing Fees: The $1500.00 Scholarship Fund Filing Fee and $500.00 Fraud Prevention and Detection Fee...................................11-12

8. Premium Processing...12

9. Continued Employment Authorization While H-1B Extension is Pending…….12

10. Attorney's Fees, Labor Condition Applications, and the H-1B Process…...13-14

11. Portability of the H-1B Petition..14

12. Procedure for Obtaining an H-1B Visa at a U.S Consulate.........................14-16

13. Should I Stay or Should I Go? The Dilemma of the FMG in the US Seeking a PGY Position While in B-2 Status..16-17

14. Fellowship vs. Attending: The Big Decision..17-18

15. Dilemma of Filing an H for an Attending Physician License; Cap Exemption…………………………………………………….………..18-20

16. The Labor Certification Process: PERM: Program Electronic Review Management……………………………………….……….……........20-22

17. Step One to the J-1 Waiver: Finding a Job..22-23

18. J-1 Waiver Memorandum...23-25

19. National Interest Waiver for Physicians..25-26

20. Employment First Preference...26-29

21. National Interest Petition: Non Shortage Area Case: Matter of Dhanasar…………………………………...…29

22. The O Visa...30-31

23. Site Inspection by USCIS-FDNS Pertaining to H-1B Petitions.…...….........31-32

24. Dilemma of Filing for Student Status ………………………………………….32

Memos Available Online

The Labor Condition Application

Non-Immigrant Visa Options for International Nurses

Form I-9: Employment Eligibility Verification

Registration Requirements for Citizens and Nationals of Countries Designated by the State Department

Form AR-11: Notification to USCIS of New Address

Termination of Employment/Termination of H-1B Petition and Labor Condition Application

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1. The Immigration Brochure for the Foreign Medical School Graduate

The following information will provide you with answers to many common questions. Due to the intricacies inherent in these laws, it is suggested that you obtain the services of an attorney engaged in the practice of Immigration Law to assist you.

1. **What is an H-1B Petition?**

   An H-1B petition is submitted by a sponsoring U.S. employer to the United States Citizenship and Immigration Service, requesting them to allow the employer to hire a specific potential international employee for a temporary period of time. The position must require at least the equivalent of a four year U.S. Bachelor's degree and the candidate must have the requisite degree, or the equivalent based on experience. It can be used to employ an International medical school graduate for a residency or fellowship position, if all parts of the USMLE exam have been passed. (See other memos for exceptions to this rule). It can also be utilized for research positions.

2. **Will I be allowed to work once the petition is approved?**

   USCIS will issue Form I-797, Notice of Action, once the petition is approved. If you have not violated your immigration status by working without permission from USCIS or remaining in the United States past the time authorized by the USCIS, then, if requested, Form I-797 will also change your status to H-1B and will authorize you to work for the petitioner. It will also list a start date and end date. Once the start date has been reached, you can commence employment. If you have violated your status, or are outside the United States or in the US and not specifically requested, Form I-797 will not change your status or provide employment authorization. In that case, you must obtain an H-1B visa from a U.S. Consulate, prior to commencing employment.

   A new petition must be filed and approved for each employer. You can have multiple H-1B petitions. You can commence employment with a new employer once the H-1B petition has been filed, if you are presently employed in the United States in H-1B status and have not violated your status, assuming you meet licensure requirements and the commencement date listed on the H-1B petition has been reached, or if the 60 day grace period applies due to being terminated prior to expiration of H status.

3. **What is Form I-94?**

   Form I-94 is/was the card issued to you by USCBP upon your entry into the United States. It is endorsed with your non-immigrant status. If you obtain an H-1B visa at a U.S. Consulate, the I-94 will be endorsed with H-1B status at the time that you enter the United States, allowing you to work for the entity that filed the H-1B petition on your behalf. When a petition for H-1B status is filed on your behalf while you are in the United States in a legal non-immigrant status, USCIS may grant the change of status or extension of status, if same is requested, and note same on an I-94 which is attached to the bottom of Form I-797, Notice of Action. Form I-797 will document any changes, including extensions, changes of status and employment authorization.

   Presently, these cards are not issued at entry. The end date of your entry is most likely written on the entry stamp endorsed in your passport. Nonetheless, after each entry into the US, confirm that you were admitted in the appropriate status and until the appropriate end date. Please contact your attorney if there is any discrepancy.

   https://i94.cbp.dhs.gov

4. **What is the Labor Condition Application?**

   The LCA is an application that all employers must submit and have accepted by the Department of Labor, in order to file H-1B petitions and extensions of H-1B status with USCIS. See memos on my website for more information.

5. **Why are some hospitals reluctant to file an H-1B petition for a validity period greater than one year?**

   There are various issues pertaining to who is responsible for the attorney's fees and filing fees on the H1B process. Additionally, USCIS Regulations require employers to pay the return transportation of the beneficiary of H-1B status to their home country in the event that they are terminated prior to the expiration of the H-1B petition. Since the contract of employment is usually only for one year, the hospital may want to limit the time of the H-1B petition for one year. Additionally, in States where a permit is required for residency or fellowship, the permit is usually only valid for 1 year and USCIS will limit the duration of the H approval to 1 year. If there is no permit requirement and if requested, H-1B status can be granted for an initial period of up to three years. Generally, one can remain in H-

1B status for up to six years. See elsewhere in this memo re: extensions past the 6th year. The J 1 is the less burdensome process for a hospital seeking to employ a physician in a residency or fellowship and this would certainly be a factor in their not proceeding with an H – 1B.
.

6. **Can immediate family benefit from my H-1B status?**

   Your spouse and children can apply to change their status to H-4 if they are in the US with you and have not violated their immigration status. If they are outside the United States or have violated their status, they can apply for H-4 visas at a U.S. Consulate. However, please see discussions in the H-1B memos regarding individuals who remain illegally in the United States for more then six months and then leave. The H-4 visa does not authorize the bearer to be employed in the US. Additionally, Social Security cards are usually not issued. If issued, the card will be endorsed with the phrase, "not valid for employment."

7. **Can I travel outside the United States while in H-1B status?**

   You can travel outside the United States while you are in H-1B status. However, in order to return, you must have an H-1B visa endorsed in your passport. The visa must be valid through your return date. Visas can only be placed in the passport at a U.S. Consulate. Please check with your attorney prior to departing the United States for an H-1B visa. Security clearances are performed on visa applicants. The clearances can take a few weeks or several months. Processing times are unpredictable.

8. **Can I apply for a visa in Canada or Mexico or another Consulate besides my home country Consulate?**

   US Consulate offices usually process third country nationals for visas. However policies constantly change, so check before you go. If you do apply for a visa in Canada or Mexico and it is refused, you will not be allowed to return to the United States with just the H-1B approval notice. You must go to the U.S. Consulate in your home country and apply for the visa there. Please consult with an attorney prior to departing the United States for a visa. Please see the memo re travel to Canada or Mexico for less than 30 days without a visa

9. **Can a hospital sponsor me for Resident Alien Status ("Green Card")?**

   A hospital can assist you in obtaining permanent resident status. Different options are discussed in the attached memos. The Labor Certification Option is not available for residency/PGY positions.

10. **Why is the H-1B status preferred over the J-1 status?**

    International Medical School Graduates entering the United States to participate in a J-1 program are representing to the U.S. Government that they will return to their home country for two years after the completion of the program. However a waiver of this requirement may be obtained if the physician finds a position in a Health Professional Shortage Area (HPSA), a Medically Underserved Area (MUA), or a VA facility. Additionally, a waiver may be requested if returning to your home country would cause severe hardship to a family member who is a Permanent Resident of the US or a US Citizen. Research waivers may also be an option. Other agencies also support waivers. The H-1B status does not contain the two-year foreign residency requirement. There are more options to obtaining Attending positions if one is in H-1B status, compared to J-1 status.

    Furthermore, the spouse of a J1 who has obtained J2 status can file for employment authorization

    Additionally, when applying for a J1 visa at a US Consulate or a J2 dependent visa, the applicant may have to establish that they have ties to their home country and will be returning home after completion of the J1 program. H1 and H4 visa applicants do not have to establish ties to their home country.

11. **Can I obtain a New York State medical license after I complete my medical residency program?**

    New York State will issue full licenses to individuals who completed residency and were in a valid employment based nonimmigrant status.

12. **Can I change to H-1B status after I have obtained J-1 status?**

    J-1's issued for PGY and certain other positions, are subject to the two year home residency requirement. If USCIS approves an H-1B Petition on behalf of an individual in J-1 status, it should not grant a change of status with the approval of the petition or grant Employment Authorization. The physician would have to apply at a U.S. Consulate for an H-1B visa. The Consulate should refuse to issue a visa until the physician fulfills the two-year foreign residency requirement from the previous J-1 status, or obtains a waiver. Even if the Consul issues the visa, the physician will have to fulfill the two-year foreign residency requirement before obtaining permanent resident status. Thus, nothing is gained by trying to switch from J-1 to H-1 status, unless a waiver has been obtained. Canadian citizens in J1 status are exempt from the visa requirement and may be admitted to the US with an approved H-1b petition. However, they remain subject to the two-year foreign residency requirement and will require a waiver. This option should not be pursued without discussing all facts with an attorney.

13. **Can a J1 fulfill the two-year foreign residency requirement anywhere outside the United States?**

No. You must return to your home country, as listed on form DS2019, for two years. Additionally, any time spent outside the home country during this two year period, must be made up.

14. **Do I need a license for Post-Graduate Training?**

Every state has its own license requirements. For example, in New York State, a physician in an accredited residency training program does not need a license or permit. However, a participant in a Fellowship program in New York State may need a Limited Permit to participate in the program and to obtain H-1B status. In Pennsylvania, Connecticut, Illinois, Massachusetts and Ohio, among other states, a training permit or license is needed. In New Jersey, the facility will obtain a blanket license for its first-year residents. After the first year, a license or permit is needed.

15. **Can I commence employment after obtaining H-1B Status, even if my Social Security Card has not been issued?**

Currently, it is taking a few weeks to obtain Social Security Cards. When applying for the card, the Social Security office will issue a letter to you confirming that you have applied for same. The Social Security website specifically states that the individual who possesses said letter can commence employment. This is obviously dependent on being in a valid non-immigrant status which allows employment. Please notify your attorney if the SSA office tells you that according to their records, you do not have an immigration status qualifying you for a social security card. Occasionally, USCIS does not update the database accessed by the SSA office to verify immigration status.

Last update: September 14, 2017

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2. Executive Orders Pertaining to Travel Bans:

This Memorandum is based upon and certain parts copied from a memorandum prepared by the American Immigration Lawyers Association dated September 26, 2017.

Since the beginning of 2017, there have been Executive Orders barring travel to the United States from different countries. Periodically, the courts of intervened to overturn partially overturn some of the bans. This has resulted in other Executive Orders and further court action and confusion. There been reported instances of Physicians and other professionals with H – 1B, J – 1 and visitors visas not being admitted to the United States. It is possible that by the time this memo is completed, it could be already stale and affected by some further counteraction. Nonetheless, we will do our best to summarize the Presidential Proclamation dated September 24, 2017 entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public Safety Threats."
The basis for this Proclamation was the result of an assessment by the US Government as required by an earlier Executive Order wherein the US Government review the worldwide information sharing practices between the United States and nearly 200 countries in order to determine whether nationals of each country seeking to enter the United States posing national security or public safety threat. Final results of the study determined that the following countries have inadequate identity management protocols, information sharing practices and risk factors:

Chad, **Iran**, **Libya**, **North Korea**, **Somalia**, **Syria**, **Venezuela**, and **Yemen**. While it was also determined that **Iraq** did not meet the baseline requirements, nationals of **Iraq** will not be subject to any outright ban on travel, but will be subject to additional screening measures.

Country-specific travel restrictions apply to each of the following countries:

Chad	Suspends the entry of immigrants and temporary visitors on business or tourist visas (B-1/B-2)
Iran	Suspends the entry of immigrants and all nonimmigrants, except F (student), M (vocational student) and J (exchange visitor) visas, though they will be subject to enhanced screening.
Libya	Suspends the entry of immigrants and temporary visitors on business or tourist visas (B-1/B-2).
North Korea	Suspends the entry of all immigrants and nonimmigrants.
Somalia	Suspends the entry of immigrants, and requires enhanced screening of all nonimmigrants.
Syria	Suspends the entry of all immigrants and nonimmigrants.
Venezuela	Suspends the entry of certain government officials and their family members on business or tourist visas (B-1/B-2).
Yemen	Suspends the entry of immigrants and temporary visitors on business or tourist visas (B-1/B-2).

(CHART PREPARED BY AMERICAN IMMIGRATION LAWYERS ASSOCIATION)

Travel restrictions for nationals of **Sudan**, who were impacted by earlier versions of the travel ban, have been lifted.

1. **Effective Date:** The restrictions listed above are effective immediately for individuals from Iran, Libya, Somalia, Syria and Yemen if the national from that country does not have a bona fide relationship to a US individual or entity. However, effective October 18, 2017, all individuals from those countries will be barred entry into the United States, even if they have a bona fide relationship with a US individual or entity.

   Furthermore, individuals from Chad, North Korea and Venezuela will also be barred entry into the United States regardless of whether they have a bona fide relationship with a US individual or entity.

2. **Individuals Impacted:** The following foreign nationals from the designated countries are affected if:
   a. They are outside the United States on the effective date.
   b. The do not have a valid visa on the effective date.
   c. They do not qualify for a reinstated visa or other travel document that were revoked under Executive Order 13769.

3. **Exemptions:** The travel restrictions in the proclamation do not apply to:
   a. Lawful permanent residents (LPR).
   b. Foreign nationals who are admitted to or paroled into the U.S. on or after the applicable effective date.
   c. Foreign nationals who have a document other than a visa (e.g., transportation letter, boarding foil, advance parole document) valid on the applicable effective date or issued on any date thereafter.
   d. Dual nationals of a designated country who are traveling on a passport issued by a non- designated country.
   e. Foreign nationals traveling on diplomatic visas, NATO visas, C-2/U.N. visas, or G-1, G- 2, G-3, or G-4 visa.
   f. Foreign nationals who have been granted asylum in the U.S.; refugees who have been admitted to the U.S.; or individuals who have been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

4. Waivers: A waiver may be granted if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:
   a. Denying entry would cause the foreign national undue hardship;
   b. Entry would not pose a threat to the national security or public safety of the U.S.; and
   c. Entry would be in the national interest.

The Secretaries of State and Homeland Security have been instructed to adopt guidance addressing the circumstances in which waivers may be appropriate. A waiver issued by a consular officer shall be valid for both the issuance of the visa and for any subsequent entry on that visa. Waivers may not be granted categorically but may be appropriate in the following situations.

I thank the American Immigration Lawyers Association for keeping its members up-to-date as to all issues and for the information contained in this memorandum.

As stated at the outset and as everyone has seen over the last several months,

especially those from the listed countries, these policies/orders/proclamations are constantly being attacked in the courts, partially suspended then revamped reissued only to have the cycle of court action/suspension and reissuance continue on end. Accordingly, much caution must be taken by those from the effected countries so that they are not impacted and prevented from returning to the United States, especially when they are in the midst of medical education or employment as well as when they have plans remain the United States happily ever after.

Please be mindful of the changing news and consult with an attorney if you are from the affected countries or from countries which may be seen as being potentially affected.

Dated: September 29, 2017

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3. The H-1B Visa/ The H-1B Cap

The H-1B visa is one of the non-immigrant visas utilized by prospective employers seeking to employ a non-U.S. Citizen or non-resident of the United States. The position must require at least a four-year college degree. The individual must have obtained the degree in the United States or possess a degree issued outside the United States that is the educational equivalent of at least a Bachelor's degree issued from a US university. The individual must utilize that educational background in the position offered. For example, an accounting major can be employed as an accountant or a related field requiring said degree. Three years of experience may be evaluated to establish equivalency to one year of college education. An independent evaluation is required of foreign degrees, and experience.

The United States Citizenship and Immigration Service (USCIS), is authorized to approve 65,000 new H-1B petitions per year and another 20,000 for graduates of US Master's Degree programs from a non-profit university. Exemptions from the 65,000 cap are available for certain facilities. Most not for profit teaching hospitals are exempt from the H-1B cap. Exemptions from the "H-1B cap" are discussed in a subsequent section.

As of mid-April 2017, the H-1B cap has been reached. Once the "Cap" has been reached, unless an employer is exempt from the cap, or the beneficiary was previously counted against the cap and is extending their H status, or was granted a J – 1waiver for employment in a federal shortage area or underserved area, the H petition will not be accepted by USCIS. Petitions will be accepted by USCIS, from non-cap exempt employers, on April 1. However, they will be given an October 1 start date. A petition cannot be filed more than six months before the date of employment.

Once the H-1B cap is reached, USCIS should not accept an H-1B petition by an employer who is not exempt from the cap, unless the employee has been previously counted against the cap based upon previous employment with a non-cap exempt employer. So, if you are employed as a PGY at a cap exempt facility and switching to a non-cap exempt employer, then the H petition should not be accepted if the cap has been reached, unless you qualify for the "employed at" exception as discussed in detail in another memo.

In order to employ an individual in H-1B status, the prospective employer must agree to pay the employee the higher of the actual wage level paid by the employer to other individuals with similar experience and credentials for that position, or the prevailing wage level in the area of employment. The employer must document the survey that is being utilized to determine the prevailing wage. Alternatively, the employer can request a prevailing wage determination from the Department of Labor. Please see the Labor Condition Application Memo for more details.

Once the prevailing wage is determined and the employer agrees to pay that salary, and the Notice of Filing of the Labor Condition Application requirements have been met, the LCA is filed with the Department of Labor. Processing times at the Department of Labor are approximately 8 days.

Attorney's fees and expenses related to the preparation of the H-1B petition and Labor Condition Application cannot be paid by the prospective employee. Please see the memo herein for more details.

The employer generally does not have to establish the unavailability of qualified U.S. workers for the position in order to process an H-1B petition. Exceptions to this rule are contained in the Labor Condition Application memo.

The petition and letter that are submitted to USCIS as part of the H-1B process, describe the employer, the position and the employee's qualifications for the position. The form also requires the prospective employer to represent that if the employee is terminated prior to the expiration of the H-1B petition, the employer will pay the employee their return airfare. USCIS does not appear to have any enforcement procedure for this clause. The employee may have to sue the employer to enforce this clause. However, the Department of Labor and US Courts have enforced this clause. Additionally, an employee may not be deemed terminated unless they have been offered their return transportation, in addition to cancelling the H petition with USCIS. If the H is not cancelled and if the return transportation is not offered, the employer may be liable for back wages.

Some employers have utilized various methods to circumvent this clause. For example, employees have been required to sign an agreement waiving this provision,

or the employer retains the employee's first two weeks' pay to cover this contingency. These steps are probably not legal. An employer can reduce the risk of this clause by limiting the duration of the H-1B status.

The H-1B petition can be approved initially for any duration up to three years. The H-1B status can be extended for up to six years. USCIS may extend the H-1B petition beyond the sixth year, if an individual has filed an Application for Alien Employment Certification or an I-140 Petition for an Immigrant Worker, at least 365 days prior to the end of the 6th year in H-1b status. The H-1B status can be extended, until a final decision is rendered on the matter, but not once the priority date on the case is reached. Upon approval of the I-140 petition if subject to retrogression, the H status can also be extended. Additionally, any time spent outside the US while in H-1B status can be "recaptured" and added back to the 6 years. Time spent in H-4 status does not count toward the 6 year maximum.

The H-1B beneficiary can only work for the employer and location specified on the H-1B petition. A separate petition is required for each employer, even if two different corporate entities have the same owners. If an employer plans to place the employee at different locations, they must be listed on the H – 1B petition and Labor Condition Application.. If these additional locations are determined subsequent to filing the petition, additional action will be needed prior to going to these locations depending on the duration and location.

The employer must withhold taxes from the H-1B beneficiary. The individual must be receiving a W-2 and not a 1099. The beneficiary cannot be employed as an independent contractor.

If an individual is presently employed in H-1B status and an H-1B petition is submitted by a different employer, or if an extension of status or change of position is filed by the same employer, the individual can commence employment with the new employer assuming the start date on the petition has been reached, or continue employment with the same employer, upon the filing of the petition at USCIS,. However, the H-1B petition must be filed prior to the expiration of the prior petition. The individual must not have violated their immigration status in any manner, including by being employed by any employer who did not petition on behalf of the beneficiary for H-1B status. The employer should require proof of filing, before allowing employment to commence. Employment pursuant to an Employment Authorization Card for a different employer while being in H-1B status should not affect one's H-1B status. Please discuss same with an attorney. Please note that the H – 1B cap may be a factor.

If you are terminated by your H – 1B employer, there is a 60 day grace period within which your H-1 B status is deemed extended. The 60 days will be deemed limited to the expiration date of your H – 1B petition if it expires sooner.

If an individual is changing status to H-1B status, the individual cannot commence employment until the H-1B petition is approved with a change of status and the start date listed on the petition is reached. If a change of status is not requested, then the employment can commence upon admission into the United States in H-1B status, after obtaining an H-1B visa at a U.S. Consulate, assuming the start date has been reached.

If the prospective employee is in a valid non-immigrant status in the United States at the time of filing the H-1B petition and the first day of employment is prior to expiration of the non-immigrant status and the H-1B cap is not an issue then, the H-1B petition should be approved with a change of status and with employment authorization, assuming the change of status has been requested.

If the prospective employee remained in the United States past the authorized time of stay, or if the effective date of employment is past the authorized time of stay, USCIS should approve the petition, but deny a request to change status to H-1B and not grant employment authorization with the approved petition. The individual will have to apply for an H-1B visa at a US consulate outside the US. Upon entry into the United States with an H-1B visa, the individual can commence employment once the start date has been reached.

There have been instances where USCIS has has granted a change or extension of status to individuals whose status expired between the date of filing and the start date listed on the H-1B petitions. This is contrary to law and logic. Fortunately this rarely occurs. If this has occurred to you, you must disclose it to your attorney in order to make sure there are no problems in the future regarding your status. The situation may be resolved by obtaining an H – 1B visa at the US consulate. However do not depart the United States without consulting with an attorney. We want to make sure that this issue does not become a major problem in the future. USCIS could later determine that the approval was erroneous and deem you out of status. It can also be raised when you file for Permanent Resident Status and may affect getting the case approved. You will not be able to rely on the argument that it was USCIS's error and hence you should not be penalized.

If you are in F1 status and your last date of being a student in good standing and 60 day grace period expires more than 60 days before the start date on the H-1B petition, you are urged to obtain a new I-20.

If you are in B-2 status or any other non-immigrant status which expires prior to the start date of the H-1B petition, consult with an attorney if USCIS grants the change of status. The approval should be deemed erroneous and could be a problem in any future filing with USCIS.

If the position requires a license, USCIS may deny the petition if the petition is filed without a license. USCIS however may issue a letter requesting the submission of the license and provide you with 30 to 90 days to submit it. Some states require permits for PGY positions. New York does not have that requirement. There is a concern that

USCIS may deny a petition if the license or permit was issued subsequent to filing the petition If the license is pending at the time of filing, it is recommended that a letter be obtained from the licensing authority confirming that you qualify for the license at that date.

Approval of an H-1B petition with employment authorization and either a change of status or extension of status, does not guarantee re-admittance to the United States. All foreign nationals, except Canadian citizens, who leave the United States, must have a valid passport and H-1B visa in order to be readmitted to the United States. Canadian citizens are exempt from obtaining visas prior to admission to the United States. However, Landed Immigrants of Canada, even those previously exempt from obtaining a visa, must have a visa prior to returning to the United States.

An individual who has been granted a change of status to H-1B, may travel to Canada or Mexico for less then 30 days and be readmitted, without an H-1B visa, unless they applied for a visa at a Consulate during that trip and were refused, or travelled to a 3rd country, or are from one of the countries where the applicability of this provision has been barred, including but not limited to, citizens of Iran, Sudan, and Syria.

If you are outside the United States and US CIS has approved the H – 1B petition, you should apply for the H – 1B visa as soon as possible, due to uncertainty as to the processing time of visa applications, security clearance delays, unavailability of appointments due to demand and other unforeseen circumstances, especially if you are from one of the countries where extra security clearance is required. Please check the Consulate's website for the procedure to schedule an appointment and documents required for the interview. If no appointments are available, keep checking the consulate's website, as very often there are cancellations. Most consulates have an emergency procedure to schedule, if no appointments are available.

After issuance of the H-1B visa, you cannot enter the US more than ten (10) days prior to the start date listed on the H-1B petition. If you do enter early, the end date on your H-1B status will be limited to 3 years from your date of entry, if the petition was for a 3 year duration. However, on any subsequent entry, you should be admitted until the requested end date.

The end date of your admission to the United States should be limited to the expiration date of your passport, if it expires prior to the end date of the H visa. Please check the end date listed by the immigration officer in your passport for any discrepancies prior to leaving the officer's desk. You can question the officer regarding any discrepancies. Additionally, please check the entry record on the US CIS website, for the end date and classification. Please notify your attorney as to any early end date, as you are considered out of status when the end date listed by the immigration officer has been reached, even if the H petition and visa was for a longer duration.

If individuals remain in the United States for more than 180 days but less than one year after their authorized stay expired, they should not be issued a visa and should be barred from entering the United States for a minimum of three years. Unlawful presence for one year or more leads to a 10-year bar.

Although the regulations surrounding the H-1B petition may be cumbersome, especially the Labor Condition Application, the H-1B category is the best and most expedient option available to employ a qualified international employee. For physicians, it does not have the "two year foreign residency requirement" that encumbers the J-1 status or the necessity of processing a J-1 Waiver Application, based upon a position in a "Health Professional Shortage Area."

Last update: September 14, 2017

4. H-1B Options for Physicians: Post Graduate Training and Attending Positions

International Medical School Graduates can obtain H-1B status for clinical residency/fellowship programs, and attending positions, if they have passed all 4 parts of the USMLE examination and have received ECFMG Certification, or graduated medical school accredited by the U.S. Department of Education. Graduates of U.S. medical schools entering post-graduate training positions are not required to have passed these examinations or require ECFMG certification. Attending physicians must obtain state licensure

This provision does not apply to teaching or research positions, including Research Fellowships. The provision may also not apply to certain Pathology Residency positions. Additionally, if an individual can establish that they are of international renown, as evidenced by publications and presentations, USCIS may approve an H-1B petition, even if the individual has not passed USMLE 3.

Last update: September 26, 2017

5. Automatic Revalidation of Visas/Travel Without a Visa

The validity of an expired nonimmigrant visa may be considered to be automatically extended to the end date of your status. Additionally, if USCIS has changed your nonimmigrant classification to another nonimmigrant classification, travel may be allowed as well as per the guidelines below. The validity of an expired or unexpired nonimmigrant visa/status may be considered to be automatically extended to the date of readmission and admission can be based upon the new status.

Nonimmigrants (and accompanying spouses and /or children) whose visas have expired may reenter the United States as above provided they meet the following requirements:

F and J Nonimmigrants:

1. Readmission from contiguous territory (Canada or Mexico) or adjacent islands (except Cuba).
2. Readmission after an absence not exceeding 30 days
3. In possession of Form I-94/Admission Record establishing an unexpired period of initial admission or extension of stay or in possession of the Certificate of Eligibility Student and Exchange Visitor Information System (SEVIS) I-20AB or SEVIS DS-2029
4. Valid unexpired passport.
5. Must not be deemed inadmissible pursuant to several grounds including health, criminal, unlawful presence among others
6. Has not applied for a new visa while abroad
7. Has maintained and intends to resume nonimmigrant status.
8. Must not be affected by any Executive Order prohibiting return to the United States based upon country of nationality

All other nonimmigrants, including H-1b non-immigrants:

1. Readmission from contiguous territory (Canada or Mexico), **not adjacent islands**
2. Readmission after an absence not exceeding 30 days
3. In possession of Form I-94/Admission Record endorsed to show an unexpired period of initial admission or extension of stay (H and others should have approval notices with an I–94 on the bottom right hand corner)
4. In possession of a valid passport, unless exempt
5. Must not be deemed inadmissible pursuant to several grounds including health, criminal, unlawful presence among others
6. Has not applied for a new visa while abroad
7. Has maintained and intends to resume nonimmigrant status
8. Must not be affected by any Executive Order prohibiting return to the United States based upon country of nationality

If a visa is needed to enter Canada, Mexico, or an adjacent island, the visa must be obtained to enter that country.

The provisions of the automatic revalidation of visas does not apply to citizens of countries identified as supporting terrorism in the State Department's annual report to Congress. Countries that are ineligible include but may not be limited to Iran, Syria, and Sudan.

Last update: September 26, 2017

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6. H-1B Cap and Cap Exemptions

USCIS can only approve 65,000 H-1B petitions per year. Another 20,000 are available to individuals who have obtained at least a Master's degree from a non—profit US University. This limitation is known as the H – 1B Cap.

PGY positions at most teaching hospitals are exempt from the H-1B cap. However the employer must establish to USCIS that they are not for profit, and have an ACTIVE affiliation with an institution of higher education (medical school). The Hospital will need to establish that one of its primary purposes is to directly contribute to the educational or research mission of the institution of higher education which is usually a medical school. It could be a different institution of higher education as well, as long as it meets this requirement. The Hospital will need to establish that one of their fundamental activities directly contributes to the research or education mission of the institution of higher education and that one of its fundamental activities directly contributes to the research or education Mission of the institution of higher education.

US regulations state that the following entities may qualify for an exemption from the H-1B cap:

1. An employer that is an institution of higher education as defined in 20 U.S.C. §1001 (a) of the Higher Education Act of 1965 and 8 CFR 214.2(h) (19) (iii).

2. A non-profit organization or entity related to or affiliated with any such institution.
3. A non-profit research organization or governmental research organization, as defined under 8 CFR 214.2(h) (19) (iii) (C).

As stated in Section 8 CFR 214.2(h(8)(ii)(F)(2)) the nonprofit entity is considered related to or affiliated with an institution of higher education and therefore can claim exemption from the H – 1B cap, if they meet any of the following requirements:

i.The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same Board or Federation.

ii.The nonprofit entity is operated by an institution of higher education.

iii.The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

iv. The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education Mission of the institution of higher education.

Most nonprofit entities claiming exemption from the H-1 B cap try to meet the last requirement.

The employer will also need to provide documentation of their tax exempt status as evidenced by a letter issued in accordance with section 501 (c) (3), (c) (4), or (c) (6) of the Internal Revenue Code of 1986, as well as documentation establishing any of the sections listed above establishing exemption from the H – 1B cap.

The new regulations effective January 2017 made it more difficult for teaching hospitals to establish exemption from the H-1 B cap. However, it is possible if the hospital meets the appropriate criteria.

If an individual whose H was with a facility that claimed an exemption, is now moving to a non-exempt facility, their H should be approved with an October start date, if the H – 1B cap has not been reached. Unless the prior H ended September 30th, or the individual obtained another status through September 30th, the petition should be approved without an extension of status and employment authorization.

An exemption from the "H-1B Cap" is available, if an individual will be "Employed at" a cap exempt facility. For example, Dr. X obtains a position at a private practice which is not exempt from the cap. However, a majority of the work will be performed at a qualifying institution namely a facility which can establish exemption from the H-1 B cap. Additionally, the H – 1B petition will need to establish that the duties being performed directly and predominantly further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, higher education, nonprofit research or government research. For doctors, the petitioner will need to establish that a majority of the time will be spent providing medical education. So far, if the duties being performed by the physician are a majority of the time being accompanied by medical school students and possibly residents, thereby providing these individuals with medical education, a claim for H – 1B cap exemption may be successful.

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7. H-1B Filing Fees: The $1500.00 Scholarship Fund Filing Fee and $500.00 Fraud Prevention and Detection Fee

H-1B Petitions have three filing fees:

The standard $460.00 H-1B petition filing fee must be paid by the employer or according to some interpretations of the law, a third party, as long as it is not paid by or reimbursed by the employee.

The $1500.00 filing fee which must be paid by the employer, is utilized for scholarship programs to train individuals in positions which are now being taken by H-1B visa holders.

Exemption from the $1500.00 filing fee is available under the following circumstances:

1. An employer that is a primary or a secondary institution of higher education as defined in 20 U.S.C. §1001 (a) of the Higher Education Act of 1965 and 8 CFR 214.2(h) (19) (iii).

2. A non-profit entity related to or affiliated with any such institution. (The employer is claiming exemption from the H-1 B cap)

3. A non-profit entity which engages in established curriculum-related clinical training of students registered at any such institution.

4. A non-profit research organization or governmental research organization, as defined under 8 CFR 214.2(h) (19) (iii).

The filing fee is not required if the petition is submitted to amend or correct a service error; to amend the petition, but not requesting additional time; or if this is a second or subsequent extension of stay filed by this employer for this employee. The fee is $750.00 if the employer has less than 25 employees. The employer must pay this fee and cannot pass it on to the employee or a third party

The $500.00 filing fee which must be paid by the employer, is utilized by the USCIS to combat Immigration fraud. The payment is required on initial H – 1B petitions and petitions for change of employer. Payment cannot be made by any entity, including a 3rd party that must be paid by the employer.

The employer must pay this fee and cannot pass it on to the employee or third party, but must be paid by the employer. The employer cannot be reimbursed for said payment..

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8. Premium Processing

The United States Citizenship and Immigration Service, through “Premium Processing,” will adjudicate an H-1B petition within 15 calendar days, upon the payment of an additional filing fee of $1,410.

Premium Processing has proven to be a very useful tool for individuals seeking H-1B status for the first time. However, if a position requires a license or permit, as with doctors obtaining attending positions or doctors obtaining positions in residency training programs in Connecticut, Pennsylvania, or New Jersey, as well as some other states, USCIS can deny the petition if filed prior to issuance of the license or permit or if the effective date of the license is after the filing date.

Presently, regular processing of H-1B petitions are being adjudicated in approximately three to four months. Accordingly, Premium Processing is the best method for securing adjudications of H-1B petitions by the required start date. The option can be selected after the H petition has been filed. In April 2017, USCIS temporarily suspended premium processing on H – 1B petitions. It has since been resumed on certain H-1b petitions. It is anticipated that in October 2017, premium processing will resume on all H-1b petiitons.

Premium Processing is presently available on certain I 140 petitions. It is not available on National Interest Petitions.

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9. Continued Employment Authorization While H-1b Extension is Pending

An individual can continue employment while in H1B extension petition has been filed, under the following circumstances:

H-1b extension for the same employer:

Upon the submission of a timely filed H-1b extension to USCIS, the H-1b non-immigrant is authorized to continue employment with the same employer from the expiration of status for a period of 240 days, or until USCIS denies the petition, whichever comes first.

H-1b change of employer:

Pursuant to the American Competitiveness Act of the 21st Century, portability provisions, an H-1b non-immigrant may commence employment with a new employer upon the filing of a new H-1b prior to the individual’s expiration of stay. Employment authorization continues until the H-1b is adjudicated.

These provisions apply if there is no gap between the ends of an individual’s present H – 1B status and the start date of the new petition.

If H – 1B employment has ended prior to the expiration of the H-1b petition, the non-immigrant is given a 60 day grace period within which to find a new position and file an H – 1B petition or to request a change of status. They will be deemed as not violating their nonimmigrant status if the H – 1B petition is filed during the 60 day grace period. The new H petition by the new employer should be approved with an extension of H – 1B status. The 60 day grace period is limited to the end date of the present H – 1B petition if it expires during the 60 days.

Last Update: September 27, 2017

10. Attorney's Fees, Labor Condition Applications, and the H-1B Process

One of the most difficult aspects in processing the H-1B Petition is the Labor Condition Application process. The American Competitive and Workforce Improvement Act of 1998 (ACWIA), made a burdensome procedure even more difficult and unclear.

This section will hopefully clarify one aspect of ACWIA, namely, the attestation as to wages, and the payment of attorney's fees pertaining to the H-1B Petition and the Labor Condition Application segments of the H-1B visa process.

As explained in the Labor Condition Application memo, it is a violation of federal regulations, specifically the wage provisions of the Labor Condition Application, if the H-1B worker is required to reimburse, or pay for the attorney's fees, or other costs related to preparing and filing of the H-1B petition, if after deducting these fees or costs from the employee's wage, the employee's wage would be below the wage required by the LCA. The reason for this is as follows.

As stated on the Labor Condition Application, an employer is required to pay the higher of the actual wage that is paid to similarly qualified and experienced workers in the position, or the prevailing wage. Any deductions that bring the wage below the required wage is deemed to be in violation of the provisions of the Labor Condition Application and regulations as set forth by the Department of Labor.

Federal regulations state that the attorney's fees and filing fees related to preparing the H-1B petition and Labor Condition Application are the legal responsibility of the employer which cannot be "imposed" on a prospective employee, if it would reduce the required wage rate. 20 C.F.R. §655.731. Based upon case law, this may include the attorney's fees for preparing a J-1 waiver application and all related expenses.

Generally, attorney's fees, especially in post graduate training positions, bring the required wage rate below the rate listed on the LCA. For example, if a physician is in a first year post graduate training position with an annual salary of $60,000, and the attorney's fees allocated to preparing the H-1B Petition and Labor Condition Application are $3,500.00, the Department of Labor would determine that the actual wage rate being paid to the physician is $56,500.00 Accordingly, the employer is in violation of the representation on the Labor Condition Application that the individual would be paid the prevailing wage for the position, if the attorney's fees are paid by the employee/prospective employee.

However, if the employer/prospective employer refuses to pay the attorney's fees, but the beneficiary/employee is able to secure payment from a third party on their behalf and the beneficiary/employee does not reimburse the third party, then the employer may be in compliance with federal regulations. This interpretation of the law is based on 20 C.F.R. §655.731(c)(10)(ii) which relates to the $1500.00 scholarship fund filing fee. The statute refers to the prior filing fees on the matter which were $500.00 and then increased $1000.00 but is now $1500.00. The statute states the following:

"the employer may not receive and the H – 1B nonimmigrant may not pay any part of the 500.00 additional filing fee (for a petition filed prior to December 18, 2000) or $1000.00 additional filing fee (for petition filed on a subsequent to December 18, 2000), whether directly or indirectly, voluntarily or involuntarily. ….If the filing fee is paid by a third party, and the H-1B Non Immigrant reimburses all or part of the fee to such third party, the employer shall be considered to be in violation of this provision, as the employer would in such circumstances have been spared the expense of the fee which the H-1B Non Immigrant paid."

This provision just applies to the present Scholarship fund filing fee and the $500.00 fraud prevention filing fee. This provision and the other sections of law do not refer to attorney's fees on an H-1 B petition. Accordingly, this regulation appears to imply that third party payment of attorney's fees is permissible, as long as the H-1B Non Immigrant does not reimburse the third party. Accordingly, based upon this reading, as well as the statute which imposes the attorney's fees on the employer, an argument can be made that a third party is allowed to pay the attorney's fees as well as the filing fees on the H-1B petition, as long as the H-1B Non Immigrant does not reimburse the third party.

This interpretation is consistent with an article published in Bender's Immigration Bulletin Volume 7 Number 8, April 15, 2002, which cited an anonymous Department of Labor spokesperson who stated that payments on H-1B cases, including filing fees, can come from a third party, as long as the third party is not reimbursed by the H-1B beneficiary. **HOWEVER, IT DOES NOT ALLOW FOR AND IS CONSISTENT WITH THE PRESENT POLICY OF THE DEPARTMENT OF LABOR WHICH CLEARLY PROHIBITS PAYMENT OF THE 1,500/750.00 SCHOLARSHIP FUND FILING FEE AND THE $500.00 FRAUD PREVENTION FILING FEE BY ANYONE OTHER THAN THE EMPLOYER.**

If an employer is not paying the attorney's fees and expenses on the H-1B petition but is relying on third party payments they are doing so at their risk, especially if they are not paying the $500.00 Fraud Prevention Filing Fee and the scholarship Fund Fee if applicable. There is no guarantee or assurance that the Department of Labor or Immigration will deem this as acceptable. The best alternative is to have the employer pay the attorney's fees, filing fees and expenses related to the H-1B process. The employee is allowed to pay that part of the attorney's fees allocable to services in the process being rendered on the employee's behalf.

An employer, upon receiving an H-1B Petition and Labor Condition Application package from an attorney, should verify who is paying the attorney's fee and expenses, because if the fee is being paid by the beneficiary, the employer is in violation of the Labor Condition Application related laws.

To summarize, the employer should pay all attorney's fees and expenses on the H process to be assured of compliance with present laws and policies on the issue. If this is not occurring, but the attorney's fees and possibly the $460.00 filing fee are paid by a third party, other than the beneficiary, as long as the beneficiary does not reimburse the individual making said payment, the employer may be able to avoid paying the attorney's fees on a Labor Condition Application and H-1B petition. However, there is no guarantee that the Department of Labor or Immigration will accept the argument that a third party paid. The best solution is for the employer to pay attorney's fees and filing fees. **THIRD PARTY PAYMENT IS NOT RECOMMENDED AND THERE IS NO ASSURANCE THAT IT WOULD BE IN COMPLIANCE WITH THE LAW.**

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11. Portability of the H-1B Petition

An individual in H-1B status who has not violated said status, and has filed another H-1B petition prior to the expiration of their present H-1B status, with either the same employer, or a different employer, can commence employment with the new employer, (or remain employed by the present petitioning entity as long as the H through that employer is still valid), as long as the petition has been submitted and the start date listed on the petition has been reached and as long as the individual has maintained their nonimmigrant status as of the time of filing and up to the start date listed on the new petition. Accordingly, an individual who is presently in H-1B status may be able to avoid paying for Premium Processing, since the individual can be employed while the petition is pending. Nonetheless, Premium Processing is recommended.

However, if you are changing from an employer who was exempted from the H-1B cap, to an employer who is subject to the cap, and the H-1B cap has not been reached, or the case has been selected in the H – 1B cap lottery, employment should not commence and an extension of status should not be requested if there is a gap between the end of the individuals present H1 and the start date of the H – 1B cap subject H petition which would require an October 1start date.

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12. Procedure for Obtaining an H-1B Visa at a U.S. Consulate

An individual should schedule an appointment at a US consulate overseas prior to appearing at the consulate for a visa. Please check the Consulate's website for information. Do not rely solely on the contents of this memo for visa issuance procedures. If you apply for a non-immigrant visa at a US Consulate outside your home country, including Canada or Mexico, the Consulate may require you to have been in the United States in a valid non-immigrant status prior to your applying for the visa. Exceptions to this policy exist, including for some physicians who will be employed in Health Professional Shortage Areas. Please check with the specific Consulate before your departure and application for the visa as policies change regularly at various consulates and from consulate the consulate. Please discuss this point and all points with your attorney.

If applicants are refused a non-immigrant visa at a US Consulate in Mexico or Canada, or islands contiguous to the United States, they will not be permitted to re-enter the United States using the USCIS approval notice showing a change or extension-of-status and will have to depart to their country of nationality from Mexico or Canada in order to apply for the H-1B visa in their home country. This provision does not apply to Canadian citizens who are exempt from the visa requirement.

Some consuls in countries other than your home country may be more reluctant to issue the H-1B visa than others. Ottawa and Toronto, Canada tend to be fair in processing the visa applications for third country nationals. It is not always recommended that you travel to another consulate from your home country, as the visa could be refused for the simple reason that the Consul Officer may feel that you are shopping for an easier consulate.

Consul Officers must verify all approved H-1B petitions with USCIS through the "PIMS" system. Rarely, a case is not in the system. It is impossible to know, until you go to the consulate. If not in the system, the consul officer can verify the approval within a few days of your visa interview.

Due to September 11th, nationals of 26 designated restricted countries may have extra delays in being processed for a visa at any consulate, even the consulate in their home country. The countries reportedly affected by the security clearance process and delays, include but are not limited to Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates and Yemen. Nationals of these countries

may face significant delays for security clearances to be completed and the issuance of the visa. Sometimes, it has taken several months.

Do not leave the United States to apply for an H – 1B visa without consulting with your attorney first, especially if you are from one of the listed countries or countries affected by the Executive Orders. Delays in the security clearances are occurring worldwide and not just for individuals from certain countries. Please discuss any planned departures outside the US with an attorney.

Individuals in H–1B status who are returning from short visits to Canada or Mexico of less than 30 days, with either expired visas or no visas but with a valid H-1B approval notice and I-94, may be admitted to the United States, as long as they did not apply for a visa in that country and were refused. However, citizens of certain countries including Iran, Sudan, and Syria will not be readmitted, unless they have obtained a visa.

Please follow the following procedures when applying for an H-1B visa:

1. Check the web site of the U.S. Consulate for its procedures, listing of any documents needed and latest requirements and schedule the appointment online if allowed by the system.

2. Some U.S. Consulates have a drop box procedure for processing visas and only schedule an appointment on a case by case basis. It usually applies for individuals renewing their H – 1B visa.

3. If you are presently in H-1B status, obtain a new original letter from your employer addressed to the U.S. Consulate, confirming your position or prospective position, salary and date you started or will start your employment. You should also bring several of your most recent paystubs, Federal tax return and W-2, if applicable. Additionally, please try to get a brochure or some photos of the place of employment. Some Consulates have been requesting same.

4. The following is a listing of the documents which you should bring to the interview. Please note that as stated above, each consulate may have its own requirements and hence this listing should not be deemed to be all-inclusive:

1. Valid passport. See Note 11 below
2. Original H-1B approval notice (I-797)
3. Attorney certified copy of the petition (Form I-129)
4. Labor Condition Application (ETA-9035)
5. Letter in support of the petition
6. Original diplomas,
7. USMLE Score Sheets,
8. ECFMG certificate,
9. If spouse and children are accompanying, marriage certificate and birth certificates of children,
10. Your resume/CV.
11. Degree evaluation, if non-physician position,
12. State license/permit if applicable
13. All previous approval notices received from USCIS, including but not limited to H-1B, F1, B2, H4, etc.
14. If you have or were in J-1 status and are applying for H – 1B status, you must bring all your DS-2019 forms and original Waiver Approval Notices, from all agencies.
15. New employment verification letter verifying job title and salary.
16. Approximately 5 current paystubs and W-2s.
17. Any previous H-1B approval notices.
18. If you are or were in student status, bring a letter from your school verifying that you are a student in good standing, together with the I-20's.

5. Do not present your contract unless it is specifically requested.

6. If you are utilizing a drop box, it is not recommended that you submit original certificates, unless requested to do so by the consulate.

7. Try to obtain a multiple entry visa. However, the duration of the visa and ability to obtain a multiple entry visa will be limited by agreements between the United States and your country.

8. If you are a physician in a PGY position, bring proof that a license or permit is not needed for the position, or if you are employed in a State where an individual training permit or license is issued, or alternatively, a blanket permit or license is issued to your employer, bring proof of same. If your PGY position is in New York, you should bring a copy of the law which states that a doctor in a residency program does not require a license. This office provides it to you with the H-1B package. **It is not recommended that you submit licensure requirements, unless specifically requested by the Consulate.**

9. Form I-94 is no longer issued upon every entry to the US. Verify that the end date listed in your passport by the immigration officer at the time of your entry and on the immigration website is identical to the date listed on form I-797, the H approval notice. This is to be done upon every return trip to the United States. As soon as you have access to a computer and printer, utilize the following link to verify the end date and the status of admission after each trip. Print out and maintain the document. Report any discrepancies to this office.

https://i94.cbp.dhs.gov/I94/#/home#section

10. If your passport expires prior to the end date listed on the H–1B approval notice, your admission to the United States should be limited to the expiration date of the passport. Please be mindful of this detail and verify the end date of your admission to the United States on above-mentioned website immediately upon your arrival. Additionally, please check the date the officer may have entered on the arrival stamp. You will need to extend your passport and leave the United States and reenter, to obtain the appropriate end date which would match the end date of the H-1 B petition. If you cannot travel then an H1-B extension will be needed to cover the gap. Please notify your attorney as to any discrepancy. Additionally, if you are entering before the start date listed on the petition and it is a 3 year H, your admission will be limited to 3 years from the entry, not the end date of the visa or H approval notice. However, you should get the correct end date on your subsequent entry.

11. If the H visa expiration date is earlier then the expiration date on form I-797, the H–1B approval notice, you are still to be admitted to the US for the duration listed on form I-797, as long as the passport does not have an earlier expiration date. If the entry stamp has an earlier end date, then ask to see a supervisor. However, the admission date will be limited to the expiration date of your passport. Contact your attorney if the entry record is inaccurate.

12. If your spouse or children are applying with you, make appointments for them as well. Bring them and their passports, the foreign language and notarized translation of birth and marriage certificates to the appointment. . Even if your spouse or children are not planning to join you at this time, but will probably be coming in the future, get the visas issued now.

There is no guarantee that a visa will be issued. Delays ranging from a few weeks to several months have occurred due to security clearances, regardless of your country of birth. The more common your name, the more likely there could be a delay. The fact that a visa was issued to you previously, even without a delay, does not mean that there will not be delay on your next application. There is a greater concern for delay and potential refusal if you are from one of the countries listed in the Executive Order.

If you are a physician or PGY, have not passed USMLE 1, 2 and 3 or FLEX 1 and 2, and are not a graduate of a US Medical school, it is not recommended that you leave the United States for an H-1B visa. Please discuss with an attorney.

The consul makes the final determination as to issuance of the visa and the USCBP officer makes the determination as to admissibility to the United States. This office cannot guarantee issuance of a visa and admission to the United States.

You can only apply for a Social Security card at the office closest to where you reside. The card can take a few weeks to a few months to process However, you should be allowed to commence employment assuming you are in H-1B status. The Social Security Office will most likely not accept your application for Social Security number prior to the start date listed on the H – 1B petition.

If you are applying for an H visa in another country that would require a visa to enter go to the appropriate foreign Consulate for a visa to enter that country. The Canadian Consulate is located at 1251 6th Avenue (Avenue of the Americas @ 49th Street) New York, NY. (212) 596-1600.

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13. Should I Stay or Should I Go? The Dilemma of the FMG in the United States Seeking a PGY Position While in B-2 Status

Over the last 30 years, the following scenario is often presented- by foreign medical school graduates:

"I am presently in the United States in B-2 status as a visitor. My B-2 status expires after my residency starts. Should I remain in United States and process my H-1B petition and seek a change in status or should I depart the United States?"

Prior to the tragedy of September 11th, the answer was relatively simple. If the IMG had a clean record with the US consulate, there was no reason to doubt that the consulate would be willing to issue the H-1B visa to the applicant. Accordingly, the IMGs may have determined that it was practical for them to return home to obtain an H-1B visa or J-1 visa in their passports, thereby allowing them to travel freely to and from the United States while in their respective status. Additionally, the IMG might visit family and friends in their home country that they may not see again for a long time once the residency started. Once the H-1B petition was approved, the IMG would apply with any dependents for their visas at the U.S. Consulate, thereby having the ability to travel to and from the United States while in H status.

Over the last decade, more stringent security clearance procedures have been put in effect. It has become a lot more difficult over the last several months. As a result, some individuals have faced delays in obtaining H – 1B visas and other visas ranging from a few weeks to several months. It is difficult to predict when a delay will occur.

However, the more common your name, the more likely you will face a delay. Additionally, nationals of certain countries as listed in the previous memo, entitled "Procedure for Obtaining the H-1B visa at a U.S. Consulate", may be more likely to face a delay. It is STRONGLY recommended that options and risks be discussed with an attorney when you first enter the US for interviews, USMLE exams or other purposes, and certainly prior to planned departures. Doctors have lost residency slots due to delays in visa issuance due to security clearance problems.

Additionally, due to tightened security, there may be delays in getting an appointment for a visa at a US Consulate, especially in the few months between the Match results being released and the start date of the H petition.

Occasionally, IMG's have represented to consul officers that they were coming to the United States to attend a conference, but then never actually attended the conference. If the consul officer determines that a visa applicant may have misrepresented their true intent when they applied for the B visa, the consul officer may refuse to issue another non-immigrant visa.

Many IMG's obtain student visas for Masters of Public Health programs but then they change to a different program, never attend the program or leave the program before completion. This may lead to problems at the consulate.

Over the last few years and as recently this past spring, consulates have raised numerous issues and delayed issuance of H and J visas to individuals who initially represented to the consul officer that they were merely coming to the United States for a few weeks and then end up staying significantly longer. Some consul officers interpret this as being a fraudulent representation when the individual initially filed for the visitor visa and stated they were coming for a few weeks and then stayed longer. This is despite the fact that very often the visa applicant did not know that the immigration officer at the port of entry would give them the option of additional time. Of course the reflex action would be to accept any additional time. Nonetheless, this is turned into an issue. This is more problematic for J1 visa applicants.

If an individual is seeking a change in status to H-1B status, and their employment commences subsequent to the expiration of their status, USCIS should not grant a change of status to H-1B status since the individual has not maintained legal status during the intervening period. For example, if an individual's B-2 status expires on February 2nd and the residency starts July 1st, the USCIS should not grant the change of status since the individual was out of status between February 2nd and July 1st. However, even if the USCIS grants a change of status under those circumstances, there could be very serious ramifications. Please see the discussion on this issue contained in the memo entitled "The H-1B Visa."

An individual submitting an application to extend their visitor status should not have the intent to get the extension and then file for a change of status to H-1B status, as there may be issues regarding fraudulent intent with regard to B-2 application. Additionally, should they then decide to go home, there could be problems obtaining a visa. Presently, applications to extend status can take longer than 4 months. Hence this is not a good option.

Individuals who return home for renewals of H – 1B visas have also faced delays in the issuance of the visa, even when previous H – 1B visas were issued without any delay. Prior experience at a consulate does not guarantee that you will not have problems on future visa applications.

It is strongly recommended that you discuss all options regarding your visa status with an attorney in order to select the option that will best serve your needs.

Last update: September 27, 2017

Stephen M. Perlitsh, P.C.

COUNSELLOR AT LAW

14. Fellowship vs. Attending Position: The Big Decision

This and the following memo probably discuss the most important issues since you have obtained residency, namely planning for the future. This memo is not a substitute for a detailed and comprehensive consultation with an attorney engaged in Immigration law, specifically a practice which deals with physicians. This memo is not meant to be exhaustive of all options.

I am very often consulted by clients and prospective clients regarding planning for the future. The main question is: "I will be finishing my 3rd year in H-1B status, and completing my residency program in June. I have the opportunity to join a fellowship, or to get a position as an attending physician. What should I do? What are my Immigration options?"

The answer varies with the individual's personal and professional needs, which need to be balanced with the reality of Immigration Law. The answer also varies with the number of years that the fellowship program will be, as well as how many years were spent in the residency program. If the combined time spent in H-1B status in order to complete the residency and fellowship is 6 years, then the physician may have limited or no option to renew their non-immigrant status. USCIS may extend the H-1B petition beyond the sixth year, if an individual has filed an Application for Alien Employment Certification or an I-140 Petition for an Immigrant Worker, at least 365 days prior to the end of the 6th year in H-1b status. The H-1B status can be extended, until a final decision is rendered on the matter. Upon approval of the I-140 petition if subject to retrogression, the H status can also be extended. However, a further extension will not be granted once retrogression has been resolved and the Priority Date has been reached. Time spent in H-4 status does not count against the 6 year H limit. Any time spent

outside the US, after being granted H status can be recaptured.

If your heart and mind is set on completing a fellowship, you must be mindful of the fact that if you are doing a 3 year fellowship, you may be running out of time in non-immigrant status to remain in the United States. If you have completed 6 years in H-1B status, you will be unable to renew your H-1B status except as discussed above. However, you may qualify for O-1 status. Please see the O-1 memo. A J– 1 visa/status may also be an option. However it would subject you to the two-year foreign residency requirement and hence you will need a J – 1 waiver.

If you are doing a 3 year fellowship, for example in Cardiology, and you completed a residency in Internal Medicine, you may be able to start an application for Alien Employment Certification, (a Labor Certification case) based upon a position as an Internist or similarly titled position for which you are qualified, if you are able to find a position that will wait for you to join after you complete the Fellowship. However, you will be required to be employed in that position with the entity that sponsored you, once your application for resident alien status is approved. This could be several years in the future if you are affected by Retrogression.

Portability provisions may allow you to change employers or sponsors after the Adjustment of Status application has been pending for 6 months. However, the new employer will need to sign an Application confirming that the position is similar to the one listed on the labor certification case and the salary is at least the same amount.

If your case is affected by retrogression, you can secure another sponsor for labor certification in a different position. You will retain your Priority Date on the new case.

If your spouse is able to proceed with permanent resident status on a Labor Certification case or any other case, you will be able to benefit through your spouse's case. If everything proceeds on a timely basis, it may not be necessary for you to depart the United States. If your spouse secures approval of an I–140 petition and your case is affected by retrogression, you can obtain an Employment Authorization Card if you obtain H–4 status. Since the spring of 2017, there have been discussions of the canceling of the EAD for individuals in H – 4 status.

If you are obtaining a position from a facility that is not exempt from the Cap, then the H-1B petition will be approved with an October 1 start date. You must maintain your non-immigrant status through October 1, or USCIS will not grant an extension of status or employment authorization when the H-1B petition.

As stated in the prelude of this memo, these issues are very complicated. It is imperative that you maintain close contact with your Immigration attorney throughout your time in residency, in order to plan adequately for your future.

Last update: September 28, 2017

15. Dilemma of Filing an H for an Attending Physician License; Cap Exemption

One of the happiest moments encountered by a doctor in the last year of residency or fellowship is finding the ideal job as an attending physician. The Immigration attorney will need to advise you regarding how to secure approval of the H-1B petition. The factors to be taken into consideration are the following:

1. When will the IMG qualify for a state medical license?
2. What will USCIS do if you file the H petition without the license?
3. How do the rules regarding cap exemption impact on our decision?

i. License Issue

USCIS requires an individual to qualify for an Immigration benefit at the time of filing the H-1B petition. There is a concern that USCIS may not approve an H petition filed without a license or letter from the licensing authority stating that the license will be issued when the H is approved or a similar letter documenting qualification for licensure and explaining why the license is not presently available. USCIS can deny an H petition when the license was issued after the date of filing or after the start date listed on the H petition, or with a letter stating that the license application is in process. USCIS may approve the petition if the license is submitted prior to adjudication of the petition. Often this is not an issue.

An employer may not want to file the H – 1B petition without the license because once the petition is submitted and the beneficiary appears for employment and completes form I – 9, the employer is required to employ and compensate the beneficiary even though the individual does not qualify to treat patients since there is no license.

The dilemma regarding licensure is the following: In most states, an individual will not qualify for a state license until they finish PGY3. In the last week of June, the IMG who is completing PGY3 and wants to file an H petition usually will not have a license. However, if they file the H petition after their H or other non-immigrant status has expired, USCIS should approve the petition without a corresponding extension of their status and without employment authorization, as they have not maintained their non-immigrant status until the date of filing.

If an H petition is filed for an IMG before completion of PGY3 and without the license or letter from the licensing authority stating that the license will be issued when the H

is approved, USCIS may deny the petition because the IMG did not qualify for the position as of the date of filing. The solutions to this dilemma and related possible problems associated to each solution are the following:

1. File without the license and hope for the best. However, if the petition is denied, it will have to be re-filed and filing fees need to be paid again. If the initial petition is denied, the IMG will be out of status and will have to leave the US and obtain an H-1B visa at a US Consulate prior to commencing employment after re-filing the H petition with the license and securing its approval. The decision as to filing without the license will have to be weighed against the alternative and other options which might be available.

2. File the petition after the license is issued and hopefully keep the IMG in the US in another non-Immigrant status to cover the gap between the end of residency and the filing of the H petition with the license and start date listed on the petition. However, there is no guarantee that the IMG will obtain another non-immigrant status, or that it will be approved before the H petition is adjudicated.

3. Send the IMG outside the US until the license is issued and the petition is approved and the start date is reached.

A. H-1B Cap Factor

The decision as to when to file the H petition is more complicated if the position being offered to the IMG is not exempt from the H-1B cap. USCIS has a quota of 65,000 H-1B's per year. There are an additional 20,000 for graduates of nonprofit US Universities with a masters degree or higher. The H quota is referred to as the "H-1B cap".

The US Government year commences October 1 and ends September 30th. H – 1B petitions can be submitted 6 months in advance of the start date. Every effort must be made to submit the H petition on the last working day in March so that it reaches USCIS on April 1 or at the earliest date possible after April 1. Over the last several years, USCIS has announced around April 8 or possibly a few days later that they have received enough petitions to cover the supply of H visas and accordingly closed the program. USCIS then randomly selects the cases for processing. About 200,000 H-1 B petitions are submitted for these slots.

The majority of physicians in residency programs pursuant to H–1B status, are employed by H – 1B cap exempt facilities. Accordingly, when they obtained H-1B status, they were not counted against the 65,000 H-1's. They are now competing and hoping to get one of the 65,000 H-1B approvals that can be issued each fiscal year. If the individual was previously counted against the H-1B cap, or is obtaining a position at a facility that is exempt from the cap, then there should not be any problem obtaining H-1B status.

B. H – 1B Cap Exemptions

As discussed in more detail in memo number 6, An employer is exempt from the H-1B cap if they are a not for profit entity pursuant to section 501c3 of the IRS code (and possibly other sections) AND affiliated or related to an institution of higher education.

The cap exemption is also available if the IMG will be EMPLOYED AT a cap exempt facility while employed by a non exempt entity. This means that if a for profit practice employs the IMG but all or some of the work is being performed at a cap exempt facility, then the position may be deemed cap exempt. Please see memo # 6 regarding the requirements for said exemption, namely performing educational duties a majority of the time and thereby advancing the Affiliation Agreement between the facility where services are rendered and their affiliated Institution of Higher education. The employer will need to establish that the IMG will be teaching and instructing medical school students and residents a majority of the time spent at the cap exempt hospital where the IMG will be performing some or all of his services. The basis for this requirement is a memo issued by Michael Aytes, Associate Director of USCIS Domestic Operations on June 6, 2006, available through the following link:

http://www.uscis.gov/files/pressrelease/AC21C060606.pdf

The memo has now been modified by a Regulation which became effective January 2017.

As stated on pages 3 and 6 of the memo, in order to successfully claim a cap exemption based upon being "employed at" a cap exempt facility, the petitioner must establish that the IMG will perform duties at the qualifying institution (a hospital) that " …… directly and predominantly furthers the essential purposes of the qualifying institution….The burden is on the Petitioner to establish that there is a logical nexus between the work performed predominantly by the IMG and the normal primary or essential work performed by the qualifying institution."

The memo, beginning on page 7, lists examples of how USCIS will apply this rule. Example 3 appears to most closely parallel what USCIS is looking for when dealing with physicians. The IMG is going to be employed at a private practice with its primary office in a University hospital which predominantly trains medical students and treats patients. Since the IMG would be furthering the primary mission of the hospital by educating and training medical students and treating patients at the medical center, the cap exemption should apply.

However, perhaps a parallel can be made with example 1. The employee will work on a research project and perform duties similar to those performed by the employees of the exempt entity, a research organization, on the exempt entities' premises and

accordingly, the cap exemption should apply. Since the affiliation agreements which hospitals have with medical schools are primarily for teaching and research, USCIS may not recognize the cap exemption if either of those functions were not part of the job.

In example 2, an Oncologist will provide clinical treatment of cancer patients and laboratory research on new medication to treat liver cancer while employed by and at a for profit hospital and research center. However 55% of his time is spent working on site at the exempt non-profit research organization. In this scenario, the hospital and the exempt entity have a relationship. The cap exemption applies because the for-profit hospital and the cap exempt entity where the Oncologist will be performing research 55% of the time, share a cooperative relationship which helps to establish a nexus between the Oncologists work and the "normal, primary, or essential purpose, mission, objectives or function of the non-profit organization." The fact that 55% of his time is spent at the exempt entity's premises is also cited as a factor.

In example 4, the cap exemption was not recognized for an individual engaged in market research on site at a qualifying University, where the work was not for the benefit of the University.

As far as the applicability to IMG's, if the IMG, will be employed by a for-profit entity as a Hospitalist at a cap exempt teaching hospital and will be involved a majority of the time in teaching medical school students as part of his duties, then the cap exemption should apply.

The main benefit of claiming a cap exemption is to secure the services of the IMG prior to October 1. However, we have to balance many factors in order to determine whether to claim the cap exemption.

1. Will USCIS approve the petition and recognize the claim that the IMG will be employed at the cap exempt entity performing duties advancing the cap exemption of that entity, which is usually, based on an Affiliation Agreement with a medical school, for the purpose of training their medical school students?

2. Can the employer wait for the IMG to join October 1?

3. What is the cost of re-filing if we are unsuccessful in claiming the cap exemption?

4. Will there still be H's available if the cap exempt petition is denied?

A possible solution to this dilemma is to not claim the cap exemption unless there is significant certainty that it will be granted. Assuming the H-1B cap has not been reached, if the employer is willing to wait for the IMG to join the practice on October 1 and the H cap has not been reached, then wait until 10/1. If the IMG cannot maintain their non-immigrant status in the US from July 1, the end of their residency and October 1, then the IMG should leave the US and reenter with an H-1B visa about ten days before October 1. However, if the IMG feels that getting the H-1B visa at the US Consulate will be a problem, then this alternative is not ideal. However there may not be an alternative.

The options become fewer and the decision easier to make if the position is cap exempt and the individual has obtained licensure, or if the cap has been reached but an argument can be made for being "employed at" a cap exempt facility.

It is impossible to address all scenarios or to provide a complete explanation without significantly expanding this memo into a treatise or chapter of significant length. However, supplementing this memo with a conversation should be helpful in understanding all aspects and hopefully reaching the proper decision.

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Stephen M. Perlitsh, P.C

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16. <u>The Labor Certification Process</u>
<u>PERM: Program Electronic Review Management</u>

The primary method for most individuals to obtain Permanent Resident Status through employer sponsorship, (except nurses, physical therapists, individuals whose services would benefit the National Interest of the United States, individuals of extraordinary ability and certain executives and renowned individuals) is through the "Labor Certification" process. It must be established to the Department of Labor that there are not any workers from the United States interested in or qualified for the position being offered. It is necessary to submit various forms to the Department of Labor describing the position, experience, education, licensure and salary requirements and the alien's education and employment history.

On May 16, 2007, the Department of Labor published a rule stating that the attorney's fees and expenses pertaining to the Labor Certification process are an employer's expense which can only be paid by the employer. The employer cannot be reimbursed or paid in any matter for these fees and expenses. It is illegal for the employee to pay these fees and expenses.

On March 28, 2005, the Department of Labor implemented the PERM regulations on Applications for Alien Employment Certification. It is a vast improvement over the previous procedure which took over two years in some states. It is now taking the

Department of labor about 8 months to process PERM cases. If the case is "audited", delays ranging from several months to two years could occur. The backlog and hence the processing time, varies over time.

The initial step in the process is to verify that the salary offered or being paid for the position is appropriate. Accordingly, an application is submitted to the Department of Labor in order to obtain the "Prevailing Wage" for the position. This step takes between 3 and 4 months though processing times sometimes become shorter and longer. Processing times are beyond the control of the attorney or employer. If the position is covered by a Collective Bargaining Agreement, the DOL will utilize the salary listed on the CBA.

Once the Prevailing Wage is obtained, and the wages to be paid to the employee upon being granted Alien Resident Status is at least equal to or greater than the Prevailing Wage, the recruiting phase of the process can commence.

A job order for the position is placed online at the State Workforce Agency – SWA website. The SWA will forward resumes to the employer which the employer is to review as part of the recruitment process.

The employer must also post the position for at least 10 consecutive business days. The posting must occur between 30 and 180 days before the application for Alien Employment Certification is filed with the Department of Labor. The posting must include the name of the employer and information identical to the job description utilized in the advertisement and the salary. A salary range can be posted, but the lower level of the range must be at or in excess of the prevailing wage.

The employer must register on the Department of Labor website. This will provide the attorney with authorization to represent the employer on this matter.

The employer must take several steps to recruit for the position, in order to establish that a qualified US worker is not available for the position. These recruitment steps include but are not limited to advertising in the Sunday edition of a major newspaper, a national magazine and company website. Applications for professional positions require additional recruitment. The regulations list the following as acceptable additional recruitment procedures: Job fairs, employer's website, job search website other than employer's, on campus recruiting, trade or professional organizations, private employment firms, an employee referral program, if it includes identifiable incentives, a notice of the job opening at a campus placement office if the job requires a degree but no experience, radio and television advertisements and local and ethnic newspapers, to the extent that they are appropriate to the position being advertised.

This office will provide the employer with the different recruitment options. This phase must be done more than 30 days but less than 180 days before filing.

The advertisement must list the name of the employer, geographic area of employment and a description of the position. Educational requirements can be included as well. The advertisement must instruct applicants to send resumes to the employer. The employer is not required to list their address. They can list a post office box or a central office for resumes to be sent. The advertisement does not have to list the salary or a detailed job description.

The employer must attempt to contact each applicant for the position who appears to be qualified. The employer will have to document legitimate reasons why the individual did not qualify for the position. The employer must maintain detailed records as to the recruitment and reasons for rejection of any applicant. If none of the applicants qualify for the position and are legitimately rejected and the Department of Labor concurs, they will issue the "Labor Certification". If a qualified applicant responds to the advertisement and wants the position, Labor Certification will not be issued and the case must not be filed, unless there is also another identical position available for that applicant. Once all the recruitment steps have been completed and if there were no qualified applicants interested in the position, form ETA 9089 is submitted to the Department of Labor.

The Department of Labor performs random audits of applications on cases as well as audits on cases they feel require further scrutiny. Accordingly, detailed records of the recruitment effort and reasons for rejection are to be maintained, as well as the efforts taken to contact the applicants. If the audit reveals willful violations and misrepresentations, the employer faces severe monetary sanctions.

Once the Department of Labor completes processing the application and issues the Labor Certification, an I-140 Petition for Immigrant Worker is filed by the employer with the United States Citizenship and Immigration Service. The Petition establishes that the alien's credentials meet those listed for the position on Form ETA 9089. It also establishes the employer's ability to pay the salary listed for the position, both when the case was commenced, as well as when the petition is filed. Employers must be willing to submit their Federal Tax Returns or audited financial statements to USCIS, as same will be required. If the sponsor is operating at a loss and the prospective employee has not been on the payroll of the sponsor, the case will probably not be approved. Not for profit entities are usually not required to submit their tax returns or financial statements. If the employer has at least 100 people on staff, then a letter from CFO as to ability to pay may be accepted in lieu of the tax return. This is at the discretion of the immigration officer.

Simultaneous with the filing of the Petition, the alien can submit an Application for Adjustment of Status to Resident Alien Status with appropriate support documentation, as well as an application for an Employment Authorization Card, unless the State Department Visa Bulletin indicates that an immigrant visa is not available in that category for the individuals country of birth. This is known as "Retrogression". If retrogression is not an issue or if the Priority Date on the case is current, then the

Application will result in the issuance of a "Green Card,"/ Permanent Resident Status. The spouse and children of the alien, who are in the United States in valid non-immigrant status, may also file for Adjustment of Status, Advance Parole/permission to travel and Employment Authorization. The Employment Authorization card is usually issued within four to five months. The Application for Adjustment of status can take several months to complete, assuming retrogression is not a factor. Delays do occur and processing times vary.

If the I-140 petition has been approved and the Application for Adjustment of Status remains unadjudicated for 180 days, the applicant can change employers without jeopardizing the application, as long as the new position is equivalent to the previous position, in terms of salary and duties. The new employer however will need to complete and sign an Application for submission to USCIS verifying the salary job title and position and establishing that it is identical or substantially similar to the position listed on the I 140 petition and Labor Certification case.

The beneficiary can opt not to file for Adjustment of Status and employment authorization and choose to complete the processing at the U.S. Consulate in their home country. That process would be commenced after approval of the Petition. This procedure may be faster, if retrogression exists. However, the beneficiary cannot change employers during the pendency of the case if they elect to proceed at a U.S. Consulate, and do not qualify for an Employment Authorization Card or Advance Parole (permission to travel). They must maintain their H-1B status and can travel with an H visa.

If an individual has been in H-1B status for six years, and an Application for Alien Employment Certification or Petition for Immigrant Worker is pending for more than one year, then the H-1B petition can be extended. If the corresponding H-1B visa has been extended, and the individual is employed by the H-1B petitioner, then the individual can travel outside the United States, assuming they have a valid H-1B visa to return. Individuals in H-4 status can travel as well, provided they have H-4 visas. Advance Parole may be another option for permission to travel. Please discuss all options with an attorney.

The Labor Certification procedure is for employment in the future, not for present employment. However, when the case is commenced, the individual must have all the experience and credentials required for the position. For example, a physician who has not completed his training may not qualify for an Attending position at this time, unless they qualify for licensure in the state of employment. However, the case may be successful if the requirement for the position is that the individual qualify for the position at some point in the future, for example 6 to 10 months.

PERM applications for PGY positions are not being approved at this time

The Labor Certification process through Adjustment of status, if there is no retrogression, may take around 2 years to complete. However times can vary and it may be longer depending upon backlogs at both the Department of Labor and Immigration. Furthermore, the processing time will be longer if the case is audited by the Department of Labor, or denied and appealed. Furthermore, if you and your spouse are from a country affected by retrogression (India, China) then Adjustment of Status will be delayed as well. Additionally, the case can be denied for different reasons, including a determination by the Department of Labor that a rejected applicant was qualified for the position or a determination by USCIS that the employer does not have sufficient resources to pay the beneficiary's salary. Effective August 2017, USCIS requires that these applications have interviews with immigration Officer.

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Stephen M. Perlitsh, P.C.

COUNSELLOR AT LAW

17. Step One to the J-1 Waiver: Finding a Job

One of the most common questions asked by International Medical School Graduates is, "how do I find a job after I finish my post graduate training?" The job search is the first and most integral step towards processing the J-1 waiver or a petition for permanent resident status for other visa holders.

As a physician in J-1 status, you know that you must find a position where you will be providing services as a physician in an area designated by the Department of Health and Human Services as a Health Professional Shortage Area, Medically Underserved Area, or a position within the jurisdiction of the Appalachian Regional Commission, Delta Regional Commission a Federal Qualified Community Health Center which comes under the jurisdiction of the United States Department of Health and Human Servs. or a position with a VA facility. These areas are located throughout the United States, are listed in the Federal Register dated September 15, 2000 and updated periodically on the Internet. It is best to start your job search just before completing your next to last year of post graduate training. The following link can be used to determine whether a specific address is in a shortage area:

http://datawarehouse.hrsa.gov/GeoAdvisor/ShortageDesignationAdvisor.aspx

The truly eager IMGs who have a lot of time on their hands can do a lot of research and send resumes to every possible hospital, physician and clinic in Health Professional Shortage Areas or Medically Underserved Areas throughout the United States and VA facilities. However, time is not a luxury available to most IMGs.

If you are presently employed at a hospital located in a shortage area, you can try to pursue an attending position and J1 waiver opportunity there.

Another way to find a position is through networking. Speak to your friends who were in your position during the last few years. Renew old friendships and acquaintances and see if perhaps there is an opening coming up in the hospital, clinic or practice where they were able to obtain a position. If they are unable to direct you to a position, ask them if they can recommend a reputable recruiter who could assist you in finding a position.

If utilizing a recruiter, be sure to interview the recruiter. Find out from the recruiter what kind of opportunities may be available to you, where these opportunities are, the chances of being successfully placed, the salary range for the positions offered, as these points may be factors in obtaining a successful completion to the J-1 process. You should also find out if there are other J-1 physicians who have been granted waivers, presently employed at these locations, so you can speak to them and get their opinion on these locations or positions.

Once you have selected a recruiter to act on your behalf, always try to verify that the positions for which you are interviewing will qualify for a J-1 waiver.

Very often, prospective employers in shortage areas place advertisements in various publications and post positions at teaching hospitals.

When you go on the interview, make sure that the job opportunity fits both your professional and personal needs. Speak to other physicians employed by the sponsoring entity. Speak to other IMGs that may have preceded you in the town. Be sure that the choice you make will meet your family's needs. You may find that you are not in the position to pick and choose your positions. But making the wrong choice for the wrong reasons can be detrimental to you and your family.

The J-1 waiver process is long, difficult, and arduous. Dealing with trustworthy people throughout your journey will certainly make the process less burdensome.

Last update: September 27, 2017

Stephen M. Perlitsh, P.C.

COUNSELLOR AT LAW

18. J-1 Waiver Memorandum

Procedure for Obtaining a Waiver of the Two Year Foreign Residency Based on an Offer of Employment at a Facility in a Health Professional Shortage Area

Physicians entering the United States with a J-1 (Exchange Visitor) visa must return to their home country for two years after the completion of training, unless the physician has obtained a waiver of the two-year foreign residency requirement, which encumbers the J-1 status. A waiver can be requested if the physician is able to obtain employment at a facility or practice located in an area designated by the United States Department of Health and Human Services (hereinafter referred to as "HHS") as a Health Professional Shortage Area (hereinafter referred to as "HPSA") or Medically Underserved Area (MUA). A waiver may also be processed if the place of employment is not in a HPSA or MUA, but treats a substantial number of patients from those locations. Waivers are also available for specialties, but it varies from State to State.

The Department of Veteran Affairs will process waivers for positions at its facilities and the Appalachian Regional Commission will process waivers for positions located in territories under its jurisdiction. All waivers require that the physician serve at the location for a minimum duration of three years.

Under the "Conrad 30" program, each state can process 30 waivers per year. Most states are participating. A few states require a four-year commitment.

Under the HHS J-1 Waiver program, the HPSA/MUA area must have a score of 14 or above and the sponsoring facility must be a Federally Designated Health Center, a Rural Health Clinic, or a Native American/Alaskan native medical facility. HHS can also process waivers for research positions.

The Delta Regional Authority will process waivers for positions within their jurisdiction The program serves 240 counties in 8 states in the Mississippi Delta Region that have a demonstrated need for physicians. The following states are included in the program: Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri and Tennessee. However not every county in these states are included in the DRA’s jurisdiction. Waivers are not limited to primary care.

The Appalachian Regional Commission will process J – 1 waivers for individuals with positions within their jurisdiction in one of the following specialties: family practice, general pediatrics, OB/GYN, Gen. internal medicine or psychiatry. They may consider specialty areas when an appropriate showing of need is demonstrated.

The waiver application takes several months to process. The preliminary step to filing the waiver application with an Interested Government Agency is to obtain a file number from the United States Department of State. After the number has been obtained, documentation establishing that the position is located in a HPSA or MUA, together with a detailed letter describing the need for a physician at the facility, the health conditions being treated at the facility, the efforts that the facility has made to recruit a US physician and the qualifications of the applicant are submitted to the agency, together with additional data and information, including an employment agreement. Each agency and each state has its own waiver policy, procedures and requirements. For example, some programs will require that the prospective employer establish that they had engaged in a recruitment effort for at least six months prior to filing the waiver application.

If the Agency supports the application, they will recommend to the United States Department of State that a Waiver be granted. The State Department will recommend to the USCIS that a waiver be granted. USCIS will then issue an approval notice confirming that the waiver has been approved. The approval of the waiver will specify that the physician must be employed by the employer specified in the waiver application for a period of three years, in H-1B status. The approval of the waiver does not confer Employment Authorization or Permanent Resident Status on the physician. An H-1B petition must be filed and approved prior to commencing employment.

There is no exact science as to when the H-1B process should be commenced. Many factors come into play. The USCIS will not grant a change of status to H-1B status by a J-1 waiver applicant, unless the waiver application has been approved. The H-1B petition cannot be filed more than 6 months before the commencement of employment. Generally, the date that office commences the H-1B processing will vary with each case. Ideally, if circumstances allow, we would file the H petition once the waiver has been approved by USCIS. Under certain circumstances, we may file the H once the United States Department of State has issued their recommendation to USCIS. Under other circumstances, we may wait until the waiver has been approved before starting the paperwork. The status of the license may impact on the time of filing.

USCIS has been inconsistent in their handling H-1B petitions filed without the USCIS waiver approval notice. The office handling the H – 1B petition sometimes contacts the USCIS office handling the waiver, obtains the approval of the waiver and approves the petition. However, this policy and procedure varies from time to time.

If the physician is legally in the United States, in a valid non-immigrant status, the H-1B petition should be approved with a change of status to H-1B. If the physician's J-1 status and 30 day grace period expired before the start date of the H petition or the IMG is outside the US, then the H should be approved without a change of status and employment authorization. The IMG will need to obtain an H-1B visa in their passport and be admitted to United States in H–1B status before commencing employment. Canadian citizens are exempt from obtaining the visa and may enter the United States in H – 1B status, by showing the H – 1B approval notice at the Port of Entry..

The physician must be employed by the sponsoring facility for three years in H-1B status before the physician can file an application to adjust status to Resident Alien Status, based upon an approved Labor Certification and accompanying petition, or an "Immediate Relative" petition, assuming retrogression is not an issue. The Application for Adjustment of Status may be filed sooner, if the physician has filed a "National Interest Waiver" based upon employment in an HPSA or MUA, assuming they are not from a country affected by retrogression. Please see the annexed memos regarding Labor Certification and National Interest Waivers.

I recommend that the physician not remain in the United States more than six months passed the thirty day grace period of the expired DS-2019, as to do so may bar return to the United States from three to ten years, even if the physician will be working in a HPSA. The present USCIS policy has been that if an individual has been given D/S, (Duration of Status) on their I-94, this provision may not apply. However, I prefer not to rely on it, if possible.

If possible, it is strongly recommended that the DS-2019 be extended for as long as possible. The ECFMG will extend the DS-2019 for Board Examinations. Once the Waiver Application is received by the U.S. Department of State, the DS-2019 may not be extended. This extension is not supposed to subject the physician to the two year foreign residency requirement again, even if it is issued subsequent to approval of the waiver. However, I strongly recommended that the physician, if possible, avoid that situation and file for the extension for the Board examinations in advance of the waiver being approved.

There is only a 30 day grace period to remain in the United States after your DS-2019 expires. Once your waiver has been forwarded to the Department of State, I do not recommend extending the DS2019, as it may make you subject to the two year foreign residency requirement again, thereby canceling the waiver. It should certainly be avoided for all points thereafter. Additionally, entering the United States in J -1 status after the approval of the waiver may subject you to the two-year foreign residency requirement and cancel the waiver approval. This however might not be an issue if you are returning to complete your PGY program. Please discuss this with an attorney prior to your departure as policies at USCIS as well as opinions of attorneys on this issue very from time to time as experiences have changed.

Options leading to Permanent Resident Status can be commenced while the waiver is in progress or at any time thereafter. Most parties will want to wait for the waiver to be approved and employment commenced in H-1B status before starting employment based cases. These options include, but are not limited to, Labor Certification, EB1/Alien of Extraordinary Ability, and Family based petitions, However, with these

options, the final step leading to Resident Alien Status, the filing of an Application for Adjustment of Status, or the interview at a U.S. Consulate, if consular processing is sought, cannot be done until after the physician has completed their obligation of being employed for three years in H-1b status at the waiver location. As mentioned in the attached memo pertaining to National Interest Petitions based upon an employment commitment for 5 years in a shortage area, if there is no retrogression, applications for adjustment of status and employment authorization can be submitted prior to completing 3 years employment in H – 1B status.

If the J-1 waiver beneficiary is married to a U.S. Citizen, or is the beneficiary of a family -based preference petition with a current priority date, the physician will have to remain employed with the J-1 sponsor for three years pursuant to H-1B status, before filing an Application for Permanent Resident Status. If consular processing is chosen as the option to complete the process, the interview should be timed to occur after the 3 year obligation has been met.

If you are planning to marry a non-U.S. Citizen or non-Permanent Resident of the United States, or come from a country where traditionally, marriages are arranged by your family, it is imperative that you marry prior to obtaining Permanent Resident status. Please discuss with your attorney if this applies to you.

The entire process, from Waiver through Permanent Resident Status, is long and involved. It should be commenced as early as possible.

Unfortunately, problems can develop between the J-1 waiver beneficiary and the employer. These problems include, but are not limited to, salary issues, medical ethics issues and requiring services to be rendered beyond the hours and locations listed on the contract, the J1 waiver application and H-1B petition. If this situation occurs, you should contact an attorney to discuss your rights and obligations.

If circumstances make employment with the J1 sponsor unbearable and you are able to find another position in a shortage area, a new H –1B petition must be filed. However, you must document that the reason that you are changing jobs is due to no fault of your own and due to circumstances beyond your control, caused by your J1 sponsor. This may become difficult to establish. However, if the circumstances are due to the failure of your sponsor to increase his practice sufficiently to provide you with patients, and your sponsor indicates that this is in fact the case or that he has had a financial reversal, the H-1B petition and hence the waiver transfers should be approved.

Last update: October 28, 2018

19. National Interest Waivers for Physicians

Section 203(b)(2) of the Immigration and Nationality Act of 1990 permits the filing of an employment-based second-preference immigrant visa petition for an alien who is "either a member of the professions holding an advanced degree" or "of exceptional ability in the sciences, arts or business." The petition incorporates a request for a waiver of the requirement of a job offer (the labor certification requirement), on the grounds that the alien would benefit the national interest of the United States.

The National Interest Waiver, a procedure to obtain Permanent Resident Status, can also be filed by a physician who will be employed in a HPSA, or perhaps in a MUA, or at a VA facility. The Petition, which is submitted to USCIS, is often referred to as a "National Interest Waiver." (It is not to be confused with the J-1 waiver). This petition seeks a waiver of the Labor Certification process on the grounds that the services to be rendered by an individual will benefit the National Interest of the United States. Occasionally, USCIS has requested a State License to practice medicine, before approving the Petition. This is probably not required. In most states, the license will not be issued prior to the completion of Residency and the verification of credentials.

The following are required for the NIW:

a. Five year contract for full time employment in a HPSA (MUA in some states) or a health care facility operated by the Department of Veteran's Affairs. The contract cannot be more than six months old.

b. A letter from a federal agency reflecting the agency's knowledge of the alien's qualifications and the agency's background in making determinations in matters involving medical affairs, so as to substantiate the findings that the alien's work is or will be in the public interest, dated and issued within six months of filing the petition.

Or

c. Letter from the State Department of Health attesting that the physician's work is in the public interest and reflecting that they have jurisdiction over the place where the individual intends to be employed, dated and issued within six months of filing the petition.

An Application for Adjustment of Status, Employment Authorization and Advance Parole (permission to travel) can be filed simultaneously with the Petition, as long as the Priority Date on the case is current. The Applications for Employment Authorization and Advance Parole are usually processed within 3-4 months of filing.

Adjustment to Permanent Resident Status will not be granted to the physician until the physician has completed a total of five years (not including time spent as a J-1 physician holder) as a physician employed in the designated area. Most states will not allow you to count time spent in H – 1B status as a resident at a hospital in a shortage area towards the 5 years.

If the employee leaves the place of employment listed on the NIW, the individual can still benefit from the approved petition, if the new position is also in a HPSA, MUA or other facility qualifying for an NIW. The five years start accruing on your first day of employment in H-1B status regardless of when the National Interest Petition was approved. A new petition may be required.

A question which is being raised constantly is whether an individual should file an application for Alien Employment Certification (Labor Certification) or proceed with the National Interest Waiver. Physicians who have been granted waivers of the J-1 two-year foreign residency requirement, and are presently employed in H-1B status, if they are not affected by retrogression, may obtain permanent resident status faster through the labor certification process. However, if retrogression is a factor, unless there is a substantial change in the law or usage of the immigrant visas, the National Interest Waiver may result in adjustment of status being granted several months earlier than the labor certification process, since the Priority Date on a National Interest waiver is usually established earlier than would be the case with the Labor Certification case.

Please note that The Labor Certification process requires the physician to remain employed with the petitioning entity after being granted Permanent Resident Status, unless the Application for Adjustment of Status is pending more than 180 days. See the memo regarding Labor Certification. We recommend that the employees remain with the sponsoring employer for at least 6 months after adjustment has been granted. However, that is not necessary with the national interest petition. The obligation for employment in a shortage area regardless of the employer ends after satisfying the five-year employment commitment.

Presently, processing an application for Labor Certification is approximately 15 – 20 months, from the time the attorney starts working on the case until a decision is rendered by the Department of Labor. It will take about 6 to 10 months to process the I-140 petition, 15 days with premium processing. Adjustment of Status is approximately four months to one year, assuming there are no delays for security clearances or backlogs at immigration. Adding a reasonable period of six months of employment with the sponsoring employer after the Application for Adjustment of Status has been granted, will probably result in adjustment of status being granted at least several months faster than through the national interest petition. Please note however that processing times do change. Additionally, the above timetable will not apply if there is retrogression. If retrogression is a factor, you should consult with an attorney regarding these options.

Time can be saved by processing the last phase of the case at the U.S. Consulate in your home country. However, that is usually not recommended. Please consult with an attorney as to the benefits of doing one case or both.

Effective August 2017, USCIS is requiring interviews on employment-based cases. This could result in further delays.

Last update: September 27, 2017

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COUNSELLOR AT LAW

20. <u>Employment First Preference</u>

The first employment-based preference category is available to individuals of extraordinary ability in the sciences, arts, education, business, or athletics. This memo will address achievement in the sciences. Different, but sometimes overlapping rules, apply to the other disciplines.

In order to qualify for Employment First Preference, aliens of extraordinary ability in the sciences must establish that they are one of a small percentage of people who have risen to the top of their field. The alien must establish sustained national or international acclaim and recognition for achievements in their field of expertise and must be seeking to enter the United States to continue work in the area of extraordinary ability.

Establishment of sustained national or international acclaim and recognition for achievement in the field of expertise can be established by providing evidence of receipt of a major internationally recognized award such as the Nobel Prize or at least three of the following:

1. Documentation of receipt of lesser nationally or internationally recognized awards for excellence in the field of endeavor.

2. Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

3. Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation.

4. Evidence of participation on a panel or individually as a judge of the works of

others in the same or an allied specialization.

5. Evidence of original scientific contributions of major significance in the field of endeavor.

6. Evidence of authorship of scholarly articles in the field in professional journals or other major media.

7. Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others.

8. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.

9. Comparable evidence if the above criteria do not readily apply to the alien's case.

10. Evidence of the display of the alien's work in the field at showcases in more than one country.

USCIS carefully scrutinizes these petitions. They maintain a very high threshold, which must be met in order to obtain an approved petition.

1. Documentation of receipt of nationally or internationally recognized awards for excellence in the field. USCIS may accept documentation that works were selected for presentation at medical conferences and meetings as fulfilling this requirement. However, if these accomplishments are also being used to satisfy another standard for qualifying in this category, it may not be acceptable for this purpose.

2. Documentation of membership in associations in the field of endeavor. The mere membership in various medical associations is not sufficient to meet this requirement. The individual must be a member of a society or association that is extremely selective and would not accept members merely by their filing of an application and payment of dues. Documentation of their selectivity and the selection process should be given, as well as information about the society.

3. Published material and professional or trade publications. Documentation submitted to USCIS must discuss the merits of the alien's work, the alien's standing in the field, and any significant impact that work has had in the field. In addition to submitting published material about the alien and their work, USCIS requires evidence to establish the significance of the published materials submitted about the individual's work, and how it has set the individual apart from others in the field as one of the small percentage who have risen to the top of their field. The publication's name, its logo, national or international circulation, how often it is printed, and the number of copies printed should also be provided.

4. Judging the work of others. Numerous physicians and researchers are involved in reviewing articles by others which are submitted for publications in various trade journals. However, USCIS may not deem this to be sufficient. USCIS requires evidence to establish the criteria used to choose the alien as a judge. It must be demonstrated that the individual's sustained national or international acclaim resulted in their being selected to serve as a judge of the work of others in the field. The judging must be on a national or international level, and involve other accomplished professionals in the field. Evidence demonstrating the review of an unusually large number of articles, or the receipt of independent requests from a substantial number of journals, or serving in an editorial position for distinguished journals should be submitted. Additionally, note that requests to review articles are generally insufficient as evidence to establish this criterion. Rather, documentation must be submitted that the individual has submitted reviews in order for this criterion to be met.

5. Original scientific contribution. USCIS requires proof establishing that the individual's work is considered original and how it has made a contribution of major significance in the field, compared to all others in the field. According to USCIS, research by itself cannot be considered major in the absence of proven major accomplishments resulting from the studies. USCIS requires other evidence to satisfactorily establish the impact in the field. If the individual has written scholarly articles, heavy independent citation of those articles would be acceptable evidence and objective evidence, according to USCIS, that other researchers have relied on the individual's work. A listing containing the name of each article and the author should be provided.

   If an individual holds one or more patents, evidence of the significant implementation of the patent(s) and innovation(s) should be provided.

   The mere fact that the individual has made presentations of their research or publication at a conference is not sufficient. USCIS requires evidence that sets these presentations apart from others in their field. Such evidence would include, but not be limited to, documentation that the individual was a keynote speaker, or that the presentation drew an unusually large audience. Accordingly, poster presentation should not satisfy this requirement.

6. Scholarly articles. USCIS requires evidence establishing the significance and importance of the alien's scholarly articles in the field. The evidence must indicate that the published articles have garnered national or international attention, for example, being widely cited by individual researchers.

USCIS does not consider the mere publication of an article in a scientific publication, in and of itself, as meeting any of the criteria. USCIS has concluded that every scientist whose scholarly research is accepted for publication does not necessarily mean that they have made a major contribution in the field.

7. Documentation of receipt of lesser nationally and internationally recognized awards for excellence in the field. USCIS does not consider the selection of an individual's work by a medical conference or journals as being equivalent to an award of a prize.

8. Performance in a leading or critical role for organizations that are established as having a distinguished reputation. The fact that the individual has done research at a major research facility or major hospital could meet the standard. Very strong letters of recommendation establishing the contributions made, and the individual's extraordinary ability, as well as information about the facility should be made. Significant detail should be included in these letters.

On March 4, 2010, the Ninth Circuit of the United States Court of Appeals issued a decision on a case appealed to it regarding an alien of extraordinary ability whereby after establishing three of the criteria for Extraordinary Ability, the applicant must show in the final merits analysis that the requisite level of achievement has been attained. The following is a link to the decision.

http://www.ca9.uscourts.gov/datastore/opinions/2010/03/04/07-56774.pdf.

In the case, Poghos Kazarian, Plaintiff-Appellant, v US Citizenship and Immigration Services, a Bureau of the Department of Homeland Security; John Does, 1 through 10, Defendants-Appellees, the Court held the following:

1. The regulations do not require an individual to demonstrate the research community's reaction to their published articles before the articles can be considered as evidence.

2. Neither USCIS nor the Administrative Appeals Office (AAO) may unilaterally impose novel substantive or evidentiary requirements beyond those set forth in 8 C.F.R. §204.5.

3. While the authors' citations (or lack thereof) might be relevant to the final merits determination of whether a petitioner is at the very top of their field, they are not relevant to the antecedent procedural question of whether they have provided at least three types of evidence.

4. The criteria applied by the USCIS and AAO in determining whether the individual was judging the works of others by judging graduate level diploma works at a university, and the AAO's conclusion that this was not persuasive evidence of acclaim beyond that of the university, and the determination by USCIS and the AAO that absent 'evidence that the petitioner served as an external dissertation reviewer for a university…" was not correct. The Court determined that 8 C.F.R. §204.5(h)(3)(iv) does not allow USCIS to inquire as to whether judging university dissertations counts as evidence, depends on which university the judge is affiliated with. The Court felt that although this might be relevant to the final merits of the determination, the AAO and USCIS could not unilaterally impose this requirement, and felt that this was a "novel evidentiary requirement."

Although the decision by the Court did not reverse the decision of USCIS and the AAO, it did acknowledge that USCIS and the AAO erred by stating that none of the criteria were met. The Court determined that two of the ten criteria, of which three are required, were met.

Despite the Kazarian decision, USCIS is taking a very tough position on these cases. After filing the petitions, they are issuing letters requesting additional information, claiming that the submission is deficient and stating and requesting the following:

"The criterion has not been met because the evidence submitted does not show that the beneficiary has made original scientific or scholarly research contributions to the Academic field. To assist in determining whether the beneficiary's contributions are original, you may submit:

- Objective documentary evidence of the beneficiary's contribution to their academic field.
- Documentary evidence that people throughout the field currently consider the beneficiary's work original.
- Testimony and/or support letters from experts which discuss the beneficiary's original scientific or scholarly research contributions to their academic field. (see note below).
- Evidence that the beneficiary's original contribution has provoked **widespread** public commentary in the field or has been widely cited.
- Evidence of the beneficiary's work being implemented by others. **Possible evidence may include but is not limited to:**

    - **Contracts with companies using the beneficiary's products;**
    - **Licensed technology being used by others;**
    - **Patents currently being utilized and shown to be significant to the field.**

- Any other relevant evidence

Note: Letters and testimonies, if submitted, must provide as much detail as possible about the beneficiary's contribution and must explain, in detail, how the contribution was "original" (not merely replicating the work of others). General statements regarding the importance of the endeavors are insufficient.

Letters of support alone are not sufficient to meet this criterion. Letters, though not without weight, cannot form the cornerstone of a successful outstanding ability claim. USCIS may, in its discretion use such letters as advisory opinions submitted by expert witnesses. However, USCIS is ultimately responsible for making the final determination of the alien's eligibility [*Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr.1988)]. The content of these letters, and how the letter writers became aware of the beneficiary's reputation, is important. **Letters solicited by him in support of an immigration petition are of less weight than the preexisting, independent evidence one would expect to find where an individual has made original contributions.** Without extensive documentation showing that the beneficiary's work has made original contributions to the field, we cannot conclude he meets this criterion."

The process established by the US government to bring the best and brightest to the United States, has been overly and subjectively complicated, making approvals of these cases for physicians extremely difficult.

Kazarian established a two step process to adjudicate first preference petitions. First, three of the criteria required for approval of an Immigrant Petition based upon Extraordinary Ability must be established. Second, in a final merits analysis, the totality of the evidence must show that the petitioner has risen to the top of the field, and has sustained national or international acclaim.

Further to the *Kazarian* 2 step analysis, USCIS has found in some cases that an applicant may meet three of the evidentiary criteria, but in the second step, an analysis of the totality of the evidence, USCIS may nevertheless conclude that the individual does not qualify for the First Preference category.

Last update: September 27, 2017

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COUNSELLOR AT LAW

21. National Interest Petition: Non Shortage Area Case: Matter of Dhanasar Precedent Decision

Section 203(b)(2) of the Immigration and Nationality Act of 1990 permits the filing of an employment-based second-preference immigrant visa petition for an alien who is "either a member of the professions holding an advanced degree" or "of exceptional ability in the sciences, arts or business". The petition incorporates a request for a waiver of the requirement of a job offer (the labor certification requirement), on the grounds that the candidate would benefit the national interest of the United States.

In 1998, after approving numerous National Interest Petitions for different professions, especially physicians who agreed to serve in Health Professional Shortage Areas, the Administrative Appeals Office of the Immigration and Naturalization Service issued a decision denying a National Interest Petition for an Engineer employed by the New York State Department of Transportation (hereinafter referred to as "NYSDOT"). The decision was accepted as precedent in the area of establishing what would truly be deemed as being in the "National Interest". This case had no impact on National Interest Petitions for physicians who would be employed for 5 years in a qualifying shortage or underserved area.

Until "NYSDOT", immigration adjudicated National Interest Petitions without a regulatory definition of what factors are to be considered in adjudicating a "national interest waiver." However, the decision established tough guidelines for determining whether an individual was truly going to be serving the "National Interest of the United States".

In December 2016, the Secretary of the Department of Homeland Security designated as precedential the USCIS Administrative Appeals Office's decision in Matter of Dhanasar. This precedent decision vacates NYSDOT. The Dhanasar decision can be found at https://www.justice.gov/eoir/page/file/920996/download.

As a result of the Dhanasar decision, USCIS may grant a National Interest Waiver if the petitioner demonstrates the following:

1) that the foreign national's proposed endeavor has both substantial merit and national importance;

(2) that he or she is well positioned to advance the proposed endeavor; and

(3) that, on balance, it would be beneficial to the United States to waive the requirement of a job offer and thus of a labor certification.

In the decision, the AAO stated that the decision in NYSDOT was ripe for revision and adopted the Dhanasar framework for adjudicating national interest waiver petitions to provide greater clarity, to provide for flexibility to circumstances of both petitioning employers and self-petitioning individuals, and to better advance the purpose of the discretionary waiver provision to benefit the national interest of the United States.

The Schedule A, Group II blanket labor certification for "aliens of exceptional ability" may still be a viable option. Group II covers aliens with exceptional ability in the sciences and the arts.

Despite the development of the Dhanasar framework, USCIS preference is for the applicant to go through the labor certification process. However, there are numerous times where the labor certification process will not be a viable option and hence the National Interest Petition or other options must be considered and possibly pursued.

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22. The O Visa

The O Visa is available to individuals of extraordinary ability in the sciences, arts, education, business, or athletics. This memo will be geared solely to achievement in the sciences. Different, but sometimes overlapping rules apply to the other disciplines.

In order to qualify for an O-1 visa, an individual of extraordinary ability in the sciences must establish that they are one of a small percentage who has risen to the top of their field. The individual must demonstrate sustained national or international acclaim and recognition for achievements in their field of expertise and must be seeking to enter the United States to continue work in an area related to their extraordinary ability.

Sustained national or international acclaim and recognition for achievement in the field of expertise can be established by providing evidence of receipt of a major internationally recognized award, such as the Nobel Prize or at least three of the following:

1. Documentation of membership in associations in the field of endeavor which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.
2. Published material in professional or major trade publications or major media about the alien, relating to the individual's work in the field for which classification is sought, which shall include the title, date and author of such published material, and any necessary translation.
3. Authorship of scholarly articles in the field in professional journals or other major media.
4. Documentation of receipt of nationally or internationally recognized awards for excellence in the field of endeavor.
5. Evidence of participation as a judge of the works of others.
6. Evidence of original scientific contributions of major significance in the field; for example, use of new technology and inventions.
7. Evidence of having commanded a high salary or other significantly high remuneration for services in relation to others.
8. Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation.
9. Comparable evidence if the above criteria do not readily apply to the alien's case.

All evidence should be backed with tangible proof of the individual's accomplishments. Applicants should document evidence of presentations of an international and national nature. Letters of Recommendation from experts in the field, together with an Advisory Opinion letter (see below), that can verify that the alien is at the top of his/her field should be obtained. A thorough knowledge of the alien's accomplishments is required.

The individual must be coming to the United States to be employed in their area of extraordinary ability and achievement.

An O-1 petition can include a recommendation from an appropriate peer group, labor organization or management organization with specific expertise in the area of the alien's ability. The peer group should issue an advisory opinion describing the individual's ability and achievements in the field of endeavor and the nature of the duties to be performed. The opinion should state whether the position requires the services of someone with extraordinary ability and must be signed by an authorized official of the group or organization. If such an organization is not available, a letter should be obtained from a recognized authority in the field.

If an O visa petition is submitted without an advisory opinion from a labor organization, USCIS is supposed to forward the petition to the national office of the appropriate union within five days of receipt. The union has 15 days to submit a written advisory opinion, comment, or letter of no objection to USCIS. After the 15 day period, and after an opportunity for the submission of any rebuttal information, should same be necessary, USCIS has 14 days to adjudicate the petition. USCIS has taken the position that consultations should be obtained from the national offices of the appropriate labor organization, as the local office may not have knowledge of labor market conditions in other parts of the United States.

An advisory opinion is not required if the petitioner establishes that an appropriate consulting entity does not exist. Evidence that no labor organization exists may take the form of affidavits or statements from practitioners in the alien's field or from a related labor organization stating that a labor organization in the beneficiary's field does not exist.

The O visa will not allow the beneficiary to serve on a freelance basis. The alien must perform services at a specific event. The petition can be adjudicated in 15 calendar days, if an additional $1,225.00 filing fee is paid to USCIS, the Premium Processing filing fee.

USCIS has requested a license for an O-1 for a position requiring licensure.

The O-1 visa category is a good option for J-1 physicians who are subject to the two year foreign residency requirement and are unable to find waiver positions. However, J-1 physicians in need of a waiver will not be allowed to change their status to O-1 status in the United States. Additionally, the O-1 DOES NOT eliminate the need for a J-1 waiver or satisfaction of the 2 year home residency requirement. A J-1 waiver or return to your home country for 2 years will still be needed at some point.

An O-1 petition filed by an individual in J-1 status subject to the 2 year home residency requirement, if approved, will not provide for a change of status to O-1. The approval will also be without employment authorization. The beneficiary/J-1 physician will then have to leave the United States and apply for an O-1 visa at a U.S. Consulate. Once the visa is issued, the beneficiary will be admitted into the United States in O-1 status and can commence employment with the O-1 petitioner. This provision only applies to physicians whose J-1's are subject to the two-year foreign residency requirement and have not obtained waivers.

If a J-1 waiver has been obtained and for reasons unknown the physician cannot secure an H-1B petition, for example, failure to pass USMLE Step 3, the O-1 may be an option. However, the physician will not be satisfying the waiver requirements because the physician must obtain a J-1 waiver and be employed for three years in H-1B status in order to satisfy the waiver requirements.

An individual in H-1B status or another non-immigrant status who files for O-1 status prior to the expiration of their status can be granted O-1 status with employment authorization.

Last update: September 29, 2017

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23. Site Inspections by the USCIS-FDNS Pertaining to H-1B Petitions

The USCIS Office of Fraud Detection and National Security makes "site visits" at places of employment of H-1B sponsors. The purpose of these visits is to verify the accuracy of the information listed on the H-1B petition and to ensure that no fraudulent representations have been made. The FDNS officers are verifying that the duties and responsibilities of the position require at least a Bachelor's degree, the minimum requirement for H-1B status. These visits have occurred at all types of business entities including hospitals, corporations and private practices. The visits are unannounced and last an average of 45 minutes to an hour. Although you may request that an attorney be present, the FDNS officer will not reschedule a visit so an attorney can be present. However, telephonic representation should be allowed. The FDNS officer will also tour and perhaps take pictures of the facility.

The officers usually request to speak to the individual who signed the H petition. At this point, the investigations have not involved a review of the Labor Condition Application or Public Access File. The FDNS officer will have the petition, and will be requesting verification of data on the petition which includes but is not limited to:

1. Business Location
2. Number of employees
3. Year established
4. Information regarding the position, including but not limited to the following:
   a. Job title
   b. Job duties
   c. Work location
   d. Salary
   e. Duration of Employment

The FDNS officer may request to see information confirming the salary, which may include but not be limited to paystubs and W-2s.

The FDNS officer may also ask the employer and employee who paid the attorney's fee and filing fees on the H.

The FDNS officer will also interview the beneficiary. During the interview with the beneficiary, the FDNS officer may ask the following:

1. Job title
2. Job duties
3. Employment dates
4. Position location
5. Educational background
6. Current address
7. Information about dependents, if any.

The officer may also request to speak to colleagues or other personnel to confirm this information.

Full cooperation should be given to the FDNS officer. Additionally, the following is recommended to be done in the event of a site visit:

1. Obtain the officer's name, title, and contact information.
2. Have another employee present as a witness at the time of the site visit.

3. Have counsel on the matter on the telephone during the inspection.
4. Take notes of what transpired at the site visit, and forward same to counsel.
5. Debrief, or have the employee debrief your attorney about the interview.

It is imperative that copies of the H-1B petition be maintained by the signatory, for reference, in the event of a site inspection. It is very likely that the signatory will not remember some of the details contained in the petition, including the year the company was established and the number of employees. You can tell the FDNS officer that you need to consult your notes or the prior petition, as this information may not be readily available in one's memory. You can get the attorney on the phone for the answers.

After the visit, the officer will prepare a report for submission to USCIS. The USCIS should provide an opportunity to the petitioner to address any adverse or derogatory information that may result from the site visit after a formal decision has been made on the case, or after the agency has initiated any adverse action which may result in termination of the approval.

It is not unusual, especially when the employer is a hospital, for an officer to be misdirected at the information desk and never find the physician or the hospital contact. When this occurs, the officer will send the attorney of record and the employer contact an email requesting confirmation of the employment. It is imperative that this email be given immediate attention and the requested documents submitted expediently.

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24. Dilemma of Filing for Student Status

USCIS has been denying, and on some occasions issuing Requests for Evidence for additional information, on applications for student status. As part of the school's responsibility in issuing an I-20, the school also enters a start date in a system that is accessible to various government agencies, including USCIS. This system is known as SEVIS, which stands for Student and Exchange Visitor program. The schools are required to have a start date listed in the SEVIS system. If an individual cannot start when that date is reached, the school changes the start date in the system to a later date. USCIS, when reviewing an application for student status, consults the SEVIS system. If the school has changed the start date to a date that is more than 30 days beyond the end of your present nonimmigrant status, USCIS will either deny the application, or issue a Request for Evidence seeking proof that you have maintained your status up until the new start date.

Given that USCIS usually does not review these applications until 5-7 months from when it is submitted, a majority of applications will fall into this scenario, and hence are very likely not going to be approvable. Accordingly, you must be mindful of this development when considering submitting an application for student status.

Last update: October 2, 2017