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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."

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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.

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COUNSELLOR AT LAW

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

<u>All other nonimmigrants, including H-1b non-immigrants:</u>

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.

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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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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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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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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.

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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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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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COUNSELLOR AT LAW

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.

Last update: September 27, 2017

Stephen M. Perlitsh, P.C.

COUNSELLOR AT LAW

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.

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Stephen M. Perlitsh, P.C.

COUNSELLOR AT LAW

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.

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COUNSELLOR AT LAW

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.

Last update: September 29, 2017

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COUNSELLOR AT LAW

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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