*Stephen M. Perlitsh, P.C.*

**COUNSELLOR AT LAW**

**110 WEST 34TH STREET – SUITE 300**

**NEW YORK, NEW YORK 10001**

**---------------**

**TEL: (212) 840-3878 FAX: (917) 510-0872**

**--------------**

**E-MAIL:** [**stephen@perlitsh.com**](mailto:stephen@perlitsh.com)

**19. 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 position. One of the most perplexing decisions for an Immigration attorney representing that physician is how do we secure approval of an H-1B petition on behalf of that physician? 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?
   * 1. License Issue

USCIS requires an individual to qualify for an Immigration benefit at the time of filing the H-1B petition. USCIS should 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 should 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. Please note that US CIS has been inconsistent on this policy.

The dilemma regarding licensure is the following: In most states, an individual will not qualify for a state license until they finish PGY3. On June 30th, 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 that date and if 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 should 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 of $2,325.00 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.

2. 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 US Universities with a masters degree or higher. The H quota is referred to as the “H-1B cap”.

The majority of physicians in residency programs are employed at an 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 fighting for one of the 65,000 H-1B approvals that can be issued each fiscal year. If you have previously been counted against the H-1B cap, or you are obtaining a position at a facility that is exempt from the cap, then you should not have any problem obtaining your H-1B status.

The US Government year commences October 1 and ends September 30. USCIS has run out of Hs, since the cap was reduced over a decade ago. In mid April 2013, the H-1B cap for fiscal year 2013-2014 was reached. Presumably, 2014 should be similar to 2013. If we assume that it will be and the position is not exempt from the H-1B cap, and you were not previously counted against the cap, then immediate action must be taken so that the case reaches immigration April 1 or shortly thereafter. Discussion should be held with the attorney regarding lack of licensure if that is the case and the ramifications of filing without the license.

Sometimes it is hard to determine whether the H cap applies to a position. 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. However it is not so simple. In 2009, USCIS began requiring proof that the physician will be performing duties which advance the purposes stated in the affiliation Agreement between the exempt facility and the institution of higher education. This usually requires proof that the IMG will be teaching and instructing medical school students 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>

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 would 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, US CIS 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 at the exempt entities 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 involved in teaching medical school students as part of his duties, then the cap exemption may apply. However, USCIS may inquire as to how much time is spent teaching. If it is less then 55% of his time, will the case be denied?

If the IMG will only be seeing patients admitted to a cap exempt teaching hospital, do we try to claim a cap exemption? The answer is YES, if the H–1B cap has been reached and there are no other options

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. The cost of re-filing if we are unsuccessful in claiming the cap exemption. Filing fees alone are $2,325.00. More, if premium processing is sought.
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.

Another solution is to list a start date on the LCA which would be before October 1. If a cap exemption is not being claimed, then the H petition, which is submitted to USCIS must list a 10/1 start date, or it will be rejected or denied. However, if you list an earlier date on the LCA, for example July 1, then the IMG can commence employment on that date, assuming the H petition has been filed and the license has been obtained. (Any date prior to 10/1 can be listed). However, the IMG would have to leave the US in September, obtain an H visa at a US Consulate outside the US and enter the US in H status. Although the IMG can commence employment prior to 10/1 by listing an earlier date on the LCA, they must leave the US , obtain an H1B visa and be admitted to the US in H-1B status, thereby cleaning up issues surrounding employment based on the LCA without a corresponding non-immigrant status.

Another solution involves “concurrent employment”. If the cap exemption cannot be claimed, but licensure has been obtained and the start date can be moved up so that it overlaps with his cap exempt employment in PGY, then the petition should be approved.

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: October 14, 2013