H-1B VISAS FOR PHYSICIANS-IN-TRAINING: A MARATHON OR AN OBSTACLE COURSE?

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INTRODUCTION

Numerous international medical graduates (IMGs) come to the U.S. to participate in graduate medical education (GME) every year. In fact, nearly 28% of all physicians in U.S. residency programs are IMGs.[869] Historically, the J-1 visa has been the dominant visa used by IMGs in residency and fellowship programs. Generally, the J-1 status is less than desirable by IMGs because of the two-year home residence requirement that automatically attaches to it.[870] However, more and more GME programs are willing to sponsor IMG trainees for H-1B status, and H-1B holders constitute more than 16% of all residents and fellows currently training in the U.S. today.[871] While this path offers IMGs future opportunities that may not be available to J-1 holders who are limited by the two-year requirement, it has its own obstacles to consider. H-1B physicians face issues like licensure and credentialing requirements, the annual H-1B cap, and the six-year maximum limit.

It is commonly known that medical residency programs, in addition to offering instruction in practical clinical skills, also teach new physicians lessons in strength and endurance. Long hours and sleepless nights are part of the training to become a full-fledged physician. For IMGs on H-1B visas, however, this marathon is filled with additional obstacles that U.S. medical grads do not have to face in their race toward board eligibility. This article will discuss these additional issues of concern and outline practical considerations for immigration law practitioners who represent international physicians considering H-1B status. Ultimately, it is our goal that this article be used as a practical tool in preserving non-immigrant status and continuous employment authorization for foreign medical doctors in training.

CERTIFICATION, CREDENTIALING AND LICENSURE REQUIREMENTS FOR H-1B PHYSICIANS

Certification, credentialing and licensure requirements for H-1B physicians are best analyzed in a backwards progression. All H-1B physicians must hold licensure and appropriate credentials (through passage of designated examinations) in order to practice medicine. To qualify for state medical licensure, a physician must complete a training

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[869] "International Medical Graduates in American Medicine: Contemporary Challenges and Opportunities," position paper by the AMA-IMG Section Governing Council, available at http://www.ama-assn.org/ama1/pub/upload/mm/18/img-workforce-paper.pdf, page 4.

[870] Section 212(e) of the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §1101 *et seq.*).

[871] "International Medical Graduates in American Medicine: Contemporary Challenges and Opportunities," position paper by the AMA-IMG Section Governing Council, available at http://www.ama-assn.org/ama1/pub/upload/mm/18/img-workforce-paper.pdf, page 20.

program in the United States, as require by every state in the U.S. And, in order to enter a GME training program, a physician must, in turn, hold certification by the Educational Commission for Foreign Medical Graduates (ECFMG), which also conducts the necessary credentialing examinations.[872]

Let's review these steps in more detail. Everything starts with ECFMG, which is the agency tasked with administering the J-1 program for GME training and also conducting the ECFMG certification process for IMGs.[873] ECFMG certification is required for all international physicians-in-training, even if they do not hold the J-1 visa. Therefore, residents and fellows in H-1B status must also obtain an ECFMG certificate before enrollment in a training program. One exception from the ECFMG certification requirement is graduation from a program accredited by the Liaison Committee on Medical Education (LCME) in the United States, Puerto Rico, and Canada. International medical graduates of these schools do not require ECFMG certification.[874]

Among other requirements for ECFMG certification, a physician must pass Step 1 and Step 2 (both the Clinical Knowledge (CK) and Clinical Skills (CS) components) of the U.S. Medical Licensing Examination (USMLE) as well as the Test of English as a Foreign Language (TOEFL) examination. Note that, to qualify for H-1B status, Step 3 of the USMLE must also be successfully completed. Once the IMG is certified by ECFMG, he or she can start the training program.

Completion of a GME program is a standard requirement in order to qualify for state licensure and board certification. Therefore, all IMGs who wish to practice medicine in the United States must finish at least some GME training, even if they were fully trained as physicians in their home country.[875] While every state's licensing requirements for physicians-in-training are different, most states require at least one year of training before a physician is eligible to obtain a state medical license. For IMGs, this requirement is often two or three years.[876]

In order to qualify for H-1B status, a physician who will be performing clinical work (including physicians-in-training) must: 1) hold a valid medical license or other authorization, in the state of intended employment,[877] 2) be a graduate of a medical school, 3) hold evidence of passing a designated licensing examination (i.e., the Federal Licensing Examination (FLEX) or its equivalent), and 4) demonstrate competency in the English language.[878]

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[872] www.ecfmg.org.
[873] 22 C.F.R. § 62.27(b).
[874] 22 C.F.R. § 62.27(b)(5). For a complete listing of all LCME-accredited medical education programs, see http://www.lcme.org/directry.htm.
[875] American Medical Ass'n, *State Medical Licensure Requirements and Statistics 2010, available at* https://catalog.ama-assn.org/Catalog/product/product_detail.jsp?productId=prod1500002.
[876] American Medical Ass'n, *State Medical Licensure Requirements and Statistics 2010, available at* https://catalog.ama-assn.org/Catalog/product/product_detail.jsp?productId=prod1500002.
[877] 8 C.F.R. § 214.2(h)(4)(viii)(A)(1).
[878] INA § 212(j)(2)(B)(i); 8 USC § 1182(j)(2)(b)(i); 8 C.F.R. § 214.2(h)(4)(viii)(B)(2), (3).

The FLEX examination is no longer administered, and the USMLE is the current equivalent of FLEX for H-1B eligibility, as designated by the National Board of Medical Examiners.[879] While ECFMG certification requires only two steps of the USMLE, an IMG must pass all three steps of the USMLE (1, 2 CK and CS, and 3) in order to qualify for H-1B status. This disqualifies from H-1B eligibility those IMGs who wish to pursue medical training in one of the states that require at least one year of GME to be eligible to sit for Step 3 of USMLE. Since they must pass Step 3 in order to qualify for H-1B status to enter the GME program, but may not sit for Step 3 until they complete one year of the GME program, clearly, the only remaining choice is to resort to J-1 status. Note that physicians of national or international renown are not required to pass these examinations in order to qualify for H-1B status.[880]

Once all of the above requirements are met, an IMG should be eligible for H-1B status in order to tackle the challenges of a medical training program. However, eligibility is just the beginning, since IMGs, as an occupational category, compete with other professional workers for the annual allocation of 65,000 H-1B visas mandated by Congress.

TACKLING THE H-1B CAP

The H-1B visa classification is subject to an annual cap of 65,000, plus additional 20,000 visas reserved for graduates of U.S. graduate programs.[881] This number – 65,000 – was established in 1990,[882] and remains in effect to date. However, there are exemptions from the "cap" enjoyed by certain U.S. employers and classes of individuals seeking H-1B status. In essence, in the years that the cap is met, the government issues *more* visas annually than the cap would allow because some petitioners and beneficiaries receive H-1B visa numbers above and beyond the numerical limitation established by statute.

As a result, many physicians-in-training may qualify for exemptions through employment at a qualifying institution. Section 214(g)(5) of the Immigration and Nationality Act, as amended by the American Competitiveness in the Twenty-First

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[879] 57 Fed. Reg. 42,755 (Sept. 16, 1992), U.S. Dep't of Health and Human Services, HHS News (Sept. 16, 1992).

[880] INA §101(a)(41), 8 U.S.C. § 1101(a)(41).

[881] INA §214 (g)(5)(C).

[882] Apparently, the 65,000 cap was a number selected arbitrarily. *See* Sen. Rep. No. 106-260 at 5 (Apr. 11, 2000), stating that:

> Until the 1990 Immigration Act, employers were allowed to hire individuals on what were then known as "H–1" visas without numerical limitations. In 1990, however, as part of a comprehensive package of immigration law reforms, the Immigration Act of 1990 capped these visas at 65,000, a number that the legislative history suggests was chosen arbitrarily in order to reassure critics of these visas that an unlimited supply of visas would not be available. "The [65,000] number was set without public hearings, is arbitrary, and was in no way arrived at by analyzing demand, labor shortages, business conditions, or skilled labor needed by firms to remain globally competitive," according to Prof. Charles B. Keely of Georgetown University.

This Senate report accompanied the American Competitiveness in the Twenty First Century Act, Pub. L. 106-313 (Oct. 17, 2000) [hereinafter AC21].

Century Act of 2000 (AC21),[883] states, in relevant part, that the H-1B cap "shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a))), or a related or affiliated nonprofit entity; [or] . . . a nonprofit research organization or a governmental research organization. . . . "[884] Thus, by statute, the following U.S. employers are exempt from the cap: (a) institutions of higher education; (b) related or affiliated nonprofit entities; (c) nonprofit research organizations; and (d) governmental research organizations. These are all employer-based exemptions and for purposes of this article, we provide a brief overview of legal standards underpinning H-1B cap exemptions for institutions of higher education and related and affiliated nonprofit entities, the likely employers of foreign physicians-in-training. This section will also review the "employed-at" principle, which extends exemptions to private, for-profit entities petitioning for beneficiaries working on-site at qualifying universities, nonprofits or research organizations.

(a) Exemption for institutions of higher education

For purposes of the H-1B cap exemption, AC21 adopts the definition of "institution of higher education" found in section 101(a) of the Higher Education Act of 1965 (HEA)[885] (20 U.S.C. 1001(a)). In accordance with Section 101(a) of the HEA, an institution of higher education is "an educational institution in any State that -

> (1) admits as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;
> (2) is legally authorized within such State to provide a program of education beyond secondary education;
> (3) provides an educational program for which the institution awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree;
> (4) is a public or other non-profit institution; and
> (5) is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time."[886]

Prong three of this definition does not appear to accommodate academic medical centers providing graduate-level research, clinical and continuing education as compared

[883] Pub. L. 106-313 (Oct. 17, 2000).
[884] *See* Section 103 of AC21.
[885] Pub. L. 89-329.
[886] *Id.*

to strictly bachelor's-level education.[887] Fortunately, the above elements are not the only ones that help establish eligibility for cap exemption. Section 101(b), titled "Additional institutions included," provides that that "the term 'institution of higher education' also includes –

> (1) any school that provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation and that meets the provision of paragraphs (1), (2), (4), and (5) of subsection (a) of this section; and
> (2) a public or non-profit private educational institution in any State that, in lieu of the requirement in subsection (a)(1) of this section, admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located."[888]

Under these additional prongs, virtually all U.S. universities and colleges would qualify as "institutions of higher education," except, of course, those colleges and universities that operate for profit. Under the law, this category of private colleges and universities would be treated as any other for-profit enterprise, so that petitions filed by such employers would be approved so long as the annual quota of H-1B visas remained available in a given year.

Where an international physician is employed by either a nonprofit educational institution or related entity, or for a private employer, determining cap exemption is relatively easy. Only physicians and physicians-in-training accepting employment at *nonprofit* colleges or universities are eligible to claim cap exemption. Typically, such employment occurs at health facilities, hospitals and medical centers that are part of private or public nonprofit universities.

But what about stand-alone teaching hospitals that do not hold an affiliation which would qualify them for an exemption? Are they to be counted toward the H-1B cap and, thus, miss out on hiring H-1B residents and fellows? Given that most GME programs start on July 1, it would be inconceivable for a residency program to operate without a resident until October 1, while the resident is awaiting the beginning of the next fiscal year. An increasing number of such hospitals and medical centers that have moved into the teaching arena beyond fellowships and residency programs may, in their own right, qualify for H-1B cap exemption. These hospitals and medical centers, if they offer relevant programming, may meet the definition of "institutions of higher education" and, thus, be a qualified entity exempt from the H-1B cap.

Let's look at each element of the definition. In addition to internships, residencies and fellowships, and various forms of continuing graduate medical education, many large hospitals offer specialized baccalaureate, master's and doctoral programs in fields ranging from nursing, to biomedical sciences, clinical sciences and medicine, not to mention formal curricula for post-doctoral researchers and scientists preparing for faculty

[887] The authors wish to note that some medical centers do offer bachelor's level training in nursing as well as various graduate and undergraduate certificate programs.
[888] Pub. L. 89-329.

positions at academic institutions. Surely, such hospitals would only accept as regular students those who have completed post-secondary education and are in possession of graduation certificates. To qualify as "institutions of higher education," they would also need to possess proper accreditation from both the state and national accreditation bodies. Further, such hospitals would need to have a not-for-profit status, although they may be either private or public. Lastly, even assuming that a given hospital does not meet the requirements of section 101(a)(3), it could still qualify as an "institution of higher education" under the expanded definition provided in section 101(b). In particular, if a hospital has an educational program that "provides not less than a 1-year program of training to prepare students for gainful employment in a recognized occupation" and "admits as regular students persons who are beyond the age of compulsory school attendance in the State in which the institution is located," it *is* an institution of higher education.

In short, physicians-in-training who accept employment at private, stand-alone non-profit hospitals that meet the definition of an "institution of higher education" may claim this H-1B cap exemption. These exemptions are often useful when a hospital's "affiliation agreement" with an institution of higher education falls short of USCIS' regulatory definitions of "related or affiliated" described in the next section. In other words, if a hospital's affiliations do not cut it, practitioners are well advised to determine if the hospital directly qualifies as an "institution of higher education," which results in exemptions from both the H-1B cap and the ACWIA fee.[889]

(b) Exemption for related or affiliated nonprofit entities

If a medical center is a "related or affiliated nonprofit entity," foreign workers, including physicians and physicians-in-training with offers of employment from such an entity would be cap-exempt. What constitutes a "related or affiliated entity"? The answer to this seemingly basic question is complicated if not controversial.

In a June 2006 memorandum by Michael Aytes, Associate Director for Domestic Operations,[890] USCIS directed adjudicators to adopt the definition of "affiliated nonprofit entity" found in USCIS regulations that govern ACWIA fee exemptions:

> *An affiliated or related nonprofit entity.* A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, though shared ownership or control by the same board or federation operated by an institution of higher

[889] The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), enacted as title IV of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, 112 Stat. 2681, 2681-641 (1998), imposed this so-called "ACWIA fee" on H-1B petitioners, while simultaneously exempting certain U.S. employers, including institutions of higher education and related and affiliated nonprofit entities, from paying the fee. See INA §214(c)(9), which codifies ACWIA §414(a).

[890] *See* USCIS Memorandum, M. Aytes, "Guidance Regarding Eligibility for Exemption from the H-1B Cap Based on §103 of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Pub. L. No. 106-313)" (June 6, 2006), *posted at* http://www.uscis.gov/files/pressrelease/AC21C060606.pdf (hereinafter "Aytes Memo").

> education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.[891]

The Administrative Appeals Office (AAO) agreed with the Aytes Memo and found that "Congress [likely] intended. . . . the phrase 'related or affiliated nonprofit entity' in the language of AC21 . . . be interpreted consistently with . . . 8 C.F.R. § 214.2(h)(19)(iii)(B)."[892] Thus, to qualify for H-1B cap exemption under AC21, a nonprofit entity must meet the definition of a "related or affiliated nonprofit entity" pursuant to the regulations implementing ACWIA.

The AAO further explained that, consistent with Department of Labor regulations at 20 C.F.R. §656.40(e)(ii), it interprets the regulatory language in 8 C.F.R. §214.2(h)(19)(iii)(B) to provide three alternative ways of demonstrating that a nonprofit entity qualifies for H-1B exemption, namely:

> (1) The petitioner is associated with an institution of higher education through shared ownership or control by the same board or federation;
> (2) The petitioner is operated by an institution of higher education; or
> (3) The petitioner is attached to an institution of higher education as a member, branch, cooperative, or subsidiary.[893]

The AAO recycled this reasoning in at least two additional decisions.[894] The main criticism of USCIS' "adopted" definition of qualifying "related or affiliated entities" is that it does not provide a realistic test of what constitutes a nonprofit entity that is associated with, operated by or attached to an institution of higher education. In its amicus brief in the *Matter of [Name not provided]*, EAC-06-216-52028 (AAO Sept. 8, 2006), the American Immigration Lawyers Association argued that,

> . . . . the USCIS has adopted narrow, restrictive definitions of "affiliated" and "related," ones that have almost no bearing on institutions of higher education and the ways that they are organized and structured. Under the USCIS *de facto* rule, almost no entity would qualify, and one would have to search far and wide to find a nonprofit entity that is "attached" to an institution of higher education as a

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[891] 8 C.F.R. §214.2(h)(19)(iii)(B).

[892] *See Matter of [Name not provided]*, EAC-06-216-52028, at 8 (AAO Sept. 8, 2006), *posted at* http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2006/Sep082006_07D2101.pdf (EAC-06-216-52028 Decision).

[893] *Id.*, at 8-9.

[894] *See Matter of [Name no provided]*, EAC-07-054-52851 (Feb. 21, 2008), *posted at* http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2008/Feb212008_02D2101.pdf (EAC-07-054-52851 Decision) and *Matter of [Name no provided]*, , WAC-08-184-51516 (AAO July 30, 2009), *posted at* http://www.uscis.gov/err/D2%20-%20Temporary%20Worker%20in%20a%20Specialty%20Occupation%20or%20Fashion%20Model%20%28H-1B%29/Decisions_Issued_in_2009/Jul302009_01D2101.pdf (WAC-08-184-51516 Decision).

"member," "branch," "cooperative," or "subsidiary." These formulations simply do not apply in the world of higher education.[895]

USCIS appears to have imposed a rule that, in essence, fails to accurately capture real-life affiliations between institutions of higher education and "related or affiliated" nonprofit organizations that wish to sponsor foreign workers, such as medical doctors and trainees, for cap-exempt employment. Furthermore, USCIS provides no guidance whatsoever, via administrative decisions, regulations or otherwise, on how a private, nonprofit medical center affiliated with an institution of higher education, as defined in section 101(a) of the HEA, might qualify.

With respect to prong one of 8 C.F.R. §214.2(h)(19)(iii)(B), two AAO decisions contended that the AAO "interprets the terms 'board or federation' as referring specifically to educational bodies such as board of education, board of regents, etc."[896] In both cases, the petitioners, public school districts, sought approval of their affiliations with qualifying institutions of higher education by claiming, *inter alia*, that they were controlled by the same state advisory boards and ultimately owned by their respective state governments. The AAO dismissed the argument that advisory boards met the "shared ownership or control test" because they acted primarily in advisory capacity.[897] It also found that a state's ultimate ownership and control of these educational bodies, which controlled institutions of higher education and primary and secondary schools, respectively, failed this same test.[898]

The authors have reviewed multiple affiliation agreements between qualifying universities and private nonprofit medical centers with facilities to provide "on-site" graduate medical training programs for universities, and are hard-pressed to report that any of them would meet the above test. Hospital-university affiliation agreements do not ordinarily contain provisions translating into common ownership or control. At best, they have joint operational committees which do not meet the requirements of prong one. They fail the prong of ownership and control because they are, indeed, advisory bodies that report to senior academic personnel on issues of compliance, accreditation, or quality of training.

When analyzing the "operation" prong, the AAO looked at "the common meaning of this term" and found that public school districts did not meet it.[899] Indeed, this test involves no additional analysis and is, thus, redundant in determining an exemption from the cap for a medical center operated by an institution of higher education. If a university operates a hospital, then that hospital is exempt from the cap as part of the university. No further inquiry is necessary.

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[895] *See* Brief of Amicus Curiae, American Immigration Lawyers Association, in the *Matter of [Name not provided]*, EAC-06-216-52028 (AAO Sept. 8, 2006), at 10, *published on* AILA InfoNet at Doc. No. 06082566 (*posted* Aug. 25, 2006) and N. Schorr, "Curb Your Enthusiasm: An Analysis of the AAO's H-1B Texas School District Case," 12 *Bender's Immigr. Bull.* 467, at 475 (April 15, 2007).

[896] *See* EAC-06-216-52028 Decision, at 9 and WAC-08-184-51516 Decision, at 5.

[897] *See* WAC-08-184-51516 Decision, at 5.

[898] *Id.*

[899] *Id.*, at 6. Also *see* EAC-06-216-52028 Decision, at 9.

Finally, prong three is also unhelpful, given its focus on being "attached to" an institution of higher education as a member, branch, cooperative or subsidiary. Once again, the AAO stated that it drew on generally accepted definitions of these terms.[900] But, as cited above, these formulations do not represent real-world affiliations, particularly between qualifying universities and medical facilities seeking exemptions for physicians or physicians-in-training.

In the first school district case that the AAO considered under this prong, it found that the petitioner, "when viewed as a single entity," did not qualify as a "related or affiliated entity" because it was not attached to a qualifying institution pursuant to 8 C.F.R. §214.2(h)(19)(iii)(B).[901] That case involved a particular program that the school district and the qualifying institution of higher education jointly operated. The AAO found that the program met prong three because it furthered one of the "essential purposes of the institution of higher education" by "train[ing] primary and secondary school teachers").[902] It granted the exemption to the petitioner as a "related or affiliated entity" without specifying whether its program was determined to be a "member," "branch," "cooperative," or "subsidiary" of an institution of higher education. The AAO modified its finding, however, by limiting exemptions to individuals "directly involved in the jointly managed program" and not to other employees of the school district.[903] This is a highly strained reading of 8 C.F.R. §214.2(h)(19)(iii)(B). In fact, it amounts to developing a forth alternative for determining a nonprofit entity's H-1B cap exemption eligibility since, arguably, joint programs cannot be reasonably classified as branches, subsidiaries, etc. Thus, according to this case, to qualify for a cap exemption, a private nonprofit medical facility must, at minimum, jointly manage a program with a qualifying institution of higher education which will employ the beneficiary. Additionally, the beneficiary's efforts must further the essential purpose of the affiliated institution of higher education.

It is not clear what impact this decision will have on hiring considerations by hospitals and healthcare facilities. The confusion is compounded by the fact that the second school district case considered by the AAO[904] entailed similar facts but resulted in the denial of the cap-exemption status to the petitioner. In an apparent reversal of its position, the AAO stated that

> . . . the analysis of program participation only occurs when it has been determined that the beneficiary will be employed on-site "at" an institution of higher education or related or affiliated nonprofit entity by a third party petitioner. In other words, according to the Aytes Memo, the *locus actus*, or place of performance is paramount in determining whether a petitioner qualifies for an exemption from the H-1B cap as an institution of higher education under section

[900] *See* EAC-06-216-52028 Decision, at 10.
[901] *Id.*
[902] *Id.*
[903] *Id.*
[904] *See* WAC-08-184-51516 Decision, at 1-6.

> 214(g)(5)(A) of the Act. It is clear from the evidence presented *in this matter that the beneficiary will be employed in the petitioner's facilities* and, therefore, does not qualify for the third party employer exception discussed in the Aytes Memo.[905] (Emphasis added.)

The first school district case did not find that a place of performance was paramount and did not discuss or impose any on-site employment requirements. The beneficiary there was primarily employed by the school district, as was the case with the second school district decision. Both petitioners sought approval of H-1B status for the beneficiaries participating in joint programs as "related or affiliated or related *nonprofit* entities" and not as third party *for-profit* entities contemplated by the Aytes Memo. Thus, since these two cases are similar in all key respects, different results can only be explained by the AAO's failure to devise a sensible means of adjudicating petitions by nonprofit entities eligible for cap exemption. This is significant because *nonprofit entities are not required to place employees at institutions of higher education to claim cap exemption.* For instance, affiliated nonprofit medical centers often train medical graduates in their own facilities and, through specific affiliation arrangements, in fact serve as training grounds for qualifying universities. Assuming a private, nonprofit hospital's affiliation agreement meets USCIS standards, foreign residents and doctors at the hospital need not engage in "on-site" employment *at* the qualifying institution of higher education.

In the end, the AAO appears to have misread the Aytes Memo, which expanded the "employed-at" concept to include non-exempt, private, for-profit businesses in the definition of institutions of higher education or related or affiliated nonprofits for purposes of H-1B cap exemption. Accordingly, in our view, place of employment is immaterial to the "related or affiliated nonprofit entity" analysis. By extension, because the "program participation" exception was derived from the analysis of exemptions for "related or affiliated nonprofit entities," we believe that the AAO's imposition of an additional requirement of "on-site" employment is misguided and contrary to the holding of *Matter of [Name not provided]*, EAC-06-216-52028 (AAO Sept. 8, 2006).

(c) Third-party petitioners or employee-centered cap exemptions

USCIS interpreted the phrase "employed . . . at" in INA 214(g)(5)(A) broadly:

> Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain aliens who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or government research organizations. In effect, *this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.*

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[905] *Id.*, at 6.

> USCIS recognizes that Congress chose to exempt from the numerical limitations in section 214(g)(1) aliens who are employed "at" a *qualifying institution*, which is a broader category than aliens employed "by" a qualifying institution. USCIS interprets the statutory language as reflective Congressional intent that *certain aliens* who are not directly employed by a qualifying institution may nonetheless be treated as cap exempt when such employment directly and predominantly furthers the essential purposes of the qualifying institution.[906] (Emphasis added.)

With this memo, USCIS extended H-1B visa cap exemptions to a broad swath of "third-party" entities, including private, for-profit firms, provided that the beneficiary's work at such entities "directly and predominantly further[s] the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution."[907] The focus is on qualifying institutions (e.g., those enjoying exemption pursuant to INA Section 214(g)(5)). These entities are to be treated *more favorably* than the rest of the for-profit industry (i.e., businesses) by mandating that they "have access to a continuous supply of H-1B workers without numerical limitation." Just one sentence later, however, the Memo shifts its analysis to "certain aliens." In other words, an employer-based exemption effectively morphs into an employee-based exemption. This is not all bad news, considering that individuals working for private, for-profit businesses that do not directly qualify for cap exemption may nevertheless enjoy exemptions on behalf of some of their employees. The conditions for such exemptions are fairly straightforward: (a) the beneficiary must be physically located "at" the qualifying institution; and (b) his or her work must further the "normal, primary or essential purpose, mission, objectives, or function"[908] of the qualifying institution.

Thus, as in Example 3 of the Memo,[909] a medical resident who has been employed by a qualifying medical center and is subsequently hired by a private, for private practice group "with primary offices within the . . . medical center" will receive cap exemption. Here, the resident will continue her work "on-site" and her duties would further the essential purpose of the medical center. In theory, similar third-party petitioners should not be required be produce extensive documentation to establish cap-exempt status under similar circumstances.

In sum, a non-exempt petitioner may gain cap exemption on behalf of an employee whom it places at a qualifying institution. Such a petitioner must be able to demonstrate a "logical nexus between the work predominantly performed by the beneficiary and the normal mission of the qualifying entity."[910]

TRANSFERRING FROM H-1B-EXEMPT TO H-1B-SUBJECT EMPLOYER

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[906] *See* Aytes Memo, at 3.
[907] *Id.*
[908] *Id.*, at 8.
[909] *Id.*
[910] *Id.*, at 6.

INA Section 214(n) provides that,

> A nonimmigrant alien . . . who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

On first glance, this language is uncontroversial. An individual who is already in H-1B status may commence employment upon filing of a new petition by his or her new employer. What about the scenario where the beneficiary wishes to move from cap-exempt employment to cap-subject employment "upon filing" of a new petition, but no H-1B visas are available for the fiscal year? This question frequently arises when a newly minted physician who just finished training in H-1B status is ready to start employment at a private clinic. The issue was raised in a letter to USCIS and received the following response:

> The portability provision of INA section 214(n) does not confer H-1B status on the beneficiary of the H-1B petition. Rather, section 214(n) provides the narrower benefit of continued employment authorization and is silent as to the actual status of that worker. As such, an H-1B worker . . . who meets the requirements of INA 214(n), may commence employment . . . with a new or concurrent employer notwithstanding the fact that the prior H-1B employment . . . [was] cap-exempt employment and the new or concurrent employment is cap subject employment.
> * * *
>
> . . . [S]ection 214(n) provides employment authorization until the H-1B petition is either denied or adjudicated. Congress appears to have not contemplated a situation in which H-1B status would not be immediately conferred upon the portability worker upon approval of the H-1B petition. By addressing the result of a denial but not an approval Congress seems to have assumed that the alien would immediately be covered by the approval and would not longer require the employment authorization conferred by 214(n), and thus drafted 214(n) so that the employment authorization it provides ends upon "adjudication." . . . A reading of 214(n) . . . that continues employment authorization until H-1B status is available is a logical one. . . .[911]

Following these standards, a private for-profit physician group may recruit a physician from a cap-exempt employer and place him or her on its payroll immediately upon fling the new petition. The physician may work for the group pursuant to INA Section 214(n) until the petition is approval and beyond. Put another way, if the case is approved before an employment start date of October 1, the beneficiary's work

[911] *See* correspondence between Efren Hernandez, Chief, Business and Trade Services, USCIS, to Attorney Naomi Schorr, *published by* AILA InfoNet at Doc. No. 07052563 (*posted* May 25, 2007).

authorization will run until his or her status is available (October 1). It is entirely possible, of course, that another vehicle, such as an exemption from the cap, is potentially available to the physician. If the practice group plans to employ the physician "at" a cap-exempt medical institution from which he or she was recruited, INA Section 214(n) "portability" may be invoked *without regard for H-1B visa availability*, since the beneficiary would be changing from one cap-exempt position to another. Attorneys should review all applicable employer- and employee-based exemption strategies to ensure a maximum use of H-1B time and continuous eligibility for H-1B status despite the statutory annual numerical limitation.

UTILIZING THE CONCURRENT EMPLOYMENT OPTION

Concurrent employment is another useful way of capitalizing on expanded employment opportunities for physicians and physicians-in-training who wish to work for private, cap-subject practices while maintaining concurrent cap-exempt employment. INA Section 214(g)(6) states:

> Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 101(a)(15)(H)(i)(b), who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5).

On May 30, 2008, USCIS issued a memorandum by Donald Neufeld, Acting Associate Director of Operations, which included interpretive guidance relating to Section 214(g)(6).[912] The memorandum stated that "USCIS does not require that an alien who is cap-exempt by virtue of [his or her employment at a qualifying entity] be counted towards the limitation contained in 212(g)(1)(a) if they accept concurrent employment with a non-exempt employer."[913] Thus, a physician maintaining current employment at a qualifying university medical center may accept a concurrent appointment at a cap-subject clinic without regard to H-1B visa availability. The Neufeld memorandum advises USCIS adjudicators to collect "a current letter of employment or recent pay stub" to ensure that the beneficiary has not ceased his or her cap-exempt employment.[914] The memorandum directs adjudicators to "deny any subsequent cap-subject H-1B petitions . . . if no cap numbers are available," if it "determines that [the beneficiary] has ceased to be employed in a cap-exempt position. . . ."[915] Given that concurrent clinical, research or academic appointments are quite common in the medical profession, this provision provides the needed flexibility in structuring overlapping assignments. Practitioners,

[912] *See* USCIS Memorandum, D. Neufeld, "Supplemental Guidance to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Pub. L. No. 106-303), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C of Pub. L. No. 105-277," HQ 70/6.2, at 7 (May 30, 2008), *posted at* http://www.uscis.gov/files/nativedocuments/AC21_30May08.pdf.

[913] *Id.*

[914] *Id.*

[915] *Id.*, at 7-8.

employers and aliens should take care that the qualifying cap-exempt employment does not "cease" until another exemption vehicle, described in this article, becomes available to the beneficiary.

AVOIDING THE H-1B SIX-YEAR LIMIT

GME programs can range from three years (general primary care programs) to eight plus years for advanced specialty training. Given the six-year limit imposed on H-1B visas,[916] this poses a serious problem for those IMGs who wish to avoid the two-year requirement of the J-1 visa.[917] In other words, physicians-in-training often find themselves running out of H-1B time before they are able to qualify for permanent residence. We propose a few strategy options to be considered by practitioners to resolve this dilemma.

(a) Changing status to J-1

This is possibly the least desirable option, which nevertheless must be considered – changing to the dreaded J-1. If an IMG pursues a training program that will last longer than six years, it will simply be impossible to complete it in H-1B status. Therefore, it may be advisable to either do the entire program in J-1 status or, at some point during the program, change from H-1B to J-1. If the IMG's long-term goal is to remain in the U.S., timing is extremely important in playing out this strategy correctly. Those IMGs who start GME on an H-1B and eventually change to J-1 must be mindful of leaving sufficient H-1B time of their six-year allotment. This is because, should they ultimately qualify for a waiver of the two-year home residence requirement based on a three-year commitment to a medically underserved area, they will be required to fulfill this commitment in an H-1B status.[918] Thus, they must reserve three years of H-1B time in order to, eventually, qualify for a J-1 waiver and complete its obligations. Alternatively, they will need to utilize some of the other strategies described in this section in order to extend their H-1B status, if they have less than three years in reserve. Note that IMGs who are seeking H-1B status after qualifying for a J-1 waiver based on a commitment to work in a medically underserved area are exempt from the H-1B cap.[919]

(b) Leaving the U.S. for one year

Perhaps an equally undesirable option as the one described above is the possibility of leaving the U.S. for one year in order to "re-start the H-1B clock." Applicable regulations provide that an alien would be eligible for a new six-year period of H-1B time after spending a year abroad.[920] While this option may only be possible in rare circumstances and is less than optimal, it would qualify an IMG for additional H-1B time in order to finish their GME program or, should the program be already completed, to

[916] 8 C.F.R. § 214.2(h)(13)(iii)(A).
[917] INA §212(e).
[918] INA § 214(l)(2)(a), 8 U.S.C. § 1184(l)(2)(a).
[919] INA § 214(l)(2)(a), 8 U.S.C. § 1184(l)(2)(a).
[920] 8 C.F.R. §214.2(h)(13)(iii)(A).

return to the U.S. in order to take up employment that would eventually lead to permanent residence.

(c) Recapturing time spent abroad

There is no doubt that physicians-in-training work hard. However, they also get regular time off. Many residency programs offer four weeks of vacation during each year of training. For those IMGs who are enrolled in lengthy programs that may take most of their H-1B allotment, it is advisable to spend most of this vacation time abroad in order to be able to recapture it later. Recapturing time spent abroad[921] may provide a valuable opportunity for getting the most out an IMG's H-1B status.

(d) Extensions beyond the six-year limit

An H-1B holder may qualify for extensions beyond the six-year limit if a labor certification or I-140 petition is filed at least 365 days before expiration of the H-1B status.[922] While a physician-in-training is certainly well-advised in using this provision to qualify for additional H-1B time, it can be used in limited circumstances.[923] If the IMG is still pursuing training, and the job that is subject to the labor certification requires completion of the training, then the IMG will be disqualified from the job. On the other hand, if the IMG is in the middle of an advanced fellowship program, but the job requires only primary care residency, which he has already completed, this strategy should certainly be considered.

One of the possibilities of utilizing this provision is through filing a self-sponsored immigrant visa petition at least 365 prior to reaching the six-year H-1B limit. Assuming that the physician qualifies for the legal standard, petitioning for the EB-1 classification[924] as a scientist of extraordinary ability is optimal, as it does not carry specific training requirements that may disqualify the IMG who is still in the process of completing them. Another self-sponsored option is to petition for the National Interest Waiver specifically designed for physicians who agree to work in a federally designated medically underserved area or a Veterans Affairs-operated facility for five years.[925] While the requirement of a five-year service obligation may discourage many physicians from applying, this option may be appropriate for an IMG who wishes to start a practice in an underserved area and plans to run it for more than five years.

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[921] *See* USCIS Memorandum, M. Aytes, "Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants (AFM Update AD 05-21)," HQ 70/6.2.8/12 (Oct. 21, 2005), *posted at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2005/recapturech1bl1102105.pdf.

[922] American Competitiveness in the 21st Century Act, Pub. L. No. 106-313, § 106, 114 Stat. 1251, 1253.

[923] *See* R. Aronson and D. Shenoy, "PERM Filings for Residents, Interns, and Physicians: Variations on a Theme by Hippocrates," *Immigration Options for Physicians*, Third Ed., 239 (2009).

[924] INA §203(b)(1)(A), 8 CFR §204.5(h).

[925] INA §203(b)2)(B)(ii). *See also Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006), USCIS Memorandum, M. Aytes, "Interim Guidance for Adjudicating National Interest Waiver (NIW) Petitions and Related Adjustment Applications for Physicians Serving in Medically Underserved Areas in Light of *Schneider v. Chertoff*, 450 F.3d 944 (9th Cir. 2006) (Schnider Decision)" (Jan. 23, 2007), *published on* AILA InfoNet at Doc. No. 07021262 (*posted* Feb. 12, 2007).

CONCLUSION

IMGs are an integral part of American medicine. Today, they comprise 26% of all physicians practicing in the United States,[926] and all of them must undergo training in order to join the workforce. With the number of physicians-in-training holding H-1B visas steadily increasing, immigration law practitioners must be aware of the potential limitations and obstacles that they frequently face. More importantly, we hope that this article offered practical solutions to overcoming these limitations and successfully leading clients to their immigration goals.

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[926] *Physician Characteristics and Distribution in the U.S.*, American Medical Association, 2009.