*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)

**13. J-1 Waiver Memorandum**

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

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

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

Under the "Conrad 30" program, each state can process 30 waivers per year. Not all states are participating. Some states may require a four-year commitment.

Under the HHS J-1 Waiver program, the HPSA/MUA area must have a score of 14 or above and the sponsoring facility must be a Federally Designated Health Center, a Rural Health Clinic, or a Native American/Alaskan native medical facility. Initially, the program was open to all J-1 physicians obtain a position in a HPSA or MUA without the aforementioned restrictions. .

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

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

If the Agency supports the application, they will recommend to the United States Department of State--the organization that issued the Form DS-2019--that a Waiver be granted. The State Department will recommend to the USCIS that a waiver be granted. USCIS will then issue an approval notice confirming that the waiver has been approved. The approval of the waiver will specify that the physician must be employed by the employer specified in the waiver application for a period of three years, in H-1B status. The approval of the waiver does not confer Employment Authorization or Permanent Resident Status on the physician. An H-1B petition must be filed and approved prior to commencing employment.

There is no exact science as to when the H-1B process should be commenced. Many factors come into play. The USCIS will not grant a change of status to H-1B status by a J-1 waiver applicant, unless the waiver application has been approved. The H-1B petition cannot be filed more than 6 months before the commencement of employment. Generally, this office commences the H-1B processing once the waiver has been approved by the initial Interested Government Agency and forwarded to the United States Department of State. We try to estimate when the waiver will be approved. The H–1B petition will be filed, either when the Department of State issues their recommendation or when USCIS issues their approval notice. Factors such as the expiration date of the DS-2019 and the status of the license may impact on the time of filing.

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

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

If the H–1B petition is approved with a change of status, employment can commence when the start date is reached. If granted without a change of status, employment can only commence subsequent to obtaining an H – 1 visa at a US consulate and entering the United States in H1B status. Citizens of Canada are exempt from the visa requirement. However, if their H–1B petition was approved without a change of status or if they are overseas, they must be admitted to the United States in H1B status in order to commence employment.

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

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

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

There is only a 30 day grace period to remain in the United States after your DS-2019 expires. Once your waiver has been forwarded to the Department of State, you should not extend the DS2019, as it may make you subject to the two year foreign residency requirement again, thereby canceling the waiver. Additionally, entering the United States in J -1 status after the approval of the waiver may subject you to the two-year foreign residency requirement and cancel the waiver approval.

Options leading to Resident Alien Status can be commenced while the waiver is in progress or at any time thereafter. Most parties will want to wait for the waiver to be approved and employment commenced in H-1B status before starting employment based cases. These options include, but are not limited to, Labor Certification, EB1/Alien of Extraordinary Ability, and Family based petitions, However, with these options, the final step leading to Resident Alien Status, the filing of an Application for Adjustment of Status, or the interview at a U.S. Consulate, if consular processing is sought, cannot be done until after the physician has completed their obligation of being employed for three years at the waiver location. As mentioned above and in the attached memo pertaining to National Interest Petitions based upon employment in a shortage area, if there is no retrogression, applications for adjustment of status and employment authorization can be submitted prior to completing 3 years employment in H – 1B status.

If the J-1 waiver beneficiary is married to a U.S. Citizen, or is the beneficiary of a family -based preference petition with a current priority date, the physician will have to remain employed with the J-1 sponsor for three years pursuant to H-1B status, before filing an Application for Resident Alien Status.

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

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

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

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

Last update: October 11, 2013