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1. **H-1B Cap Issues**

USCIS can only approve 65,000 H-1B petitions per year. Another 20,000 are available to individuals who have obtained at least a Masters degree from a US University.

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, have an affiliation agreement with an institution of higher education (medical school), and previously had an H – 1B petition approved claiming the cap exemption on or after June 2006.

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).

1. A non-profit organization or entity related to or affiliated with any such institution.
2. A non-profit entity which engages in established curriculum-related clinical training of students registered at any such institution.
3. A non-profit research organization or governmental research organization, as defined under 8 CFR 214.2(h) (19) (iii) (c).

Section 214.2(h) (19) (iii) (B), the applicable provision of law on this issue defines an affiliate related to a nonprofit entity that is deemed as an exempt organization as follows:

“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, through shared ownership or control by the same board or federation operated by an institution of higher education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.”

The parentheses are included in the statute.

Numerous hospitals have affiliations and relationships with medical schools.

If your employer does qualify for the exemption, they must provide a copy of the 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 the appropriate affiliation, relationship or other reasons why the exemption is claimed, as well as an approval notice and H – 1B petition for a petition approved subsequent to June 6, 2006.

There are more questions than answers to numerous issues surrounding the H-1B cap. For example, there is no clear definition as to what USCIS considers a related facility.

From December 2010 until mid-March 2011, USCIS required that teaching hospitals document that a relationship exists between the position and the Affiliation Agreement. For example, if the agreement is for students at a medical school to receive medical education at the hospital, it should suffice for a PGY position. It became extremely burdensome, if not impossible, to establish. The problem appears to now be resolved. Nonetheless, however, once the H – 1B cap has been reached, USCIS may not approve the petition without the aforementioned documentation. The affiliation agreement must be related to the position being offered.

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, part of his duties will require him to spend time at a hospital which is exempt from the cap. The Cap exemption can be claimed. USCIS has been inconsistent in their processing of these cases. They have required proof that the doctor will be advancing the purposes listed in the Affiliation Agreement between the Hospital and the University. This would include establishing that the doctor would be teaching medical students rotating through the hospital or advancing any other activities specified in the Affiliation Agreement.

The option referred to as “Employed at” a cap exempt facility has opened up numerous opportunities for physicians whose prospective employers cannot wait for them to join in October, or when the H – 1B cap has been reached. However numerous factors should be considered before selecting this option. There have been instances where it has been extremely difficult to establish to USCIS that this provision applies.

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