

IMG TASKFORCE

INTERNATIONAL MEDICAL GRADUATE TASKFORCE

info@imgtaskforce.com
www.imgtaskforce.org

April 9, 2010

Department of Homeland Security
U.S. Citizenship and Immigration Services
Chief, Regulatory Products Division
Clearance Office
111 Massachusetts Avenue, NW.
Suite 3008
Washington, DC 20529-2210

Re: OMB Control Number 1615-0009
Agency Information Collection Activities:
Form I-129, Revision of an Existing Information Collection

Greetings:

The International Medical Graduate (IMG) Taskforce submits the following comments in response to the request for public comment from the Department of Homeland Security on its Notice of Information Collection, proposing revisions to Form I-129, Petition for Nonimmigrant Worker 75 Fed. Reg. 6212 (February 8, 2010).

In light of our mission, we focus our comments on the particular issues raised by the proposed revision to the Form I-129 affecting physicians who are International Medical Graduates. The International Medical Graduate (IMG) Taskforce comprises professionals in medicine and law who are dedicated to helping Americans in rural and other physician-shortage areas obtain the basic medical services they so desperately need and deserve. Among other goals, we strive to educate national and state policy makers, administrative officials, and the American public on the need for fair and reasonable laws for allowing international medical graduates to become licensed as physicians and to begin or continue their medical careers in the United States. We work on behalf of universities, teaching hospitals, medical centers, and clinics of all sizes, and on behalf of international medical graduates seeking necessary authorizations. Given the inherent complexities and constant shifting of underlying laws and policies, we also collegially support each other. Ultimately, we share a deep desire to ensure that Americans in underserved areas and underserved populations of the United States receive adequate health care services.

Each of the comments below corresponds to a page number of the I-129 Form and Supplements

Form I-129, page 4, Items 11a and 11b: New Information Request Regarding Prior J-1 Exchange Visitor Status

The proposed I-129 form asks whether any beneficiary in the petition *has ever been* a J-1 exchange visitor or J-2 dependent of an exchange visitor. If the answer to this information collection is yes, then the petitioner must provide the dates the beneficiary maintained J-1 or J-2 status. In addition, the petitioner must provide copies of corresponding DS-2019 or IAP-66 forms, as the case may be, or a copy of a corresponding J-1 or J-2 visa stamp.

The information request is overly broad in that it requests answers to these questions regardless of the applicability of Section 212(e). There should be an exception to the requirement to respond to this information request where the beneficiary never was subject to Section 212(e) or, if subject to it, has previously complied either by obtaining a waiver or having completed the two-year foreign residency requirement. This exception is especially necessary where the Service itself has already recognized compliance with Section 212(e) by previously granting an immigration benefit that could not have been issued but for compliance with Section 212(e). For example, if a petitioner requests a change of status from J-1 to H-1B on behalf of an International Medical Graduate, then a subsequent petition requesting an extension of stay on behalf of the same beneficiary should not be subject to the same information request. Often times, beneficiaries will not retain copies of old visas or Forms IAP-66/DS-2019 where there was no requirement to comply with the foreign residency requirement.

These information collections are new to the Form I-129 and should be deleted or, in the alternative, their purpose should be made clear. Stakeholders are concerned that these questions imply that the Service questions without reason the eligibility for H-1B or other nonimmigrant classification in the case of former J-1 or J-2 nonimmigrants.

The Service's regulations state that any alien admitted in J-1 status or who later acquired such status in order to obtain graduate medical education is ineligible for a change of status except in certain limited circumstances. Specifically, if the international medical graduate received a waiver of Section 212(e) through the Conrad Program pursuant to 214(l)(1)(B) (a "Conrad Waiver"), then s/he is eligible for a change of status from J-1 to H-1B. 8 C.F.R. §248.2(a)(3). Also, beneficiaries may change status from J-1/J-2 to A, G, U or T nonimmigrant status without first having to depart the U.S. *Id.* All others are ineligible. *Id.*

If the Service is requesting documentation of all previous stays in J status, it would seem appropriate also to request documentation regarding why Section 212(e) no longer applies to a particular beneficiary. As currently drafted, these open-ended information requests leave open the possibility of Requests for Evidence if the Service is attempting to determine eligibility for a change of status. A beneficiary may have complied with Section 212(e) by returning to his or her home country for two years.

Likewise, the beneficiary may have obtained a no objection statement, a hardship waiver, a Conrad Waiver, an interested government agency waiver or a waiver due to extreme hardship or persecution. In any event, a petitioner might not have access to all of these historical documents, and the request is overly burdensome in contravention of the Paperwork Reduction Act. 5 C.F.R. §1320.9(c). In light of the fact that USCIS (or legacy INS) issued the waiver, the agency itself should have access to the waiver documents.

The information collection would appear to be irrelevant to USCIS adjudication of eligibility for a nonimmigrant classification, as opposed to a change in status, where the beneficiary will present evidence in connection with a nonimmigrant visa application at a U.S. consulate regarding compliance with Section 212(e). In fact, the instructions to the proposed new form state that a “J-1 exchange visitor subject to the foreign residence requirement who has not received a waiver of that requirement” is ineligible to change status. *See* Proposed Form I-129 Instructions (Rev 01/27/10)N at p. 4. In light of this very clear and correct instruction, questions 11a and 11b are unnecessary.

Accordingly, these questions run afoul of the Paperwork Reduction Act, which is intended to minimize an agency’s paperwork burden on petitioners resulting from the collection of information by or for the Federal Government. The Paperwork Reduction Act also requires the Service to set forth a particular need for collecting the information, and the proposed rule fails to indicate any such reason.

Questions 11.a and 11.b also seem to question the ability of a petitioner to request a change of status on behalf of beneficiary who was admitted in some other nonimmigrant classification. The Service’s regulations bar a change of status where the beneficiary was last admitted in J status to another nonimmigrant status. The regulations do not bar a change of status where a beneficiary who previously held J status departed the U.S. and was admitted in another nonimmigrant classification, such as F-1 or O-1. In these cases, INA Section 212(e) and USCIS regulations do not bar a change of status. Therefore, the reason for the information collection remains unclear and unnecessary in this respect.

It appears that questions 11.a and 11.b are relevant if at all, to the issue of whether a beneficiary is eligible for a change of status. As indicated above, the instructions to the form address this issue. If the questions remain on the final Form I-129, then AILA recommends that these questions should be prefaced with the following question 11, “If the petition requests a change of nonimmigrant status, then answer the following two questions.”

**Form I-129 Part 6 (page 5): Additional Information About Employment Under a Third Party Contract
and
H-1B Data Collection Supplement Part D (page 19) Attestation Regarding Off-Site Assignment of H-1B Beneficiaries**

The Service is to be commended for trying to improve and make more efficient the I-129 petition form. The proposed new I-129 form nonetheless appears to be a one-size-fits-all document that disregards the realities of today's healthcare system. We are particularly concerned about the inclusion of concepts in the form that appear to be based on the January 8, 2010 Memo from Donald Neufeld Regarding Determining Employer-Employee Relationship for Adjudication of H-1B petitions (the "Neufeld Memo").

The Neufeld memo was never the subject of a notice and comment rulemaking pursuant to the Administrative Procedures Act. Despite this fact, the Neufeld memo, fraught with its own problems, is now carried over to the proposed new I-129 form thereby incorporating those problems into the form itself. Nowhere is this more clear than in the sections regarding employment involving third party placement. It is understandable that the Service would try to end many of the collateral issues involved in some industries which may appear to violate the intent of Congress in establishing the H-1B program. However, by lumping all professions together and ignoring the real world of business, the Service has created a form which will have the unintended consequence of creating more work for the agency and the regulated community, result in an increase in extralegal Requests for Evidence, and thereby further deepen the healthcare shortage in our country.

Part 6 "Additional Information About Employment Under a Third Party Contract" and the corresponding Part D Attestation Regarding Off-site Assignment of H1B beneficiaries are obviously intended to address particular industries where the Service is concerned about fraudulent uses of the H1B. Congress specifically intended for H1B visas to be used for physicians, however, and the proposed revision to the I-129 Form does not reflect consideration for the medical profession in the 21st century.

The following are just some of the examples illustrating this problem:

Corporate Practice of Medicine (Example 1): Many states, including Texas, California and New York, have laws that prohibit the "corporate practice of medicine," which means that a physician may not work directly for a hospital or for a corporation with non-physician ownership. Federal law also prohibits a physician from making a referral to an entity such as a hospital if he/she has a financial relationship with that entity. 42 U.S.C. § 1395nn ("Stark Law"); 42 CFR § 411.350, *et seq.*, ("Stark regulations.") In order to comply with state and federal laws, many hospitals have either created separate wholly-owned subsidiaries, or have transferred the affected physician-employees to separate entities whose sole purpose is to employ the physicians at the particular medical facility, where the day-to-day duties are performed. Thus, while the entity employing the healthcare provider is the petitioner, it would not be able to satisfy the factors identified in the Neufeld Memo. In answering questions to Part 6, the entity would indicate the physician working in an "off-site" location i.e. the Hospital. The

proposed revision to Form I-129, however, fails to acknowledge in any way that this legitimate employment practice in the healthcare field. The revised form does not provide a field to explain. In short, Part 6 will raise a red flag, causing unnecessary RFEs at best and wrongful denials at worst. In essence, despite the H-1B regulations specifically authorizing H-1B classification for physicians, the proposed form will cause these cases either to be denied or substantially delayed to the point of disruption to continuity of medical practice. *See* 8 CFR §214.(h)(4)(viii).

Likewise, the H1B Data Supplement Part D exacerbates this very problem. The questions asked about “off-site assignments” would not make any sense in the physician context. The physician can only work at the Hospital; and therefore the provision about advising him/her of this placement and of his/her’s acceptance of the terms and conditions of this job location is both irrelevant in the real world of providing medical care to the public and beyond the reach of the regulations which already impose specific obligations on the employer, none of which is advising employees of off-site employment and relocation.

Moreover, the petitioner is already obliged under law to adhere to the terms and conditions of employment as set forth in the current regulations and the required temporary Labor Condition Application, including the terms and conditions of employment and the prevailing wage. To now add to those obligations by adding additional ones will wreak havoc upon U.S. healthcare employers. Hospitalists do not work per an “itinerary” (See Part D). Physicians in rural areas may “travel” in a wide area in order to provide medical care, but they do not relocate or work pursuant to an “itinerary”. Yet, it is all but inevitable that Immigration Services Officers will simply deny cases or issue unnecessary, burdensome and costly RFEs to hospitals and healthcare provider groups because those professions do not fit into this form’s unduly narrow formula for the employer-employee relationship.

Locum Tenens and Other Temporary Placements (Example 2): *Locum tenens* physicians provide coverage in medical clinic, practice and hospital environments when a short-term need arises, such as when the incumbent is unavailable due to maternity leave, illness, other leave, resignation or other vacancy. In communities that are underserved, *locum* agencies hire doctors and place them where the need is great. Other healthcare workers, such as traveling nurses and physical therapists, also work in similar arrangements. *Locum* agencies would have a difficult time satisfying the requirements of the Neufeld Memo and the proposed revision to the Form I-129, as currently drafted.

Rural Practices and Hospital Call Services (Example 3): Similarly, a physician serving a rural community with a private employer is often needed to help staff hospitals’ emergency rooms or to cover physician shortages in the Emergency Room or hospital wards. Often, these physicians must work for their own corporations or for staffing companies to help staff these areas. Just as the Neufeld Memo could impose insurmountable barriers to these *bona fide* employment arrangements, Part 6 of the I-129 Form and Part D the Form I-129 H-1B Data Collection Supplement will raise red flags

where no red flags were intended to be raised and result in problems for both the petitioner and for the Service. RFEs will increase. They will be long and burdensome, adding unnecessary costs to the petitioner, result in inefficiency both for the employer and for the Service, and most importantly, in the end will not accomplish what the Service hopes to accomplish by this form with respect to third party placement.

Form I-129 H-1B Data Collection Supplement, Part C (page 18)
Numerical Limitation Information

The IMG Taskforce welcomes the attempt made by USCIS to clarify the bases for H-1B cap-exemption as part of the proposed revisions to Form I-129 H-1B Data Collection Supplement. Among the helpful clarifications is the reflection at Part C, Question 1 that there is actually more than one “cap” in the H-1B category. Similarly, while additional technical corrections are required (found at “Suggested Technical Corrections” section below), we note with approbation the addition of the helpful phrase “commonly called a Conrad Medical Waiver” in Part C, Question 3.f. We also praise the proposed Form’s removal of the misleading pronoun “you” from the prior version of the form, in describing the qualifying institutions and entities within the cap exemption section that corresponds to Section 214(g)(5)(A-B) of the Immigration and Nationality Act (hereinafter, “INA,” or “the statute”). We also commend the clarification rendered in Part C, Question 1, that the election of the petitioning party rather than that of USCIS governs whether a given H-1B petition will be “counted against” the H-1B annual numerical limitation, or “H-1B Cap.”

Just as it is the election of the petitioning party whether a case will be counted against the H-1B cap, so too it is the election of the petitioning party on which basis or bases a case will be exempted from the cap. To better reflect this concept, we would suggest the addition of an elective parenthetical plural to “reason” at Part C, Question 3, thereby transforming “reason” to “reason(s)” for H-1B cap exemption. There are several instances, particularly in the healthcare context, in which there is more than one basis for cap exemption. Permitting the selection of more than one basis for exemption would provide USCIS adjudicators greater transparency. It would also aid the individual’s subsequent immigration practitioners and employers in their reviewing an individual’s prior H-1B petitions, to have a form that reflects the all applicable bases selected for a beneficiary’s previous H-1B cap exemption.

To continue in USCIS’ laudable movement toward clarification of the bases of H-1B cap exemption within the proposed Form, we would recommend that the reasons for cap exemption based on employment provided in Part C, Question 3 maintain a parallel structure to the relevant subsections of the INA (i.e., INA §214(g)(5)(A-B)), so as to most clearly reflect the statute and thereby ensure the realization of legislative intent to afford H-1B cap exemption to “any nonimmigrant alien issued a visa or otherwise provided status under section 1101(a)(15)(H)(i)(b),” INA §214(g)(5), who is employed or has received an offer of employment at a qualifying institution. See INA §214(g)(5)(A-B). We submit that the Form would further effectuate the statute and, therefore

Congressional intent, with language in Part C, Question 3 of the Form, additionally revised as follows:

- ☐ 3.a. The beneficiary has received an offer of employment at an institution of higher education as defined in the Higher Education Act of 1965, 20 U.S.C. §1001(a), and such offer of employment is the subject of this petition.
- ☐ 3.b. The beneficiary has received an offer of employment at a nonprofit organization or entity related to or affiliated with an institution of higher education, such as institutions of higher education defined in the Higher Education Act of 1965, 20 U.S.C. §1001(a), and such offer of employment is the subject of this petition.
- ☐ 3.c. The beneficiary has received an offer of employment at a nonprofit research organization or governmental research organization.
- ☐ 3.d. The beneficiary is currently employed at an institution of higher education as defined in the Higher Education Act of 1965, 20 U.S.C. §1001(a) or at a nonprofit organization or entity related to or affiliated with such an institution of higher education.¹

The INA's discussion of H-1B cap exemptions related to employment of the beneficiary do not distinguish between the identity of the employer, but rather the location of employment of the beneficiary "at" a qualifying institution or entity. The INA makes no distinction between employment *by* a qualifying institution or entity and employment *at* a qualifying institution or entity. See INA §214(g)(5). The sole choice for H-1B cap exemption under INA Section 214(g)(5) is that of employment "at" an institution or entity listed in 214(g)(5)(A) or 214(g)(5)(B), rather than employment "by" an institution or entity. As has been aptly noted by this agency previously, USCIS appropriately "recognizes that Congress chose to exempt from the numerical limitations in Section 214(g) ... aliens who are employed 'at' a qualifying institution, which is a broader category than aliens employed 'by' a qualifying institution." Interoffice Memorandum from Michael Aytes, Associate Director for Domestic Operations, USCIS "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" (HQPRD 70/23.12) (June 6, 2006)(hereinafter, "Aytes Memorandum"), at p. 3.² Accordingly, the Form I-129 will best further the intent of Congress by expanding rather than limiting the petitions afforded cap exemption at qualifying institutions or entities on the basis of INA Section 214(g)(5)(A-B).

¹ This comment's proposed inclusion of additional language at para. Question 3.d. above is necessary to effectuate fully the statutory language providing for H-1B cap exemption for "any nonimmigrant . . . provided status under section 1101(a)(15)(h)(1)(b) of this title who is employed. . . at" a qualifying institution. INA Section 214(g)(5)(A-B). This concept is colloquially referred to as "concurrent employment" and has been adjudicated by USCIS to constitute an established basis of exemption from the H-1B cap.

² Note regarding quotation: The Aytes Memorandum cites section "214(g)(1)" in apparent typographic error, as 214(g)(1) sets for the numerical limitations. The first reference to exclusion from the limitation does not begin until 214(g)(2), and the "employment at" exemptions discussed throughout the Aytes Memorandum are in fact found at 214(g)(5)(A-B).

Unfortunately, the proposed addition of extra-statutory, extra-regulatory and therefore extra-legal language in the proposed Form at Part C, Question 3.d. would have the opposite effect. The proposed Form would overreach the location of H-1B cap-exempt employment as the determinative question for cap exemption and require the “job duties. . . [to] directly and predominantly further the normal, primary, or essential purpose, mission, objectives, or function of the qualifying institution, namely higher education or nonprofit or government research.” Proposed Form I-129, H-1B Data Collection Supplement at Part C, Question 3.d. The inclusion of this language in the proposed Form would not only constitute *ultra vires* action on the part of USCIS, but would also directly contravene Congressional intent to set forth a “broader category,” Aytes Memorandum, at p. 3, of cap-exempt beneficiaries under Section 214(g)(5)(A-B).

The Aytes Memorandum quoted above uses language that resonates with the proposed additional language. *Id.* In addition, a non-precedential AAO decision appears to set forth a similarly limiting requirement that would review the relationship between the proposed duties of a beneficiary and an institution of higher education to which the nonprofit entity was affiliated or related. (AAO decision, In re EAC 06 215 52028, issued September 08, 2006) (commonly referred to as the “Texas School District decision”). However, neither the Aytes Memorandum nor the Texas School District decision is binding as a matter of administrative law, and neither is to be permitted to have the effect of superseding the law as enacted by Congress.

Further, no statutory requirement or legitimate legislative purpose is served by creating a new sub-category of petitioner type for purposes of H-1B cap exemption pursuant to Section 214(g)(5)(A-B). Employment at a qualifying institution or entity, regardless of type (e.g., institution of higher education, related or affiliated nonprofit entity, nonprofit research organization, or governmental research organization), qualifies for H-1B cap exemption without a difference in criteria or outcome. Had such a distinction proved necessary or helpful, USCIS has had ample time since the enactment of Section 214(g)(5)(A-B) as Section 103 to the American Competitiveness in the Twenty-first Century Act of 2000 (“AC21”) over 9 years ago to promulgate a further sub-categorization and differing eligibility criteria subject to proper rulemaking procedures in conformity with the Administrative Procedures Act. (5 U.S.C. Section 500, *et seq.*) The Service should not be allowed to circumvent the APA rulemaking procedures by incorporating agency memoranda into a proposed form revision. The public is not afforded proper notice and an opportunity to comment. The Service should not be permitted to achieve through a form revision what it has not done through notice and comment rulemaking, which is an extra-legal revision of INA §214(g)(5) to restrict the number of H-1B visas when Congress added the provision to expand exemptions from the H-1B cap.

The rules promulgated under the relevant regulatory scheme found at 8 C.F.R. §214.2(h)(8) continue to stand without the creation of further subcategories or differences in documentary evidence regarding cap exemption under Section 214(g)(5)(A-B) as

between different types of qualifying institutions or entities. The sole regulations promulgated with regard to the numerical limitation for the H-1B category are published at 8 C.F.R. 214.2(h)(8). To illustrate the limiting and statutorily contravening effect of the unduly limiting language in the healthcare context, we will provide a representative and common example.

Background information: Most physicians who are foreign nationals and who practice medicine in the U.S. as physicians have obtained medical degrees abroad prior to entering the U.S. However, they are generally required to carry out graduate medical education (i.e., residency and/or fellowship, depending on practice area) in the United States at a U.S. medical school prior to obtaining licensure in the U.S., among other requirements.

Illustrative Example

A foreign national physician seeks to participate in the residency or fellowship program of a U.S. medical school in cap-exempt H-1B status. The clinical care to be provided by the foreign national physician as part of his/her training in connection with the residency or fellowship will take place at Hospital A. Hospital A is a non-profit entity with 501(c)(3) status. Hospital A is an entity related to or affiliated with the medical school through an agreement pursuant to which the doctor's medical school's residents or fellows are trained at Hospital A. The medical school which oversees and directs the residency or fellowship is an "institution of higher education" as defined as defined in section 1001(a) of Title 20. The "qualifying institution or entity" in this example is therefore Hospital A. The physician's services will be performed at Hospital A. Accordingly, the physician's H-1B petition for the residency is cap-exempt pursuant to INA Section 214(g)(5)(A). The foreign national physician accordingly obtains a cap-exempt H-1B visa, enters the U.S., and carries out the residency or fellowship program through its completion on the typical end date of June 30th of the final year of training.

As is not uncommon for foreign national physicians, the physician performs well in his or her program. As is also commonly the case, Hospital A provides treatment to predominantly underserved populations and populations with a higher-than-average Medicare, Medicaid or charity-based care. Hospital A is prohibited under corporate practice of medicine laws from directly employing the physician. Due to all three of these commonly occurring factors, a private physician group offers to employ the foreign national physician as soon as possible upon completion of his or her program, to continue providing clinical care at Hospital A to its medically underserved populations.

In this example, at the time of offering the doctor post-residency or post-fellowship employment, Hospital A continues to maintain its nonprofit status, continues to maintain its qualifying relationship with the medical school, and the medical school continues to qualify as an institution of higher education as defined as defined in section 1001(a) of Title 20. Accordingly, Hospital A continues to be a qualifying institution under INA Section 214(g)(5)(A). The doctor therefore, in the direct language of the INA,

“has received an offer of employment at an institution of higher education (as defined in section 1001(a) of Title 20) or a related or affiliated nonprofit entity.” INA §214(g)(5)(A). As such, the doctor’s post-residency or post-fellowship employment at Hospital A is exempt from the H-1B cap pursuant to INA Section 214(g)(5)(A).

Unfortunately, the Form as proposed would render precisely the contrary result; the Form as proposed would preclude the doctor offered employment at a qualifying institution or entity from obtaining H-1B cap exemption. Under the proposed Form, the petitioner’s closest yet impossible choice for cap exemption would be found at Question 3.d. – i.e., employment “at a qualifying institution.” If the description of the cap-exempt employment ended there, the language of the form would more closely effectuate the relevant exemption found in the statute. However, the description goes on to limit such employment to “job duties. . . that directly and predominantly furthers [sic] the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution, namely higher education or nonprofit or governmental research.” Proposed Form I-129 H-1B Data Collection Supplement, Part C, at Question 3.d. In our example, the qualifying institution or entity is Hospital A. As is usually the case with non-profit hospitals, medical clinics, and federally qualifying health centers (FQHCs), the entities themselves are not institutions of higher education, nor is their “normal, primary or essential purpose, mission, objectives or function of the qualifying institution” that of higher education or research. Their primary objective is typically patient care. It is oftentimes care of medically underserved and needy patients. While the doctor in our example qualifies to directly further that noble mission pursuant to clear statutory language providing for H-1B cap exemption, the proposed Form as drafted at Question 3.d. would preclude such continuity of service.

Further, because employment authorized subject to H-1B cap-subject petitions cannot commence before October 1 of any given year, the International Medical Graduate will need to depart from the U.S. for at least 2-3 months after completing the residency or fellowship program. This disruption has further negative consequences in that it hinders and delays the doctor’s licensing and credentialing process. This, in turn, disrupts continuity of care that the doctor’s new post-completion H-1B petition would otherwise permit him or her to provide to his or her patients. Some International Medical Graduates, by the arbitrary fact of their birth, nationality or first name, would be subject to yet further months of delay in their service at qualifying institutions in the U.S., while their visa issuance is delayed due to lengthy background checks at consulates and embassies abroad. In the meanwhile, their service at the qualifying institutions is disrupted unnecessarily.

In conclusion, to avoid the unintended effect of an administrative agency’s form contravening federal statute, we would recommend that Questions 3.a. through 3.d. be struck in their entirety and replaced with the suggested language set forth above and reiterated here as follows:

- ☐ 3.a. The beneficiary has received an offer of employment at an institution of higher education as defined in the Higher Education Act of 1965, 20 U.S.C. 1001(a), and such offer of employment is the subject of this petition.
- ☐ 3.b. The beneficiary has received an offer of employment at a nonprofit organization or entity related to or affiliated with an institution of higher education, such as institutions of higher education defined in the Higher Education Act of 1965, 20 U.S.C. 1001(a), and such offer of employment is the subject of this petition.
- ☐ 3.c. The beneficiary has received an offer of employment at a nonprofit research organization or governmental research organization.
- ☐ 3.d. The beneficiary is currently employed at an institution of higher education as defined in the Higher Education Act of 1965, 20 U.S.C. 1001(a) or at a nonprofit organization or entity related to or affiliated with such an institution of higher education.

The IMG Taskforce supports the comments made by the American Immigration Lawyers Association (“AILA”) with regard to added clarity that can be provided with respect to beneficiary-based H-1B cap exemptions discussed at Part C, Question 3.g. of the proposed Form I-129 H-1B Data Collection Supplement.

Suggested Technical Revisions Related to Form I-129
H-1B Data Collection Part 3 – Cap Exemption

Question 3

There appears to be a typographical error in the first line of Question 3. We recommend the insertion of the word “from”, so that Question 3 reads “this petition is exempt from the numerical limitation for H-1B classification” rather than “this petition is exempt numerical limitation for H-1B classification.”

Question 3.a.

We note what was likely an inadvertent typographical error at Part C, namely, the repeat of the phrase “as defined in the Higher education.” It would be best to strike the first “as defined in the Higher education.”

Question 3.c.

The H-1B cap exemption for a nonimmigrant to be employed at a nonprofit research organization or a governmental research organization is found within the INA itself at Section 214(g)(5)(B). Accordingly, any citation to the Code of Federal Regulations is unnecessary. In addition, the citation to 8 CFR §214.2(h)(19)(iii)(C) is inapposite. Subsection 19 of 8 CFR 214.2(h) relates to H-1B filing fees, rather than numerical limitations on the H-1B category. The regulations relating to the numerical limitations on the H-1B category are found exclusively at 8 CFR §214.2(h)(8).

Question 3.f.

Question 3.f. of the proposed Form cites to INA Sections 214(l)(1)(B)(C). These subsections previously served as the sole statutory bases for H-1B cap exemption for what we colloquially refer to as “J waiver doctors” during their three years of required service. However, due to more recent amendments to the INA, the statute now explicitly provides for H-1B cap exemption for J waiver doctors at INA Section 214(l)(2)(A). In addition, the new statutory language makes clear that the request for a J waiver as a basis for H-1B cap exemption may be made by “an interested Federal agency” as well as an interested State agency. Accordingly, while the Conrad 30 program is one basis for cap exemptions at 214(l), it is not the sole basis. To reflect the INA in its current iteration, we recommend Question 3.f. be revised as follows:

- ☐ 3.f. The beneficiary of this petition is a J-1 nonimmigrant physician who has obtained a waiver requested by an interested Federal agency or an interested State agency (including waivers commonly called a “Conrad Medical Waiver”).

H-1B Data Collection Supplement, Part D (page 19) Beneficiary Signature

The proposed Form I-129 H-1B Data Collection Supplement requests the signature of the beneficiary of the H-1B petition. The H-1B Data Collection Supplement must be included with any H-1B petition submitted to U.S. Citizenship and Immigration Services. In the past, the beneficiary has not been required to sign any form associated with the H-1B petition.

This requirement for the beneficiary’s signature is in direct contradiction to the Service’s regulations, which provide that “[a] beneficiary of a petition is not a recognized party in such a proceeding.” 8 C.F.R. §103.2(a)(3). In this instance, the proceeding is the submitted H-1B petition. See 8 C.F.R. §103.2(a)(1). Only the appropriate applicant or petitioner is to sign an application or petition and, “[b]y signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter, is true and correct.” See 8 C.F.R. §103.2(a)(2). In short, the regulation provides no reference to the beneficiary as signatory, and the regulation specifically notes that the beneficiary is not recognized as a party to the H-1B petition. Hence, there is no legal basis to compel the beneficiary's signed acquiescence and acknowledgment with regard to the H-1B petition.

Further, the proposed H-1B Data Collection Supplement and the Form I-129 proposed instructions are confusing concerning where the beneficiary must sign. There is no reference in the instructions to the signature of the beneficiary. The portion of the instructions allocated to the H-1B Data Collection Supplement does not refer to *any* signature requirement and discusses only Parts A, B and C of the H-1B Data Collection Supplement. See page 6-8. However, page 5 of the instructions specifies that the H-1B

petitioner “seeking to place the H-1B beneficiary off-site at a location other than their own location (a “third party” worksite) must complete and sign the attestation on page 20 [sic]..[.]” The Attestation Regarding Off-site Assignment of H-1B Beneficiaries is, in fact, Part D of the proposed H-1B Data Collection Supplement. Again, there is no reference in the instructions to the signature of the beneficiary. This formulation begs the question as to whether even the H-1B petitioner, much less the beneficiary, needs to sign the H-1B Data Collection Supplement if the beneficiary will only be working at the petitioner's place of business instead of an off-site location. We are confused as to why the signature portion of the H-1B Data Collection Supplement provides two blocks for signatures but only one for entering the name in print.

Only in actually reading Part D of the H-1B Data Collection Supplement is it seemingly apparent that USCIS is mandating the beneficiary's signature as a means of obtaining an attestation from the beneficiary that he or she is aware of the off-site assignment and “further accepts the terms and conditions” of the off-site arrangement. If the requirement for the beneficiary's signature is somehow intended to protect the beneficiary, then it is outside the scope of USCIS' authority and is a matter between the petitioner and beneficiary as employer and employee and the federal agencies charged with regulating that relationship, e.g., Department of Labor, Equal Employment Opportunity Commission. It is ultimately the petitioner's obligation to comply with the statutory and regulatory requirements of the H-1B nonimmigrant classification regarding employee compensation, including those pertaining to the Labor Condition Application. To ensure that the beneficiary is aware of the petitioner's obligations with regard to the Labor Condition Application, the employer must provide the beneficiary with a copy of the certified, signed Labor Condition Application on the first day of his/her employment. See 20 C.F.R. §655.734(a)(3). If the beneficiary were to sign the H-1B Data Collection form, the beneficiary would attest to far more than just whether he or she is aware of any off-site assignment. The beneficiary would be acknowledging parts A-D of the H-1B Data Collection Supplement, which includes information outside the knowledge and control of the beneficiary.

Finally, to obtain the original signature of the beneficiary as well as the petitioner on the H-1B Data Collection Supplement would be onerous, time-consuming and costly. Typically, the beneficiary and the petitioner's designated signatory are not in the same location at the time of filing, which in the case of a new employee is prior to the commencement of the employment relationship. In some instances, the beneficiary is not in the U.S. at the time the H-1B petition is prepared and submitted. The transmission of an original, legal document between the beneficiary, the petitioner, and attorney would be needlessly confusing, expensive and substantially increase the time necessary to prepare the petition for filing.

Respectfully submitted,

INTERNATIONAL MEDICAL GRADUATE TASKFORCE